# (25,030)

# SUPREME COURT OF THE UNITED STATES. OCTOBER TERM, 1916.

# No. 311.

ROCK SPRING DISTILLING COMPANY AND SILAS ROSEN-FELD, PETITIONERS,

vs.

# W. A. GAINES & COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Certified Copy, Volume 1.

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals for the Sixth Circuit.

No. 2572.

W. A. Gaines & Company, Appellant,

ROCK SPRING DISTILLING COMPANY and SILAS ROSENFIELD, Appellees.

Volume I.

Appeal from the District Court of the United States for the Western District of Kentucky.

Original Transcript Filed December 1st, 1913.

Filed Dec. 2, 1913. Frank O. Loveland, Clerk.

Citation. Issued July 15, 1913.

United States of America,
Western District of Kentucky,
Sixth Judicial Circuit, ss:

a.

To Rock Springs Distilling Company and Silas Rosenfeld, Greeting: You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit on the 13th day of August next, pursuant to an Order allowing appeal filed in the Clerk's Office of the District Court of the United States for the Western District of Kentucky, wherein W. A. Gaines and Company are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 15th day of July in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States of America the one hundred and thirty-eighth.

WALTER EVANS, Judge.

Service of above citation acknowledged this 28th day of July, 1913.

W. T. ELLIS AND LUTHER ELY SMITH, Solicitors for Appellees.

# Petition for Appeal. Filed June 12th, 1913.

The above named complainant, conceiving itself aggrieved by the order and decree made and entered on the 7th day of February, 1913, in the above entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Sixth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit.

Dated at Louisville, Kentucky, this 12th day of June, 1913.

JAMES LOVE HOPKINS,

EDMUND F. TRABUE,

JNO. C. DOOLAN, AND

ATTELLA COX, JR., Solicitors and of Counsel for Complainant.

 Proceedings in the District Court of the United States for the Western District of Kentucky, Owensboro Division.

At a Regular Term Began and Held at the Federal Court Hall, in the City of Owensboro, on Monday, November 25th, 1912.

Present: Honorable Walter Evans, Judge.

W. A. GAINES & COMPANY, Complainant,

ROCK SPRING DISTILLING COMPANY, a Corporation, and SILAS ROSENFELD, Defendants.

Be it Remembered, that heretofore, to-wit, on the 28th day of September, A. D. 1909, there was filed in the office of the Clerk of the then Circuit Court of the United States for the Western District of Kentucky, a Bill in Equity in the above styled cause, which said Bill in Equity is in the following words and figures, to-wit:

# Bill in Equity. Filed September 28th, 1909.

W. A. Gaines & Company, a corporation organized, existing and doing business under and by virtue of the laws of the State of Kentucky, and having its principal office and place of business in the city of Frankfort, in the County of Franklin, in the State of Kentucky, and being a citizen of the State of Kentucky, brings this its bill of complaint into this Court against Rock Spring Distilling Company, a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Kentucky, and having its principal office and place of business at Owensboro, in the County of

Daviess, State of Kentucky, and Silas Rosenfield, a citizen of the United States and of the State of Kentucky, and a resident of Owensboro, in the County of Daviess, in the Western Judicial District of the State of Kentucky, and thereupon your Orator

complains and says:

1. That your Orator is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and having its principal office and place of business in the City of Frankfort, in the County of Franklin, in the State of Kentucky, and that it is engaged

in the distillation of whisky in the State of Kentucky.

2. That at all of the times hereinafter mentioned the Complainant was, and it now is, the sole and exclusive owner of the certain whiskey distillery situate in Woodford County, in the State of Kentucky, and known and named as the "Old Crow Distillery," and that the said distillery was and is the only distillery in the State of Kentucky that is or ever has been designated by the name "Crow" or "Old Crow."

That the product of the said distillery is made, produced and controlled by the complainant and has, at all the times hereinafter mentioned, been so made, produced and controlled by the complainant, and that said product at all said times has consisted of straight rye whisky and straight bourbon whiskey, and that to the said product made at the said distillery there has at all the times hereinafter mentioned been applied the trade mark consisting of the words "Old Crow," which said trade mark has at all of said times been applied to the straight rye whiskey and straight bourbon whiskey produced at the said distillery, by being inprinted or branded — the wooden packages containing said whiskey, and by being imprinted upon labels, which labels were affixed to bottles, containing said whiskey. That said trade mark is now being, and for many years past has been used by Your Orator and its predecessors in commerce among the several States of the United States of America.

3. And your Orator shows unto Your Honors that on the 26th day of February, A. D. 1909, your Orator then being the sole and exclusive owner of the said trade mark by virtue of priority of adoption

and use of the same as a trade mark for whiskey by its prede-3 cessors, did file in the Patent Office of the United States. under and in pursuance of the provisions of the Act of Congress entitled, "An Act to Authorize the registration of trade marks used in commerce with foreign nations or among the several States or with Indian tribes, and to protect the same," approved February 20th, 1905, 33 Statutes at Large, 724, an application for the registration of the said trade mark, in writing, addressed to the Commissioner of Patents, and signed by Your Orator as the applicant, specifying the name, domicile, location and citizenship of Your Orator, the class of merchandise and the particular description of goods comprised in such class to which the said trade mark is appropriated by Your Orator; the description of the trade mark itself, and a statement of the mode in which same is applied and affixed to the goods, and the length of time during which the trade mark has been used: together with a drawing of the trade mark signed by Your Orator its attorney, and the number of specimens of the trade mark, five in numbr, as actually used, and being the number of such specimens required by the Commissioner of Patents; and that thereupon Your Orator paid into the Treasury of the United States the sum of Ten Dollars, and complied with all of the other regulations not hereinbefore specified, which had been prescribed by the Commissioner of

Patents and were then in force and effect.

4. And your Orator, respectfully represents that thereafter and on the 20th day of July, A. D. 1909, the Commissioner of Patents having caused an examination to be made and having caused the said trade mark to be published in the Official Gazette of the Patent Office, and no notice of opposition having been filed within the time limited by the law, a certificate of registration of the said trade mark was issued, in due form of law, under the seal of the Patent office of the United States, signed by the Acting Commissioner of Patents of the United States and numbered 74537, wherein and whereby the said trade mark was duly registered to your orator and its successors or assigns, the said certificate to remain in force for twenty years, unless sooner terminated by law; as will by the said certificate of reg-

istration, or a duly certified copy thereof, ready in Court to
be produced, and whereof Your Orator herein and hereby
makes profert, more fully and at large appear. That the
said trade mark, as so registered, is being, and for many years past
has been used by Your Orator in commerce among the several States
as a trade mark for straight rye whiskey and straight bourbon

whiskey.

5. That at all of said times the Respondent Rock Spring Distilling Company was, and it now is, a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Kentucky, and having its principal office and place of business at Owensboro, in the County of Daviess, State of Kentucky, and the owner of a certain whisky distillery situate in the County of Daviess, and known as Distillery No. 18 in the 2nd Internal Revenue District of the State of Kentucky.

6. That at all of said times the Respondent Silas Rosenfield was, and he now is, engaged in the operation of the said distillery, the property of the Respondent Rock Spring Distilling Company, under a license granted to him for the purpose of operating said distillery

by said Respondent Rock Spring Distilling Company.

7. That at all times since the first production of the said whisky by Your Orator's predecessors, the "Old Crow" whisky of the Complainant and its predecessors has been regularly distilled whisky known as a straight whisky and being the genuine product of distillation; that in the year A. D. 1897, the Congress of the United States having enacted the Act of March 3, 1897, entitled "An Act to allow the bottling of distilled spirits in bond," this complainant, availing itself of the provisions of the said Act, did then begin and has ever since maintained the bottling of the said "Old Crow" whisky in bond, and that it then was and ever since has remained and now is the only "Old Crow" whisky bottled in bond in the State of Kentucky or elsewhere; and that the said whisky of this Complainant has had and still has an extensive sale throughout the United States of America and foreign nations, and that its whisky when so bottled in bond is known and called for as "Old Crow Bot-

tled in Bond"; and that the said "Old Crow" whisky of this Complainant so bottled in bond has always commanded and now com-

mands a high market price and that it has always been, and now is, a whiskey of the highest type and class, made for the choicest ingredients, and being of the highest grade and quality of whisky made in the State of Kentucky or elsewhere. That to each package of the said "Old Crow" whisky bottled in bond produced and sold by Your Orator, Your Orator has caused to be affixed its said registered trade mark consisting of the words "Old Crow"; the bourbon whisky so produced, bottled and sold by Your Orator having the said words "Old Crow" imprinted or otherwise affixed thereto in script type, as said words are reproduced in the drawing which is a part of the said certificate of registration; that a specimen of the packages to which said registered trade mark is applied by Your Orators is exhibited with this bill and is filed herewith

as "Exhibit A" accompanying the bill.

8. That well knowing the premises and with full knowledge of this complainant's rights above recited, the respondents above named, without the knowledge or consent, and against the will of the Complainants, did on the twenty-first day of July, A. D. 1909, and thence continuously from day to day until the time of the filing of this bill of complaint, in violation of the complainant's rights in and to its said trade mark consisting of the words "Old Crow" and in invasion of the Complainant's rights under its said registration and in infringement of Your Orator's said registered trade mark, and in fraud against this Complainant and against the public, did make or cause to be made, and sell or cause to be sold, in Owensboro, in the County of Daviess, State of Kentucky, a certain spurious straight bourbon whiskey not the product of this Complainant's "Old Crow" Distillery, or distilled by this Complainant, or licensed to be distilled by this Complainant, and that they, the said Respondents, have marked or branded the same with the words "Celebrated Old Crow Whisky Bottled in Bond," and have caused the same to be bottled in bond, and have applied to the labels thereon the words "Old Crow" in script type; and have caused the same to be sold and transported in commerce among the several States of America; that a specimen of the package so made and sold by Respondents is exhibited with this bill and is filed herewith as "Exhibit B" accompanying the bill.

9. That the said words "Old Crow" have never been lawfully applied to any whisky but that produced by Complainant Company and its predecessors, and distilled by them at their distillery in the County of Woodford, in the State of Kentucky.

10. That the whisky so dealt in by the Respondents and marked and branded with the words "Old Crow" was so marked or branded for the purpose and with the intent to mislead and deceive the public and consumers of whisky to purchase Respondents' whisky in the belief that it was the whisky distilled by the Complainant and bottled in bond by the complainant, and that the public and consumers of whisky have, by the said acts of the Respondents been led into purchasing the Respondents' whisky under the false belief that it was the whisky of the complainant, and that by means of the said fraud and imposition upon the public by means of and through the instrumentality of their said unlawful appropriation and infringement of Your Orator's said registered trade mark, the Respondents have sold very large quantities of their whisky so falsely marked and branded, all of which wrongful acts have resulted in injury to the Complainant's business and the good will thereof, and were wantonly, wilfully, deliberately, and maliciously done by the Respondents to Complainant's damage in the sum of Twenty Thousand Dollars (\$20,000).

11. That the said acts are continuing, and unless restrained by the injunctive power of this Court, will jeopardize the Complainant's right in and to its said registered trade mark "Old Crow," and will ultimately destroy the same and render it of no value whatsoever.

12. And Your Orator further says unto Your Honors that said respondents have made and sold and caused to be made and sold, large quantities of said whisky bottled in bond, marked and designated with the said infringing reproduction of Your Orator's said registered trade mark, and have on hand within this District and elsewhere a large quantity of said whisky, and a large quantity of labels bearing the said infringing mark, and have made and realized

large profits and advantages therefrom (but to what extent and how much your Orator does not know, and prays a discovery thereof); and Your Orator further avers that the use of the said registered trade mark by the said Respondents and their preparation for, and avowed and wilful determination to continue said use and sale, and their aforesaid unlawful acts, in disregard and defiance of the rights of Your Orator, will, unless restrained by this Honorable Court, have the effect to encourage and induce others to venture to infringe said registered trade mark in disregard of Your Orator's rights, and thus cause Your Orator additional expense and

damages in enforcing its lawful rights in the premises. 13. May it please your Honors to grant unto Your Orator a writ of subpæna directed to said Respondents, the Rock Springs Distilling Company, and Silas Rosenfeld, commanding them and each of them, under a certain penalty therein to be stated, to personally appear before this Honorable Court, and for as much as Your Orator has no remedy at law and can have no adequate relief except in this court, and to the end, therefore, that the said Respondents may, if they can, show why Your Orator should not have the relief hereby prayed, and may, according to their best and utmost knowledge remembrance, information and belief, full, true, direct and perfect answer make to the premises, but not under oath, answer under oath being hereby expressly waived, and to all the several matters hereinbefore stated and charged, as fully and particularly as if severally and separately interrogated as to each and every of said matters, and may be compelled to account for and pay to Your Orator the profit by them acquired, and the damages suffered by Your Orator from their aforesaid unlawful acts, Your Orator prays for relief.

14. And Your Orator prays that the said Respondents, Rock

Spring Distilling Company, and the officers of said corporation, and each of them, its servants, agents, employes and workmen, and the Respondent Silas Rosenfeld, may be restrained and enjoined, provisionally as well as perpetually, by the order and injunction of this Honorable Court, from directly or indirectly making or causing to be made, using or causing to be used and selling or causing to be sold, any whisky not the product of Your Orator and to which

Your Orator's said registered trade mark is applied or affixed or in anywise using any labels to which Your Orator's said registered trade mark is falsely or fraudulently affixed or from advertising for sale or dealing in any whisky falsely designated, marked, branded or advertised under Your Orator's said registered trade mark; and from reproducing, counterfeiting, copying or colorably imitating Your Orator's said registered trade mark, without the consent of Your Orator, and affixing the same to merchandise of substantially the same descriptive properties as those set forth in the registration of Your Orator's trade mark, or the labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise of substantially the same de-

scriptive properties as those set forth in said registration.

15. Your Orator further prays that upon a decree being rendered in this cause enjoining the Respondents as hereinbefore prayed, that the Court shall adjudge and decree the Complainant to be entitled to recover, in addition to the profits to be accounted for by the Respondent, the damages the Complainant has sustained thereby, and that the Court shall assess the same or cause the same to be assessed under its direction; and that the Court upon said damages being assessed will enter judgment upon such assessment for such increase damages, not exceeding three times the amount of the assessment of damages, as to this Honorable Court may seem meet and proper under the circumstances of the case, in addition to the profits realized by the Respondents, and the costs of this suit, and that Your Orator may have such other and further relief as to this Honorable Court shall seem meet and proper, and shall be agreeable to equity.

And Your Orator will ever pray, etc.

W. A. GAINES & COMPANY, By JAMES L. HOPKINS, His Solicitor.

G. W. JOLLY, D. W. LINDSEY, Of Counsel.

9 STATE OF KENTUCKY, County of Franklin, ss:

George F. Berry, of lawful age, being on his oath sworn, deposes and says, that he is Secretary and Treasurer of W. A. Gaines & Company, the corporation Complainant in the above and foregoing bill of Complaint, and the principal officer of said corporation now

in the State of Kentucky; and that the contents of said bill of complaint are true to the best of his knowledge, information and belief.

GEORGE F. BERRY.

Subscribed and sworn to before me this 13th day of September, 1909.

[SEAL.]

JESSIE P. WILLIAM, Notary Public, Franklin Co., Ky.

My commission expires Feb. 5th, 1910.

EXHIBIT "A," FILED WITH BILL OF COMPLAINT.

Trade Mark

W. A. Gaines & Company,

Straight Bourbon and Rye Whiskey.

Application Filed Feb. 26, 1909.

74.537.

Registered July 20, 1909.

Old Crow.

Proprietor, W. A. Gaines Company, By James L. Hopkins, Att'y.

EXHIBIT "B," FILED WITH BILL OF COMPLAINT.

United States Patent Office.

W. A. Gaines & Company, of Frankfort, Kentucky.

Trade Mark for Straight Bourbon and Rye Whisky.

No. 74,537.

Registered July 20, 1909.

Statement and Declaration.

Application Filed Feby. 26, 1909. Serial No. 40801.

Statement.

To all whom it may concern:

Be it known that W. A. Gaines & Company, a corporation duly organized, existing, and doing business under and by virtue of the laws of the State of Kentucky, and having its principal office

and place of business in the City of Frankfort Kentucky, has adopted and used the trade mark, which consists of the words "Old Crow." Said trade mark has been continuously used in the business of ourselves and our predecessors since, to-wit, January 1st, A. D. 1835.

The class of merchandise to which the trade mark is appropriated is Class 49, Distilled alcoholic liquors and the particular description of goods comprised in said class upon which the said trade mark is used is straight Bourbon and Rye Whisky.

The trade mark is displayed on the packages, containing said whisky by being imprinted upon labels or stamped, printed or

branded upon wooden containers.

W. A. GAINES & COMPANY, By EDSON BRADLEY, Vice-President.

Declaration.

CITY OF WASHINGTON, District of Columbia, 88:

Edson Bradley of lawful age being duly sworn, deposes and says that he is the vice president of the corporation (W. A. Gaines & Company), the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade mark sought to be registered; that no other person, firm or corporation or association, to the best of his knowledge and belief, has the right to use said trade mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade mark is used by said corporation in commerce among the several States of the United States, and between the United States and foreign nations and particularly between the States of Kentucky and New York, and between the United States and Great Britain, and that the description, drawing and specimens presented truly represent the trade mark sought to be registered.

EDSON BRADLEY.

Subscribed and sworn to before me, this 13th day of February, A. D. 1909.

[SEAL.]

A. M. PERKINS, Notary Public for the District of Columbia.

11 Order Filing Motion for Preliminary Injunction. Entered November 22nd, A. D. 1909.

The complainants, W. A. Gaines & Company, by their counsel, George W. Jolly, move the court to issue a preliminary injunction herein upon the averments of complainant's bill according to the prayer thereof, enjoining the defendant, Rock Spring Distilling Company and the officers of said corporation and each of them, its servants, agents and employes and workmen, and the defendant, Silas Rosenfeld, from directly or indirectly causing to be made or use, or causing to be used; in selling or causing to be sold any whiskey not the product of the complainant, to which the com-

plainant's registered trade mark is applied or fixed or in anywise using any labels to which complainant's registered trade mark is fradulently or otherwise affixed and from advertising for sale, or dealing in any whiskey falsely designated, marked or branded or advertised complainant's registered trade mark "Old Crow" and from reproducing, counterfeiting, copying or colorably imitating trade mark, without complainant's consent and from affixing same to merchandise of substantially the same descriptive properties as set out in the registration of complainant's trade mark, or labels, signs, prints packages, wrappers or receptacles, intended to be used upon or in connection with the sale of merchandise of substantially same descriptive properties as set forth in said registration. that the Court make an order herein setting this motion down for hearing thereof at a particular time and place designated therein and that a copy hereof be served on each of the defendants and the complainants be allowed a reasonable time to file affidavits and defendants a reasonable time thereafter to file their affidavits and complainants a further reasonable time to file affidavits in rebuttal.

Came again the complainants, W. A. Gaines & Co., by their counsel, George W. Jolly. Came also the defendants, Rock Spring Distilling Company and Silas Rosenfeld, by their counsel, Sweeney, Ellis & Sweeney, and after an informal discussion as to a convenient date, it is ordered that the motion for a temporary injunction as specified in said motion, be set down for hearing at the Federal

Court Hall at Louisville, Kentucky, on the 20th day of 12 January, A. D. 1910, at 10 o'clock A. M., on affidavits; that the complainants have until the 15th day of December, 1909, to file their affidavits in support of their motion, and the defendants have until the 15th day of January, 1910, to file counter affidavits and the complainants five days thereafter and until the 20th day of January, 1910, to file affidavits in rebuttal.

Order Filing Affidavits. Entered November 22nd, 1909.

Came the complainant, W. A. Gaines & Company, by their counsel, George W. Jolly. Came also the defendants, Rock Spring Distilling Co. and Silas Rosenfeld, by their counsel, Sweeney, Ellis & Sweeney. Came again the complainants and filed the following affidavits, to-wit: Affidavit of George F. Berry, and exhibits 1 to 13, inclusive; affidavit of same party, to-wit, George F. Berry, and exhibits 17, 18, 19 and 20; Frank Merrall and exhibits A and B; Patrick B. O'Brien, and exhibits A and B; Edwin Burch and "Ritter Exhibits A & B"; Frank McMillan and exhibit A; Soloman Rosenbloom and Exhibit No. 1; William G. Moore and Exhibits A, B and C; Isaac Bishop and Exhibit A; Micheal Durner and "Durner Affidavit Exhibit"; Edson Bradley, Cornelius A. Burkhardt, Louis Poock, Godfrey Holterhoff, Jacob Straub, William J. Gorman, Geo. G. Brown, Edmund H. Taylor, Jr., James H. Graham and Leopold Labrot.

Affidavit of William G. Moore. Filed Nov. 22nd, 1909.

William G. Moore, of lawful age, being on his oath sworn, de-

poses and says:

That he is President of H. B. Kirk & Company, a corporation organized, existing and doing business under the laws of the State of New York and having its principal office and place of business at 156 Franklin Street in the City of New York; that he has been an officer of the said Corporation since its organization in the year A. D. 1900, and that for three years prior thereto he was a member of the firm of H. B. Kirk & Company, whose business the said corporation succeeded to upon its organization.

That affiant has been engaged in the wholesale liquor business in the City of New York for about 35 years last past; that the said H. B. Kirk & Company is now engaged in the wholesale liquor business and extensively handles the leading American

whiskies.

That affiant has been familiar with the "Old Crow" whisky of W. A. Gaines & Company for 30 years last past and is particularly familiar with the "Old Crow" bourbon whisky as bottled in bond by said W. A. Gaines & Company, and with the "Old Crow" rye whisky as bottled by said W. A. Gaines & Company for said H. B. Kirk & Company, which latter bottling is made by W. A. Gaines & Company in its bonded warehouses under the following label:

14



ON THE DISTILLERY PREMISES UNDER THE SUPERVISION OF THE OFFICERS OF THE U.S.INTERNAL REVENUE DEPARTMENT
AND GUNDANTEED ARSOLUTELY PURE AND OF AGE AND STRENGTH INDIGATED BY STAMP OVER CORK AND CAPSULE.

# w. a.gaines & co.,

DISTILLERS.

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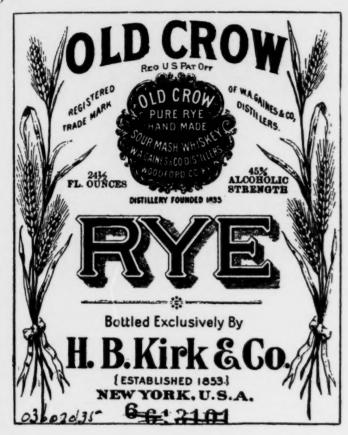
FRANKFORT, KY.

H. B. KIRK & CO.,

CAUTION: BE STADE THAT THE INTERNAL PRIVATE STAMP OVER THE CORN AND CAPSUCE IS UNBROKEN THIS INSURES THE GENUINENESS AGE & STRENGTH OF THE CONTENTS OF THIS BOTTLE.

THIS LABEL IS USED ONLY IN COLUMN WITH THE GOVERNMENT STAMP.

That for many years past said H. B. Kirk & Company has been the sole bottler and distributer of all of the rye whiskey produced at the "Old Crow Distillery of W. A. Gaines & Company, which bottling of "Old Crow" rye whiskey out of bond being effected under the following label:



That said free bottling, as well as the bond bottling of the "Old Crow" rye whiskey, have been extensively advertised and dealt in by the said H. B. Kirk & Co., and among the various forms of advertising employed by said H. B. Kirk & Company, circular letters have been extensively employed, of which a specimen is herewith filed and marked "Moore Exhibit A."

That among the other forms of advertising employed by H. B. Kirk & Company in reference to the sale of the "Old Crow" whiskey of the complainant, have been price lists for the whole-

sale trade, whereof a specimen is herewith filed and marked "Moore Exhibit B." Quotations relating to said "Old Crow" whiskey, 16 both rve and bourbon being found at pages 4, 5, 6 and 7 of

said "Moore Exhibit B."

That H. B. Kirk & Company have always employed retail price lists, whereof a specimen is herewith filed and marked "Moore Exhibit C" wherein the quotations of the said "Old Crow" whisky of

W. A. Gaines & Company are to be found at pages 4 and 5.

That since the organization of the present corporation H. B. Kirk & Company, the advertising in which said H. B. Kirk & Company have employed the said "Old Crow" whisky, has been distributed to practically all of the States of the United States and to several foreign countries, and that the total amount expended in such advertising, in all of which the said "Old Crow" whisky has been listed or advertised for sale, is in excess of the sum of One Hundred Thousand Dollars; that the distribution of said "Old Crow" whisky of W. A. Gaines & Company, including both rye whisky and bourbon whisky, and including whisky in bulk as well as in bottles, and both the bottling out of bond and bottling in bond, has extended to many of the States of the United States, and that the total sales of said "Old Crow" whisky of W. A. Gaines & Company by said H. B. Kirk during the year 1908 were in excess of 45000 cases, nearly all of which cases consisted of twelve bottles, each bottle containing approximately one-fifth of a gallon.

During the entire connection of the affiant with the wholesale whisky trade of the United States he has never known or heard of any other "Old Crow" whisky but the "Old Crow" whisky of W. A. Gaines & Company produced at the "Old Crow" Distillery in Woodford County, Kentucky; that he never knew or heard of any claim of ownership of said words "Old Crow" in application to whisky being made by any person at any time save by persons who have been enjoined by various courts as infringers of the same; that the said W. A. Gaines & Company has taken active steps to suppress the infringement of the free bottling of the "Old Crow" rye whisky as

bottled and sold by said H. B. Kirk & Company, and has 17 obtained many injunctions against infringers of the same. and has never been denied relief in equity against fraudulent

simulations of the said labels and packages.

That the bottling in bond of any whisky other than that of W. A. Gaines & Company, under the name "Old Crow" by the Defendants in this case can only be for the purpose of passing off such spurious whisky as and for the bottled in bond "Old Crow" whisky of said W. A. Gaines & Company, to the end of cheating and defrauding purchasers of the same and of depriving W. A. Gaines & Company and the distributers of the said "Old Crow" whisky of the benefits of the advertising and high reputation which have resulted from the efforts of said W. A. Gaines & Company and the various bottlers and distributers of the "Old Crow" whisky of said W. A. Gaines & Company, including the said H. B. Kirk & Company; that if such acts of the Defendants are not restrained the Defendants or others will be at liberty to invade and destroy the good will of H. B. Kirk and Company in its said bottlings of "Old Crow" rye whisky made in bond and out of bond; and to deprive H. B. Kirk & Company of the benefits of its said large advertising expenditures, and to impair or destroy the good will established by said H. B. Kirk & Company in the bottling and sale and distribution of "Old Crow" whisky.

And further affiant saith not.

WILLIAM G. MOORE.

Subscribed and sworn to before me this 18th day of October, 1909.

[SEAL.] MORRIS H. COHN,

Notary Public.

# EXHIBIT A WITH AFFIDAVIT OF WILLIAM G. MOORE.

Office of H. B. Kirk & Co. Sole Bottlers and Distributers of Old Crow

Bottle Old Crow Rye Whisky

Cut of

156 Franklin St., New York, N. Y.

Free Bottling. U. S. A.

Bottled in Bond.

Cut of

Bottle

18 New York, N. Y.

Dear Sir: We take pleasure in quoting you prices of Old Crow
Rye Whiskey as follows:

# "Free" Bottling.

Single case.	5-case lot.	25-case lot.	100-case lot.
Case of 12 bottles	\$12.25	\$11.50	\$11.00
Case of 144 miniatures 13.00			11.00
"V. O." (very old) Case of 12			
bottles	18.50	18.00	17.50

Prices are F. O. B. New York, Actual Freight will be allowed on shipment of one hundred cases or more to single points, when the freight rate does not exceed 75c. per hundred pounds.

Terms—Four months' note, or cash within ten days less four (4) per cent.

# "Bottled in Bond" at Distillery, Woodford Co., Ky.

Sin		25-case lot.	100-case lot.
Half Gallons, 6 bottles to case \$14	25 \$13.50	\$12.75	\$12.25
Quarts, 12 bottles to case 14		13.00	12.50
Fives, 12 bottles to case 13	00   12.25	11.50	11.00
Pints, 24 flasks to case 15	00   14.25	13.50	13.00
Half Pints, 48 flasks to case 16	25   15.50	14.75	14.25
Fifth Pints, 120 bottles to case. 18.	25 17.50	16.75	16.25
Tenth Pints, 240 bottles to case. 21	25   20.50	20.00	19.50

Not less than five cases to one consignees will be shipped from the

The different sizes and also both the "free" bottling and "in bond"

bottling may be assorted in making up the quantity desired.

Our own selling prices to the trade for quantities less than one hundred cases are appended for your information and will be strictly adhered to by us.

Both bottlings are guaranteed under the National Food and Drug

Act, June 30th, 1906, specifically on each bottle.

19 Old Crowe Rye is only sold in bottles—never in bulk. Your orders are solicited.

Yours respectfully,

H. B. KIRK & CO.

Extract from Exhibit B, Affidavit William G. Moore, Wholesale Price List H. B. Kirk & Co., New York, 1908, Pages 6 and 7.

# Page 6.

American Whiskies, Old Crow Bourbon and Hermitage Rye Whiskies, Bottled in Bond at Distillery,

	1-case.	5-cases.	25-cases.
Half Gallons, 6 bottles to case	\$14.75	\$14.50	\$14.25
Quarts, 12 bottles to case	15.00	14.75	14.50
Fives, 12 bottles to case	13.50	13.25	13.00
Pints, 24 flasks to case	16.50	15.25	15.00
Half Pints, 28 flasks to case	17.75	15.50	16.25
Fifth Pints, 120 bottles to case		18.50	18.25
Tenth Pints, 240 bottles to case	22.00	21.75	21.50

### Page 7.

American Whiskies, Old Crow Bourbon Hermitage Rye and

Hermitage Bourbon Whiskies. H. B. Kirk & Co.'s Free Bottling.

	Per o	case 12 bots.	Per gal.
Old Crow Bourbon		\$12.75	

Extract from Moore Exhibit C. Affidavit William G. Moore, Being "Latest Retail Price List H. B. Kirk & Co., New York, U. S. A. Filed November 22nd, 1909, Page Five.

> American Whiskies. Distilled by W. A. Gaines and Co. Old Crow Bourbon Hermitage Rye and Hermitage Bourbon Whiskies. Bottled in Bond at Distillery.

20	Per case.	Each.
Half Gallons, 6 bottles to case	\$15.25	\$2.75
Quarts, 12 bottles to case	15.50	1.40
Fives, 12 bottles to case	13.75	1.25
Pints, 24 flasks to case	16.50	. 75
Half Pints, 48 bottles to case		.40
Fifth Pints, 120 bottles to case		. 20
Tenth Pints, 240 bottles to case	26.00	. 15

# H. B. Kirk & Co.'s Free Bottling. Old Crow Bourbon.

	Per	Per case	Per	Per pt.
	gal.	12 bot.	bot.	flask.
Old Crow Bourbon	.\$5.50	\$13.75	\$1.25	\$0.75

Affidavit of Edson Bradley, Filed Nov. 22nd, 1909.

"Edson Bradley, of lawful age, being on his oath sworn, deposes and says:

I am an officer, stockholder and director of W. A. Gaines & Company, the corporation complainant, and have been an officer, director and stockholder therein ever since its incorporation under the laws of the State of Kentucky. I was a co-partner in the partnership named and styled W. A. Gaines & Co., and I was intimately acquainted with the properties owned by that partnership and its products and its method of doing business, and I have a similar acquaint-

ance with the business affairs of the complainant.

The business of the complainant consists in the maintenance and operation of two whisky distilleries and the vending of their products. These distilleries are the "Hermitage" located in Frankfort, Franklin County, Kentucky, and the "Old Crow" located in Woodford County, Kentucky. The last named distillery is named for James Crow, a noted distiller who distilled whisky in Kentucky from the year 1835 until his death in 1855, and who, for a number of years preceding his decease, was the distiller for Oscar Pepper, and while in charge of that distillery produced a whisky known as "Crow" or "Old Crow" and developed a formula by which that whisky was made.

In 1867, a partnership styled Gaines, Berry & Company leased the Oscar Pepper distillery and obtained from William Mitchell, who had been Crow's assistant in his lifetime, knowledge of the formula for making Old Crow Whisky, and shortly afterwards the firm of Gaines, Berry & Co., was succeeded by W. A. Gaines & Co., the co-partnership, which built the Old Crow Distillery, in the immediate neighborhood of the Oscar Pepper distillery, and continued to produce the whisky under the name "Old Crow," which production was continued by said W. A. Gaines & Co., until the complainant corporation was formed, whereupon the complainant purchased all of the property, assets, good will and trade marks of the

said W. A. Gaines & Co., the co-partnership.

That affiant's personal knowledge of the matters hereinbefore set forth dates from the year 1872, when the copartnership W. A. Gaines & Co, had been organized and doing business for some five years. That the matters above referred to and which occurred prior to that time are known to affiant as part of the general history of the whiskey industry in Kentucky, and from his inspection of ancient documents and from his information derived from numbers of the contemporaries of said James Crow, who are now dead, and whose personal testimony cannot be secured. That all of said ancient facts were matters of common notoriety among the people of Kentucky and throughout the whisky trade of the United States. reputable dealers in whisky everywhere do now and always have acquiesced in the use of words "Crow" and "Old Crow" as the distinguishing name of the whisky produced by complainant and its predecessors at the "Old Crow" distillery, and the standard of excellence of that whisky has always been maintained as one of the foremost whiskies produced in the world. That the high repute of said whisky has become known to the affiant by his personal travels in the United States, Canada, and Europe and his acquaintance, since 1872, with all the foremost distillers of American whiskies, and substantially all of the reputable whisky dealers of the United States.

That the affiant, in behalf of the complainant, actively sought the enactment by the Congress of the United States of legislation looking to the bottling of distilled spirits in bond, so that the 22 whisky produced by the complainant might be bottled at the distillery, and in bond, to reach the ultimate consumer with governmental assurance that the contents of the package were genuine whiskey, regularly produced by distillation, and upon the enactment of the statute the complainant at once proceeded to avail itself of the benefits of the act and began the bottling of the Old Crow whiskey in bond and proceeded to sell and distribute the same throughout the United States and many foreign countries, and that the sales of the said bottling have been very extensive and have become widely That the complainant's said whisky, so bottled, has become widely known and called for as and by the phrases "Bonded Crow." "Bonded Old Crow" and "Old Crow bottled in bond." sales of said whiskey so bottled in bond have been continuous and uninterrupted, and have increased so that a large percentage of the whiskey produced at the Old Crow Distillery is so bottled in bond.

That the affiant is acquainted with the defendants and the whiskey produced and branded and bottled by them at the Rock Spring Distillery at Owensboro in the Western District of Kentucky. That prior to the year 1909 said defendants never applied the words "Crow" or "Old Crow" to any whiskey, unless secretly.

That shortly before the filing of this suit affiant learned for the first time that the defendants were bottling in bond some spurious whiskey, not "Old Crow" whiskey, and falsely marking and labeling

the same with the words "Old Crow."

That the only object that can possibly be accomplished by said conduct of the defendants is the defrauding of the public in passing off upon them said initiative and spurious article when the com-

plainant's Old Crow whiskey bottled in bond is called for.

That unless the defendants are enjoined, other fraudulent and designing dealers will be encourage- to commit like frauds, and the registered trade mark of the complainant will become worthless and that its value is now more than One Hundred Thousand Dollars (\$100,000).

That wherever the words "Crow" or "Old Crow" are written or spoken in the whiskey trade of the United States they now mean the complainant's whiskey. That unless the defendants are enjoined the distinctive meaning of those words will be destroyed and the defendants permitted to steal from and defraud the public upon the strength of the high reputation and wide celebrity of the complainant as a distiller and the results of over forty years' labor, integrity and honest distillation, and the expenditure of the complainant and its predecessors in ownership of the Old Crow distillery (they having spent approximately Three hundred thousand dollars (\$300,000) in such advertising) will be diverted to the defendants, and that the injury so inflicted upon the property and reputation of the complainant will be irremediable and impossible to be compensated by money damages.

Affiant further saith not.

EDSON BRADLEY.

Subscribed and sworn to before me this — day of October, 1909. GEO. H. EVANS, Notary Public.

Affidavit of Godfrey Holterhoff. Filed November 22nd, 1909.

Godfrey Holterhoff, of lawful age, being on his oath sworn, deposes and says that he is a member of the firm of William C. Biles & Co., Whiskey Commission Merchants, whose offices are at 313 Vine Street, in the City of Cincinnati, Hamilton County, Ohio.

That affiant first engaged in the whiskey business in the year A. D. 1855, and has been engaged in, or connected with, said busi-

ness continuously ever since.

That he has had many business transactions in the "Old Crow" whiskey of W. A. Gaines & Co., and has been familiar with the

whiskey ever since the year 1869 or 1870, when it was being produced by W. A. Gaines & Co., the partnership. That during all of that time to the best of his knowledge and belief it was the only "Old Crow" Whiskey known to the wholesale whiskey trade of the United States, and since the enactment of the Act of Congress permitting the bottling of whiskey in bond, it has been the only "Old Crow" whiskey, bottled in bond and known to the trade.

That affiant's transactions in whiskey have extended to prac-24 tically every portion of the United States, and that he has a general acquaintance with the wholesale whiskey dealers of the United States. That in ordering the "Old Crow" whiskey of the complainant, or offering it for sale, it is usual to refer to it merely as "Old Crow" whiskey, as all dealers know who produces it; and the name of W. A. Gaines & Co., is seldom, if ever, used in such orders

or offers.

That for many years past, the firm of William C. Biles & Co. has published a whiskey Price Courrent, whereof copies have been introduced in evidence in this case. That said publication is intended to include all, and only, the standard distillers' brands of Bourbon and Rye Whiskies. That the name "Old Crow" is and has always been a distiller's brand and among the leading brands of that class. That to permit any other whiskey to be bottled in bond under that name could only result in fraud upon the careless ultimate purchaser calling for "Old Crow" whiskey (meaning of course, Complainant's) in stores where whiskey is retailed, and such result would be certain to occur. The wholesale trade and distillers all recognize the "Old Crow" as a distiller's brand of long standing and great value, and could not be deceived into buying any other than the product of the Old Crow Distillery.

That as to the retail trade, it is possible that illiterate saloon keepers might be deceived into buying the fraudulent "Old Crow" whiskey, bottled in bond, in the belief that it was the genuine product of the "Old Crow" Distillery; but far more probable that such goods would be sold to and bought by the saloon keeper with

knowledge of their real character.

And further affiant saith not.

# GEORGE HOLTERHOFF.

Subscribed in my presence and sworn to before me this 13th day of November, A. D. 1909.

SAL.

GEORGE A. TURRILL. Notary Public in and for Hamilton County, Ohio.

25 Edwin A. Burch, of lawful age, being on his oath sworn, deposes and savs:

That he is the president of C. H. Ritter & Company, Incorporated, engaged in the wholesale liquor business in the City of Detroit, trading under the name of C. H. Ritter & Company, Incorporated, and that he has been engaged in this business in the City of Detroit for thirty-three years last past.

That he has been familiar during his entire experience in the wholesale liquor trade in the City of Detroit with the "Old Crow" whisky of W. A. Gaines & Company, as distributers in bulk and as bottled in bond. That he has dealt in the same extensively and has from time to time in the course of his business issued price lists for circulation in the State of Michigan, and in other States of the United States, wherein the "Old Crow" whisky of W. A. Gaines & Company has been listed and offered for sale; that a specimen copy of said price list published by deponent in 1891 which is herewith submitted marked Ritter Exhibit "A" and attached hereto, together with the price list distributed in 1902, a copy of which is also herewith filed and marked "Ritter Exhibit "B."

That the said W. A. Gaines & Company has always been recognized by this affiant as the sole and exclusive owner of the trade mark for straight Kentucky whisky consisting of the words "Old Crow"; and further that he has dealt in the brand "Old Crow" of W. A. Gaines & Company since 1882, and during this period has never recognized any other brand of whisky as "Old Crow" other than

that produced by the said W. A. Gaines & Company.

And further affiant saith not.

EDWIN A. BURCH.

Subscribed and sworn to before me this 27th day of October, 1909.

[SEAL.] ANTHONY BODDE,

Notary Public, Wayne County, Mich.

Commissioned to March 13th, 1911.

26

Notarial Jurat.

#### No. 4904

I, Thos. F. Farrell, Clerk of the Circuit Court for the County of

Wayne, which is a Court of Record, having a seal.

Do hereby certify, that Anthony Bodde whose name is subscribed—the Jurat of the annexed instrument and therein written, was, at the time of taking such Jurat, a Notary Public, in and for said County, duly, commissioned and qualified, and duly authorized to take same. And, further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to the said Jurat is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court and County at Detroit, this 4th day of Nov. A. D.

1909.

[SEAL.]

THOS. F. FARRELL, Clerk. FRANK H. PATTON, Deputy Clerk.

STATE OF MICHIGAN, County of Wayne, 88:

Extract from Ritter Exhibit A, Page 79, Affidavit Edwin A. Burch, Being Price List of C. H. Ritter & Co., 25 Monroe Ave., Detroit, Mich., Page 79, Column 2.

# Bottled Whiskies.

				Full	quarts.	5's to gallon.
Old	Crow	 	 	 	\$12.00	\$10.00

Extract from Ritter Exhibit B, Page 14, Being Wholesale Price List, 1902, of C. H. Ritter & Co., Detroit.

### Hand-made Sour Mash Whiskies.

	Brands.	Free.	In bond.
Old Crow, Spring	'86		
Old Crow, Spring	'89		

# Page 15.

#### Bottled Whiskies.

	Brands.	Full quarts. 5's to gallon.
Old Crow		\$12.00 \$10.00
	Distillery Bottled in bond	

Frank McMillan, of lawful age, being on his oath sworn, 27 deposes and says that he is President of G. & R. McMillan Company, a Michigan corporation, engaged in the wholesale and retail grocery business and the wholesale and retail liquor business in the City of Detroit, and that said G. & R. McMillan Company, first as a copartnership and later as a corporation have been engaged in such business since the year 1848. That deponent has been connected with said firm and said corporation for twenty years and more last past; that he has been familiar during his entire experience in the wholesale liquor business in the City of Detroit with the "Old Crow" whisky of W. A. Gaines & Company, and that said G. & R. McMillan Company have handled the same during all that time, first as bottled at the distillery of W. A. Gaines & Company and later as bottled in bond, and that he has dealt in the same extensively and that said G. & R. McMillan have from time to time in the course of their business issued price lists for circulation in the City of Detroit and State of Michigan, wherein "Old Crow" whiskey of W. A. Gaines & Company has been listed and offered for sale; that a specimen copy of one of said price lists, published by deponent's firm

in the year 1908, - and marked "McMillan Exhibit A" and made a

part of this affidavit.

That the said W. A. Gaines & Company have always been recognized by this affiant as the sole and exclusive owner of the trade mark for straight Kentucky whiskey, consisting of the words "Old Crow" further that he has dealt in the brand of "Old Crow" of W. A. Gaines & Company for at least twenty years, and during this time has never recognized any other brand of whiskey as "Old Crow" other than that purchased from the said W. A. Gaines & Company.

And further affiant says not.

FRANK McMILLAN.

Subscribed and sworn to before me this 4th day of November, A. D. 1909.

GEORGE B. YERKS,

Notary Public, Wayne County, Michigan.

My commission expires July 15, 1913.

28

Notarial Jurat.

No. 4903.

STATE OF MICHIGAN,

County of Wayne, 88:

I, Thos. F. Farrell, Clerk of the Circuit Court for the County of

Wayne, which is a Court of Record, having a seal.

Do hereby certify, that George B. Yerks, whose name is subscribed to the Jurat of the annexed instrument and therein written, was at the time of taking such Jurat, a Notary Public in and for said County, duly commissioned and qualified, and duly authorized to take the same. And, further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to the said Jurat is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court and County, at Detroit, this 4th day of Nov.

A. D. 1909.

[SEAL.]

THOS. F. FARRELL, Clerk. FRANK H. PATTON,

Deputy Clerk.

Extract from Frank McMillan Exhibit A, Dated 1908, Price List of G. & R. McMillan Company, Detroit, Page 12.

# American Whiskies.

	Per case	Per
	12 bots.	bottle.
Old Crow (Bottled in Bond)	\$14.00	\$1.25

Affidavit of Soloman Rosenbloom. Filed Nov. 22nd, 1909.

Solomen Rosenbloom, of lawful age, being on his oath sworn,

deposes and says:

That he is engaged in the wholesale liquor business in the City of Pittsburgh, Pennsylvania, trading under the name and style of S. Rosenbloom & Company, and having its offices at 29 and 30 Diamond Square; that he has been engaged in the wholesale liquor business continuously since about the year A. D. 1892; that he engaged in the said business at the City of Steubenville, in the State of Ohio; that he continued said business in said City of Steubenville until the year A. D. 1899, when he removed to the City of Pittsburgh.

29 That the affiant makes a specialty of the handling and sale of bottled in bond whiskies, and that he believes he is the largest distributer in the United States of bottled in bond whisky.

That in the course of his business experience he has handled and sold all of the principal straight bourbon and rye whiskies which

have been bottled in bond in the United States.

That during the entire business experience he has been familiar with the "Old Crow" whisky of W. A. Gaines & Company, Complainant herein, and that he has for many years past and since the commencement of the bottling of whiskies in bond in the United States, handled very large quantities of the said "Old Crow" whisky bottled in bond by said W. A. Gaines & Company; that there is no other "Old Crow" whisky bottled in bond by the wholesale liquor trade of the United States and that where the words are used in quotations or in ordering whisky, either in writing or by word of mouth, the "Old Crow" whisky of W. A. Gaines & Company is meant and intended, and that to substitute any other whisky than that of W. A. Gaines & Company when "Old Crow" whisky bottled in bond is ordered, would be a fraud upon the purchaser and upon W. A. Gaines & Company and upon the dealers in the "Old Crow" whisky of W. A. Gaines & Company.

That the affiant's correspondence and business transactions relating to said "Old Crow" whisky of W. A. Gaines & Company bottled in bond extend to substantially all of the States and territories of the United States, and that the contents of this affidavit are based upon the personal knowledge acquired by the affiant in the course of the

said business transactions.

That the circular hereto attached and entitled "Jobbers' Price List" is one of the price lists regularly issued to the jobbing liquor trade of the United States by this affiant, and that the "Old Crow Bbn." and "Old Crow Rye" Kirk's entries under the title "Bottled in Bond Whiskies" relate to the "Old Crow Bourbon" bottled in bond by W. A. Gaines & Company, and the "Old Crow Rye" whisky bottled in bond by W. A. Gaines & Company for H. B.

30 Kirk & Company of New York. Said exhibit being marked

"Rosenbloom Exhibit No. 1."

And further affiant saith not.

SOLOMEN ROSENBLOOM.

Subscribed and sworn to before me, this 4th day of November, 1909.

SEAL.

A. C. STAIN, Notary Public.

My commission expires January 19th, 1911.

Extract from Solomen Rosenbloom Exhibit No. 1, Jobbers' Price List of S. Rosenbloom and Co., Pittsburgh, Pennsylvania, Page 2.

# Bottled in Bond Whiskies.

		4's.	6's.	Pts.	1/2 pts.
Old Crow					
Old Crow	Rye (Kirk's)			* *	

Affidavit of Frank Merrall. Filed November 22nd, A. D. 1909.

Frank Merrall, of lawful age, being on his oath sworn, deposes and

says:

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That he is Vice President of the Acker, Merrall & Condit Company, a corporation organized, existing and doing business under the laws of the State of New York, and having its principal office in the City of New York; that the said Acker-Merrall & Condit Company is engaged in the wholesale and retail grocery, wine and liquor trade, and is, and for many years last past, has been engaged in commerce in groceries, wines and liquors between the State of New York and substantially all of the States of the United States and with many foreign nations.

That affiant has been connected with the Acker, Merrall & Condit Company in its present capacity for eight years last past and that prior to said time he was engaged in and conversant with the grocery and liquor trade in the City of New York, aforesaid, for a period of

about 25 years.

That ever since the year 1884 affiant has been acquainted with the "Old Crow" whisky as the same is known, called for and dealt in in the liquor trade of the United States; that the words "Old Crow" have and ever since affiant has been acquainted with their use, signified to him the product of W. A. Gaines & Company,

and a straight regularly distilled Kentucky whisky.

That in the conduct of the business of the Acker, Merrall & Condit Company printed price lists are periodically issued by said company for distribution to the wholesale and retail trade; that a specimen of the wholesale price lists of said Acker, Merrall & — Company, entitled "Wholesale Price List, Acker, Merrall & Condit Company, New York, April 19th, 1908," is hereto attached and marked Merrall Exhibit A." That on page 4 of said Merrall Exhibit A," under caption "American Whiskies," the term "Gaines Old Crow Bourbon bottled in bond \$12.75" refers to the bond bottling of W. A. Gaines & Company, which Acker, Merrall & Condit Company has dealt in for many years past and which is the only

"Old Crow Bourbon Whisky bettled in bond with which this affiant

is acquainted.

That the said "Old Crow" whisky bottled in bond has a large and established reputation in the trade of the Acker, Merrall & Condit Company, and that in the opinion of this affiant, no other "Old Crow" whisky than that of W. A. Gaines & Company can be offered for sale without effecting a fraud upon the public.

That the items in said catalog under the same caption of "American Whiskies" and reading "Kirk's Old Crow Rye \$11.25," and "Kirk's Old Crow Bourbon \$12.50," also refer to the "Old Crow" whisky of W. A. Gaines & Company as the same is bottled by H.

B. Kirk & Company.

That the words "Old Crow" as used in the said "Merrall Exhibit A" and as used in the other periodical price lists circulated and used in the wholesale liquor trade of the United States have always, so far as this affiant is advised, referred to the product of W. A. Gaines & Company of Frankfort, Kentucky, and to no other product, and that the said whisky is among the prominent and leading

brands of Kentucky whiskies.

And affiant further states that the said Acker, Merrall & Condit Company issues regularly for use and circulation in its retail trade a certain magazine—catlog entitled "Table and Home," whereof a copy entitled "Table and Home, Vol V, No. 2, New York, June, 1909," is hereto attached and marked "Merrall Exhibit B"; that on page fifty-five, in the third column thereof, and under the title "American Whiskies—Popular brands," the items "Kirk's Old Crow Rye" and "Kirk's Old Crow Rye (Bottled in Bond") refer to the "Old Crow Rye" Whisky of W. A. Gaines & Company as bottled by H. B. Kirk & Company out of bond, and as bottled in bond by W. A. Gaines & Company for H. B. Kirk &

Company.

That the executive offices and various stores of the said Acker, Merrall & Condit Company, in the said City of New York are indicated upon the back cover page of the said "Merrall Exhibit B" and that the said Acker, Merrall & Condit Company also has established places of business in the City of Brooklyn, New York, Far Rockaway, L. I., Flushing, New York, Mt. Vernon, New York, Yonkers, N. Y., and Rochester, N. Y.; at West End, N. J., Morristown, N. J., Montclair, N. J., and East Orange, N. J.; at Greenwich, Conn., Stamford, Conn., at Newport, Rhode Island, and in the City of Baltimore, Maryland, as indicated upon the back cover page of the said "Merrall Exhibit B" and that at all of the said places of business the said "Old Crow" whisky produced by the Complainant W. A. Gaines & Company is sold and dealt in, and that the shipments and deliveries of the said "Old Crow" whisky of W. A. Gaines & Company by the said Acker, Merrall & Condit Company extended, as aforesaid, to practically all of the States of the United States.

And affiant further saith not.

FRANK MERRALL.

Subscribed and sworn to before me, this 13th day of October, 1909.

> JAMES N. McNEILL, Notary Public, New York County, New York.

Extract from Frank Merrall Exhibit A, Page 4, Column 3, Being Wholesale Price List of Acker, Merrall & Condit Company of New York, April, 1908.

American Whiskies. 33

Per box.

Gaines' Old Crow Bourbon, Bottled in Bond...... \$12.75

Extract from Merrall Exhibit B, Magazine Entitled "Table and Home," Published by Acker, Merrall & Condit Company, New York, Vol. V, Number 2, New York, June, 1909, Column Three, Page 55.

Acker, Merrall & Condit Company Price List.

# American Whiskies.

# Popular Brands.

	Per box.	Per bot.
Kirk's Old Crow Rye	\$11.75	\$1.00
Kirk's Old Crow Rye (Bottled in Bond)	13.50	1.25

Affidavit of George F. Berry. Filed November 22nd, A. D. 1909.

George F. Berry, of lawful age, being on his oath sworn, deposes and says that he is Secretary of the Complainant W. A. Gaines & Co.; that said W. A. Gaines & Company is a Kentucky corporation owning and operating the "Old Crow" Distillery situate in Woodford County, Kentucky. That the said Distillery was built by Gaines, Berry & Company, a co-partnership composed of W. A. Gaines, Hiram Berry and E. H. Taylor, Jr., in 1869; that said distillery after being built was continuously operated by said Gaines. Berry & Company from 1869 to the fall of 1870, when they were succeeded by the co-partnership called W. A. Gaines & Company, composed of W. A. Gaines, Hiram Berry, E. H. Taylor, Jr., Sherman Paris, Marshall J. Allen and Frank S. Stevens; that shortly thereafter E. H. Taylor, Jr., withdrew as a partner and George H. Allen was admitted as a member of the firm. The business of the firm was continuously and uninterruptedly pursued until the year 1882; W. A. Gaines having died in November, 1872, the surviving partners continued the operation of the distillery and management of the business under the same firm name. In 1882 Sherman Paris withdrew as a partner and Edson Bradley was ad-34

mitted to the partnership and the business of the firm in its operation of the distillery and production and sale of whiskey continued uninterruptedly until February A. D. 1887; when the present corporation complainant was organized under the laws of the State of Kentucky, and succeeded to the good will, trade marks

and all other assets of said co-partnership by deed.

That "Old Crow" whiskey was originally produced in Woodford County, Kentucky, by James Crow, who was a distiller operating in said vicinity from 1835 up to the time of his death in 1855. That he had in his employ one William Mitchell as assistant distiller and that said James Crow prior to his death, confided to the said William Mitchell the formula and process under which he had produced the "Old Crow" whiskey throughout his lifetime from 1835 to 1855, and which process and formula had been kept secret by him.

That two years prior to the building of the present "Old Crow" distillery, said Gaines, Berry & Company employed the said William Mitchell and secured from him the formula and knowledge of said secret process and resumed the production of the "Old Crow" whiskey in a distillery in Woodford County where the Old Oscar Pepper Distillery now stands, which distillery they leased from the

widow of Oscar Pepper.

That affiant first became connected with the firm of W. A. Gaines & Company as a clerk in the year 1872 and has continuously been connected with the business since that time without interruption. That ever since the year 1872 the said whiskey has been of the highest quality and of uniform standard of excellence and has always been vended in packages bearing the words "Old Crow," That a very large portion of the trade of the Complainant and its predecessors has been in bulk whiskey sold by it to the leading wholesale merchants of the United States, which wholesale merchants would in turn frequently subdivide the whiskey bought by them in bulk into smaller packages, upon which packages they would imprint the words "Old Crow." That the words "Old Crow," whereever the same have been known, seen or established in the trade, have meant and now mean the "Old Crow" whiskey

of the Complainant and of no other person or persons; that 35 in transactions in whiskey throughout the United States, whenever whiskey is quoted by the name "Old Crow," the whiskey of this Complainant is meant. Affiant submits herewith specimens of the regular periodical price lists used in the whiskey trade and published by J. W. Biles & Company of Cincinnati, Ohio; Wm. C. Biles & Co., Cincinnati, Ohio; H. W. Voss & Company, Cincinnati, Ohio; The Weideman Company, Cleveland, Ohio; M. Durner & Co., Cincinnati, Ohio; Glasner & Barzner Distilling & Importing Co., Kansas City, Mo.; Chapin & Gore, Chicago, Ill.; Jaffe & Co., Seattle, Wash.; A. Moll Grocer Company, St. Louis; James Durner, Spokane, Wash.; and the wholesale and retail price lists of W. L. Perkins & Co., St. Paul, Minn.; a copy of each of which price lists is herewith filed and marked "Berry Affidavit Exhibit No. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12," respectively; as well as the standard trade journal used in the whiskey trade of the United States and known as Mida's Criterion, published at Chicago, Illinois, by the Criterion Publishing Company, a copy whereof is herewith filed and marked

"Berry Affidavit Exhibit No. 13." That in all these publications the words "Old Crow" mean and always have meant the whiskey of the

Complainant or its predecessors in business.

That shortly after the enactment of the Congress of the United States of the Act providing for the bottling of whiskey in bond, the Complainant began the bottling of its "Old Crow" whiskey in bond in packages of the various sizes provided for by said Act, and its whiskey so bottled has acquired wide reputation and celebrity and is known and called for as "Old Crow Whiskey Bottled in Bond," a specimen whereof is herewith submitted and marked "Berry Affidavit Exhibit No. 16."

That the trade and the public everywhere have acquiesced in the right of the Complainant to the use of its trade mark "Old Crow" as applied to whiskey, and particularly to straight whiskey bottled

in bond, with the exception of the Defendants.

Affidavit Exhibit No. 18."

That the Complainant and its predecessors have at all times availed themselves of the benefits of the various trade mark 36 registration acts of Congress, the trade mark "Old Crow" having first been registered in conjunction with other words on December 13, 1870, Certificate No. 102, under the Act of 1870, a certified copy of which registration is herewith filed and marked "Berry Affidavit Exhibit No. 17"; that the trade mark consisting of the words "Old Crow" was subsequently registered under the Act of March 3, 1881, being registered on June 28, 1904, Certificate

That upon the enactment of the Act of February 20, 1905, the said trade mark was again registered by the Complainant, the original certificate whereof, No. 74,537, issued July 20, 1909, is here-

No. 42,919, whereof a copy is herewith filed and marked "Berry

with filed and marked "Berry Affidavit Exhibit No. 19."

That the Complainant has used and is using its said registered trade mark consisting of the words "Old Crow" not only in bottling the "Old Crow" whisky in bond at its distillery, but also in bottling said "Old Crow" whisky out of bond, and that many of the prominent wholesale liquor dealers of the United States have had and are having such special bottlings out of bond made for them by this Complainant of its "Old Crow" whisky, as will here fully appear from the following specimen labels which are authentic specimens of the labels used in such out of bond bottlings for the customers of the Complainant in the various cities and States indicated upon said labels.

(Here follow complainant's exhibits marked pages 37 to 66, inclusive.)



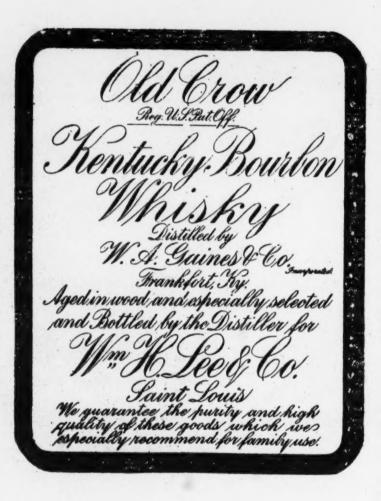
# Phurban Whisky

Helish

Bottled by the Distillers W.fl. Gaines & Co., mount



D. Canales Co. Remphis, Tenn.





which is burnt on the WHISKY, which enjoys such to FORD CO. KENTUCKY, in the OLD FASHIONED a, wide spread reputation, is manufacfured by W. A. GAINES & CO. In WOOD-

CRON

Mingled, and doubled in COPPER STILLS over OPEN WOOD in the process of fermentation they emiddy no chemical or other deleterious substance, and use a portion of the spent beer of previous distillation as an aid to fermentation. Their processes of distillation and fermentation are much slower and require greater care and Whiskies, but the result obtained is in every respect superior By the almost perfect fermentation obtained the generation of PUSEL OIL. HAND MADE. SOUR-MASH, FIRE CUPI'ER MAY, being It is distilled from the most carefully selected Corn, endrely obviated. And, by their IMPROVED STILL, S and MANNER OF DISTILLATION, ALL DELETERIOUS SUBSTANCES are sept. Are and Barley-Mait, and under their direct personal supervision. which renders many other Whiskies so injurious to health, is almost rated from the Spirit, and an article produced which has watchfulness than are employed in the production

O WHISKY BY

CACA DIST TRADE MARK

SON DESTILLERS &

recommended as being strictly PURE THE OLD CROW WHISKY is especially and WHOLESOME.

deservedly attained an enviable reputation.

before purchasing, that it is distilled by W. A. GAINES & CO., h on to our PATENTED TRADE d of every barrel, and we : FOODFORD CO., KT., as none other is genuine. he resulte SOUR-MASH, FIRE-COPPER and others who may wish to deal is sumerous and injurious imitati in order to guard our patroi

It may interest those purchasing our OLD CROW WHISKY to to whisky produced by his know that it is produced by the formula of a scientific Scotch lames Crow, of Woodford Co. Ky., now first applied the trade mark "CROW" formula in 1835. tiller.

since 1967 Always adhering to the celebrated formula of Jam he OLD CROW WHISKY, he well known and highly ester Crow, and always improving the facilities of our distillery. we have by constant efforts, solely with a view of im has been manufactured continuously by us and proving the quality, built up and steadily maintained the Aigh repulation which the vhisky enjoys.

W. A. GAINES & CO.,

Diffice, Frankfort, Ky.

C.W.CRAIG & CO.

BOTTLED FOR

SAN FRANCISCO,CAL

W. 4. GAINES & CO.

DISTILLERS

# OLD CROW

# BOURBON WHISKEY

000

FINE OLD SPECIAL LIQUEUR DISTILLED FROM SELECTED GRAIN AND AGED IN WOOD BY

W.A.GAINES & CO. (INCORPORATED)
FRANKFORT, KY.

And Bottled by them Expressly for

SAMBUCETTI & CO.

PADUCAH, KK

# OLD CROW BOURBON



DISTILLERY FOUNDED 1835.

# WHISKEY

DISTILLED AT THE OLD CROW DISTILLERY
WOODFORD CO.KENTUCKY.
AND BOTTLED BY THE DISTILLERS
FOR

THE WM. EDWARDS &





Under our personal supervision W.A.GAINES & CO. INCORPORATED.

FRANKFORT, KY.

DISTILLERS.









-SW.A.Gaines & Co. (INCORPORATED) Frankfort, Ky.

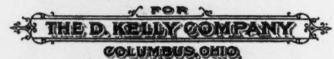
# OLD CROW

HAND MADE SOUR MASH

# KENTUCKY BOURBON

BOTTLED BY THE DISTILLERS

W.A.GAINES & CO. FRANKFORT, KY.
FROM RARE OLD SELECTIONS



We guarantee the purity age and high quality of these goods which we especially recommend for family use as being the highest grade of Hentucky Whiskey bottled!

"IT'S PURE THAT'S SURE."







DISTILLED FROM SELECTED GRAINAND AGED IN WOOD BY W.A.GAINES & CO. INCORPORATED FRANKFORT, Ky., AND BOTTLED IN ITS ORIGINAL PURITY BY THEM FOR THE

MICHIGAN DRUG COMPANY
DETROIT, MICHIGAN.

# COLO COURDONS BOURBONS BOTTLEDEXPRESSIVEOR Loreng He Sons Co. Des Moines, Sa. BY THE DISTRILERS WAGAINES & CO.INC. FRANKFORT, KY.

# OLD CROW BOURBON WHISKEY



re oftende

W. A.GAINES & CO. DISTILLERS.

= FOR =-

JAMES DURKIN, SPOKANE, WASH.

# OLD CRO BOURBON





Made at the Old Crow Distillery ULA.Gaines & Co. Distillers

And Bottled by the Distillers for

HOUSTON

TEXAS

# ThisWhiskey has been Distilled and Bottled by

FRANKFORT KENTUCKY

# DER DW BOURBON WHISKEY

BOTTLED EXPRESSLY FOR



HARTFORD, CONN.

Nº 32 FRONT ST

Nº 202 STATE ST.



# V. O. OLD CROW Bourbon Whiskey

W. A.GAINES & CO. INCORPORATED.
FRANKFORT, KY.

EXPRESSLY FOR

# SiepKer& Company

QUINCY, ILLINOIS.

# OLD GROW

REG. U. S. PAT. OFF.







DISTILLERY FOUNDED 1835.

# BOURBON WHISKEY

BOTTLED & DISTILLED BY

W.A.GAINES & CO. INCORPORATED.

DISTILLERS

J. OPPENHEIMER & CO. San Antonio, Texas.

# OLD GROW







THIS WHISKEY WAS DISTILLED AT THE OLD CROW DISTILLERY WOODFORD CO, KY.
AND BOTTLED BY THE DISTILLERS

W. A.GAINES & CO. INCORPORATED.
ESPECIALLY FOR

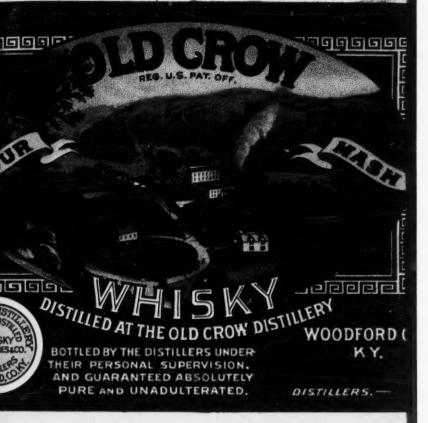
# YOCHIM BROS

NEW ORLEANS, LA.

# ERY OLD

W. A. Gaines & Co., Frankfort, Ky. Expressly for the

Cleveland, Ohio.







DISTILLERY FOUNDED 1835.

# WHISKEY

THIS WHISKEY WAS DISTILLED AT THE OLD CROW DISTILLERY WOODFORD CO.KY.

AND BOTTLED BY THE DISTILLERS

W. A.GAINES & CO. INCORPORATED.
ESPECIALLY FOR

S. Maier,

PALESTINE, TEXAS.



Galveston, Texas.





# Stephens-Kennedy Company Sioux City, Ia.

This Whiskey has been bottled by us expressly for above firm and under our personal supervision.

W.A.GAINES & CO.INC.

FRANKFORT. KY.

Distillers.

That such of the foregoing labels as do not bear the imprint "Reg. U. S. Pat. Off." are specimens of labels used in the bottling for various customers as indicated, none of which bottlings has been packed by the Complainant since the registration of

its trade mark was effected.

That this affiant recently learned for the first time that the Defendants were producing the spurious "Old Crow" whiskey bottled in bond, of which a specimen is submitted to the Court herewith, as Exhibit B accompanying the bill. That the preparation and sale of the said whisky bottled in bond was done without the knowledge, permission, consent or acquies-ence of the Complainant, and was done solely and only for the purpose of preying upon the established trade and reputation of the Complainant as heretofore described.

That the defendants in producing the said whisky do not use and cannot bottle the genuine "Old Crow" whiskey of this Complainant, but are substituting the product of the said Rock Spring Distilling Company at its Distillery No. 18 in the Second Internal Revenue District of Kentucky, and an entirely different whiskey to that of Complainant and not the product of the Complainant's "Old Crow"

distillery.

That the Defendants are now preparing and marketing other specimens of the said infringing whisky and unless restrained by this Court will persist in doing so to the irremediable damage of the Com-

plainant and to its irreparable injury.

That there is not now and never has been any genuine "Old Crow" whisky produced in Daviess County, Kentucky, or anywhere else than at the Old Crow Distillery of the Complainant in Woodford

County, Kentucky.

Affiant further states that he is familiar with the litigation heretofore had between this Complainant and Max Kahn, Administrator,
et al., in the United States Circuit Court for the Eastern District of
Missouri, Eastern Division, in which case this Complainant charged
the Defendants, who were the predecessors in business of a certain
Hellman Distilling Company, a Missouri corporation, with unfair
competition in the manufacture and sale of blended whisky or a
spurious compound under the name "Old Crow," and in this

behalf affiant states that in said cause Defendants were charged with and admitted having used the name "Crow" or "Old Crow" only upon a blended whisky, as will appear from the testimony given in that cause by the Defendant Moritz Hellman, at page 473 of the Transcript of Record of said cause, which Transcript of Record is herewith filed as "Berry Affidavit Exhibit No. 20," being the Transcript of record of said cause in the United States Circuit Court of Appeals for the Eighth Circuit, case No. 2700.

Affiant further states on information and belief that the Defendants in said cause never made or caused to be made, or put up or caused to be put up any package whatever any straight whisky under the name "Crow" or "Old Crow" until long after the decision of the said case by the United States Circuit Court of Appeals for the Eighth Circuit, and that the acts complained of in the Bill of Complaint herein were committed by the defendants herein after the

said decision and after the said litigation in the Eighth Federal Judicial Circuit had terminated; and affiant states that the Defendants herein have not at any time prior to the termination of the said litigation in the Eighth Federal Judicial Circuit applied or affixed the words "Crow" or "Old Crow" to any straight regularly distilled

whisky, whether bottled in bond or otherwise.

That the complainant is the distiller of the "Old Crow" and of the "Hermitage" whisky, the latter being distilled at Complainant's Hermitage Distillery in Frankfort, Kentucky. That both of said brands are jointly advertised in trade publications, and the total advertising expenditures are kept in a single advertising account by Complainant. That the total amount expended in such advertising from January 1st, 1884, to October 1st, 1909, by Complainant is \$272,656.84.

And further affiant saith not.

GEORGE F. BERRY.

Subscribed and sworn to before me this 12th day of November, 1909.

SEAL.

JESSE P. WILLIAMS, Notary Public, Franklin Co., Ky.

My commission expires Feb. 5th, 1910.

69 Extract from Berry Affidavit Exhibit No. 1, Being Biles'
Semi-monthly Pocket Edition Whiskey Prices, Volume
20, October 9th, 1909, No. 7, Published by the J. W. Biles Co.,
Cincinnati, Ohio, Page 15.

Bourbon		1909	1	1908	1	907	1	906
		S	F	S	F	S	F	S
Old Crow		\$0.75 1905		\$0.80 1904		\$1.05 1903		\$1.15 902
	F	8	F	8	F	S	F	8
		\$1.45	-	\$1.65	-	\$1.80		

Columns to the left contain prevailing current or distillers' quotations, while under these

#### Odds and Ends

Will be found special lots offered from time to time.

#### Old Crow:

	-		
50	Spg.	'08	\$0.70
50	Spg.	'07	.80
50	Spg.	'06	1.00
	Fall	'05	1.10
	Spg.	'05	1.35
25	Spg.	'04	1.55
25	Spg.	'03	1.75
	Spg.	'02	1.68

Extract from Berry Affidavit Exhibit	No. 2, Page 14, Being William
C. Biles & Co., Cincinnati Whiskey	Price Current, Volume 18, No.
14, October 10th, 1909.	

Bourbon	1909	19	008	1	907	1	906	1	905
	S	F	S	F	S	F	S	F	S
Old Crow	\$0.75		\$0.80		\$1.05		\$1.15		\$1.45
			1904	4	19	03	190	2	1901
			F	S	$\mathbf{F}$	S	F	S	F
	*			1.6	5	\$1.80	)		

### Bourbon. Cheap Lots-Continued.

Bbls	. Ag	e.	Bra	nd.													1	Price.	
25	Spr.	'03,	Old	Crow	 			 					 	0		-	\$1.	70	
25	Spr.	'04,	Old	Crow	 	 			0 (								1.	60	
70.																			
10	Spr.	'05,	Old	Crow	 	 							 			,	1.	35	
25	Fall	'05,	Old	Crow	 . ,	 							 				1.	15	
50	Spr.	'06,	Old	Crow	 	 							 			è	1.	021/2	
				Crow															
100	Spr.	'08,	Old	Crow	 * 1	 												771/2	

Extract from Berry Affidavit Exhibit No. 3, Page 16, Being Quotations of H. W. Vose & Co., Whisky Brokers, Cincinnati, Ohio, Dated August, 1909.

#### Bourbon Whiskies-Continued.

20	Old	Crow				 				 	 				Spr.	'04	at	\$1.571/2
25	Old	Crow				 					 				Spr.	'05	at	$1.32\frac{1}{2}$
60	Old	Crow				 					 				Spr.	'06	at	$1.02\frac{1}{2}$
50	Old	Crow				 					 				Spr.	'07	at	.80
50	Old	Crow				 					 				Spr.	'08	at	.731/2

Extract from Berry Affidavit Exhibit No. 4, Page 26, Being Catalogue of the Weideman Company, Cleveland, Ohio.

## Whiskies (In Cases). Bourbons, Our Own Bottling.

	Cost.	Sell.
Old Crow	ia	
Old Crow	25	

Extract from Berry Affidavit Exhibit No. 5, Page 22, Being Price Current of M. Durner & Co., Cincinnati, Ohio, Dated August 20th, 1908.

	Old Crov	v :	
Fa	ll '99		
Sp	g. '00		
	11 '00		
25 Sp	g. '01	\$1.75	
	ll '01		
25 Sp	g. '02 .	1.76	
	g. '03	1.75	
Sp	g. '04	1.65	
20 Sp	g. '05	1.35	
25 Sp	g. '06	1.00	
	ll '06		
25 Sp	g. '07	.80	
Sp	08 '08	. 75	

71 Extract from Berry Affidavit Exhibit No. 6, Page 1, Being Wholesale Price List of Glasner & Barzen Distilling and Importing Company, Kansas City, Mo.

#### Whiskies Bottled in Bond.

Old Crow:																		Per case.
5's							. ,											\$12.00
Screw Top, pints	 								 				. ,					14.00
Screw Top, half pints.												0	 		0			15.00
120 1-5 pints, per case	 									0								18.00
240 1-10 pints, per case		9	0	0	a			9 (	 						9			21.00

Extract from Berry Exhibit No. 7, Page 2, Being Wholesale Price List of Chapin and Gore, Chicago, Ill.

#### Kentucky Sour Mash Whiskies. (Tax Paid or in Bond.)

	In Bb	l. lots.
Distilled expressly for us:	Per gal.	Per gal.
Old Crow Bourbon, Spring of 1893		
Old Crow Bourbon, Spring of 1899		
Old Crow Bourbon, Spring of 1900		
Old Crow Bourbon, Spring of 1901		
Old Crow Bourbon, Spring of 1902		
Old Crow Bourbon, Spring of 1903		
Old Crow Bourbon, Spring of 1904		
Old Crow Bourbon, Spring of 1905		
Old Crow Bourbon, Spring of 1906		
Old Crow Bourbon, Spring of 1907		

Extract from Berry Affidavit Exhibit 8, Page 1, Being Catalogue of Jaffe & Company, Seattle, Wash.

#### Bourbon Whiskies. Straight Double Stamped.

Per gallon.
Old Crow, according to age..... \$4.50 to \$10.00

Extract from Berry Affidavit Exhibit No. 9, Column 40, Being Price List of A. Moll Grocery Company, October, 1909.

72 Whiskies.

Extract from Berry Affidavit Exhibit No. 10, Page 5, Being Price List of James Durkin, Spokane, Wash.

#### Whiskies.

The following list of whiskies are selected from among the choicest of Kentucky, Maryland, Pennsylvania, Tennessee and Canada, and we guarantee the genuineness and absolute purity.

 Old Crow—W. A. Gaines & Co.
 \$4.00
 \$2.00
 \$1.25
 \$0.65
 \$0.35

 Old Crow, 1890
 5.00
 2.50
 1.50
 .75
 .40

Extract from Berry Affidavit Exhibit No. 11, Page 1, Being Price List of W. L. Perkins & Co., St. Paul, Minn.

#### Whiskies. Bourbon.

Per Case 12 qts. 24 qts.

V. O. Old Crow (a very old Old Crow Whiskey distilled by W. A. Gaines & Co., and bottled by ourselves):

#### Bourbon-Bottled in Bond.

Old Crow . . . . . Ask for prices. Prices change so often we do not print prices.

Extract from Berry Affidavit Exhibit 12, Page 1, Being Another Catalogue of W. L. Perkins & Co., St. Paul, Minn.

Whiskies. Bourbon.

		-	Per	Case.
			12 qt. bot.	24 pt. bot.
				\$13.00
Old Crow,	1892	 	 . 14.00	16.00

73 Extract from Berry Affidavit Exhibit 13, Page 18, Column 1 of Mida's Criterion, Chicago, Jan. 1st, 1907.

Distillery | District | Distillers, Location Number | Number | and Special Address



W. A. GAINES & CO., Frankfort,
Woodford County, Ky.
Rate:—.45.
Warehouse equipped with an automatic sprinkler.
Address, Paris, Allen & Co., New York.

Affidavit of Leopold Labrot on Application for Preliminary Injunction.

STATE OF KENTUCKY, County of Franklin, City of Frankfort, ss:

Leopold Labrot, of lawful age, being sworn, on his oath says:
That he is a citizen of Frankfort, Franklin County, Kentucky, and that he is not the owner and operator of the "Old Oscar Pepper Distillery" which is situated on Glenn's Creek in Woodford County, Kentucky, and which distillery was owned by Oscar Pepper in 1865. That said distillery was in the possession of, and was operated by, Gaines, Berry & Company about the year- 1867 to 1869, and affiant understood that they leased it for an additional two years but permitted it to remain idle,—they having transferred their manufacture of whiskey to a new distillery erected by them a few miles further down the same creek and to which latter distillery they gave the name of "Old Crow Distillery."

Affiant says that when the firm of Gaines, Berry & Company were operating the Oscar Pepper Distillery in 1867-1869 they called the product of that distillery "Old Crow" whiskey and branded it with that brand, the essential words of the brand being the words "Old Crow."

That after the firm of Gaines, Berry & Company ceased to have possession of the said Oscar Pepper distillery it was run in the name of Jas. E. Pepper, but that E. H. Taylor, Jr., controlled the product and had a mortgage on the premises; that they, on the site of the old Oscar Pepper Distillery built a new distillery and called it "Old Oscar Pepper Distillery" and used a brand on the product of the distillery, the essential words of which were "Old Oscar Pepper Distillery," and that every since then that distillery has been known by that name and its product has been branded with that trade mark or brand.

That James E. Pepper became bankrupt and Taylor also then being bankrupt, the Assignee of the former transferred and conveved the said "Old Oscar Pepper Distillery" brands, etc., to the Assignee of Taylor, who sold and conveved the same to Geo. T. Stagg and that about thirty years ago the same was sold and conveyed by said Stagg to James H. Graham, who a few months later sold and conveyed one undivided half of the said distillery, brands, etc., to this affiant, and that about ten years or more ago said Graham sold and conveyed to this affiant his remaining one-half interest in the same, and this affiant now owns said properties and is now holding and operating the same under the said name and brand "Old Oscar Pepper Distillery."

Affiant says, that from about the year 1869 or 1870 the firm of Gaines, Berry & Company and their successors the firm of W. A. Gaines and Company and the successors of the latter firm, to-wit, the corporation of the same name, W. A. Gaines & Company, have continuously owned and operated the before mentioned new distillery erected by them on Glenn's Creek in Woodford County Kentucky, to which distillery they gave the name "Old Crow Distillery" the product of which has always been high grade straight whiskey and to which they have continuously applied the said brand

"Old Crow."

Affiant says that after the firm of Gaines, Berry & Company left the Old Oscar Pepper Distillery and removed to their Old Crow Distillery as above stated, that neither James E. Pepper, or any 75 of his successors, including this affiant, have ever used, or claimed the right to use, the words "Old Crow" or any part of them, either as a name for affiant's said distillery or as a brand

for its product.

Affiant further says, that he has been for the last thirty-six years or thirty-seven years identified with the whiskey business and has known of the various distilleries and manufacturers' brands for whiskies, throughout the country, and particularly in the State of Kentucky and of the brands of Kentucky whiskies, and that he has never heard of any distillery in this, or any other State in the Union named or spoken of as "Old Crow Distillery" except the distillery aforementioned of W. A. Gaines & Company situated on Glenn's Creek in Woodford County, Kentucky, the same being the distillery erected by the firm of Gaines, Berry & Company about the year 1869 and to which they attached the name of "Old Crow Distillery"; nor has affiant ever known or heard of any other distillery or manufacturers of whiskey using the said brand "Old Crow" as

a brand for their product of whiskey.

And affiant being asked the question, further states that if he should see upon a bottle or any other package containing whiskey the distinctive words "Old Crow" or "Old Crow Whiskey" without examining the contents and unless otherwise informed he would suppose that the whiskey contained in the package so marked was straight whiskey and was made by W. A. Gaines & Company at its said "Old Crow Distillery" on Glenn's Creek in Woodford County, And affiant says that the said trade mark or brand em-Kentucky. bracing as its particular or essential features the words "Old Crow" is recognized by the trade and manufacturers and dealers as indicating a straight whiskey of superior quality and value, made by W. A. Gaines & Company at its said Old Crow Distillery and commands a ready sale on the market; that the said trade mark or brand has been continuously and exclusively used by W. A. Gaines & Company and its predecessors since the year 1867; and that by such continuous and exclusive use, as well as the superior quality of the whiskey, under this name W. A. Gaines & Company have built up a large and valuable trade in said whiskey.

(Signed)

LEOPOLD LABROT.

76 Subscribed and sworn to before me by Leopoid Labrot, this the 18th day of November, A. D. 1909.

My commission as Notary Public will expire on the 25th day of January, A. D. 1910.

[SEAL.]

D. W. LINDSEY, Jr., Notary Public, Franklin County, Ky.,

Affidavit of Isaac C. Bishop on Application for Preliminary Injunc-

STATE OF NEW YORK,

City of New York, Borough of Manhattan, 88:

Isaac C. Bishop, of lawful age, being on his oath sworn, deposes

and says:

That for the last past twenty years about, he has been engaged in the City of New York in the wholesale and retail wine and liquor trade and for many years last past, has been engaged in commerce between the State of New York and substantially all of the States of the United States and with many foreign nations; that ever since the year 1890, the affiant has been acquainted with the "Old Crow" whiskey as the same is known, called and dealt in in the liquor trade of the United States; that the words "Old Crow" have ever since affiant has been acquainted with their use, signified to him the product of W. A. Gaines & Company and a straight regularly distilled Kentucky Whiskey.

That in the conduct of his business, printed price lists are periodically issued by him for distribution to the wholseale and retail trade and that the price lists have quoted either "Old Crow Bourbon" or

"Gaines'Old Crow Bourbon" meaning thereby the "Bourbon whiskey produced by W. A. Gaines & Company, and that he has for many years sold and listed on his price lists "Old Crow Bourbon bottled in bond," meaning thereby the product of W. A. Gaines & Company, distilled in Woodford County, Kentucky, which is the only "Old Crow Bourbon" whiskey bottled in bond with which this affiant is acquainted and that the said "Old Crow Bourbon" whiskey or "Old

Crow" whiskey bottled in bond, has a large and established reputation in his trade, and that in the opinion of the affiant, no other "Old Crow" whiskey than that of W. A. Gaines & Company can be offered for sale without effecting a fraud upon the

public.

That the "Old Crow Rye" whiskey which the affiant also lists on his price list, refers to the "Old Crow" whiskey of W. A. Gaines & Company as the same is bottled by H. B. Kirk & Company in New York, or which is bottled in bond for them by W. A. Gaines & Com-

pany in Woodford County, Kentucky.

That the words "Old Crow" as used in "Bishop Exhibit A" and as used in the price lists of the affiant, circulated and used in the wholesale and retail liquor trade of the United States, have always referred to the product of W. A. Gaines & Company of Frankfort, Kentucky, and to no other product and the said whiskey is among the prominent and leading brands of Kentucky whiskies.

The affiant further says, that all quotations either verbal or written on "Old Crow" whiskey either "Rye" or "Bourbon" made by him, and all his printed price lists for "Old Crow" whiskey refer exclusively to the product of W. A. Gaines & Company and no other prod-

uct.

And further affiant saith not. (Signed)

ISAAC C. BISHOP.

Subscribed and sworn to before me this 14th day of October, 1909.

[SEAL.]

GEO. H. EVANS,

Notary Public,

Affidavit of Cornelius A. Burkhardt on Application for Preliminary Injunction.

STATE OF OHIO,

County of Hamilton, ss:

Cornelius A. Burkhardt, of lawful age, being on his oath sworn, deposes and says that he is President and General Manager of the A. G. Corre Hotel Company, a corporation owning and operating two of the leading hotels of Cincinnati, Ohio, namely: The Gibson House and the Grand Hotel. That he has been actively connected with hotel management in the City of Cincinnati for ten years last past.

That said hotels of the A. G. Corre Hotel Company each
maintain- and operate- a restaurant and a bar wherein wines
and liquors are sold. That among the liquors so sold,
whiskey is included, of many of the leading brands of the world, and
in large quantities. That among said whiskies "Old Crow" is one

of the leading brands, sold by affiant's company and affiant means thereby the whiskey produced at the Old Crow Distillery in Woodford County, Kentucky, by W. A. Gaines & Company. That said "Old Crow" whiskey has been known to affiant ever since he first engaged in the hotel business. That affiant would not tolerate or permit any other than W. A. Gaines & Company's whiskey to be dispensed in said hotels upon a patron's call for "Old Crow" whiskey as only fraud and deception could result therefrom.

And further affiant saith not.
(Signed) CORNELIUS A. BURKHARDT.

Subscribed and sworn to before me this 11th day of November, A. D. 1909.

[SEAL.]

GEORGE A. TURRELL, Notary Public in and for Hamilton County, Ohio.

Affidavit of Patrick O'Brien on Application for Preliminary Injunction.

State of Michigan, County of Wayne, City of Detroit, 88:

Patrick P. O'Brien, of lawful age, being on his oath sworn, deposes and says that he is a member of the firm of O'Brien & Company, which is a co-partnership composed of William B. O'Brien and deponent. That they have been trading for the past twenty-two years under the name of O'Brien & Company in the City of Detroit and have been engaged in the wholesale and retail grocery business and in the wholesale and retail liquor business; that for the past fifteen years and more, he has been familiar with the "Old Crow" whiskey of W. A. Gaines & Company and that said firm of O'Brien & Company have handled the same, first as bottled at the distillery by W. A. Gaines & Company and later as bottled in bond; that he has dealt in

the same extensively and has from time to time in the course of their business issued price lists for circulation in the City of Detroit and State of Michigan, wherein the "Old Crow" whiskey of W. A. Gaines & Company has been listed and offered for sale; that a specimen copy of the said price lists, published by deponent's firm some two or three years ago is hereto attached and marked "O'Brien Exhibit A" and made a part of this affidavit. That some little time ago, according to their usual custom, the said firm of O'Brien & Company got out a catalogue in which catalogue said "Old Crow" whiskey was also listed a copy of which catalogue is hereto attached and marked "O'Brien Exhibit B" and made a part hereof.

That the said W. A. Gaines & Company have always been recognized by this affiant as the sole and exclusive owner of the trade mark for straight Kentucky whiskey consisting of the words "Old Crow" further that he has dealt in the brand of that character of W. A.

Gaines & Company for at least the past fifteen years and during this period has never recognized any other brand of whiskey as "Old Crow" other than that purchased from the said W. A. Gaines & Company.

And further affiant says not.
(Signed)

PATRICK B. O'BRIEN.

Subscribed and sworn to before me this 3d day of November, A. D. 1909

[SEAL.]

GEORGE B. YERKES, Notary Public. Wayne County, Michigan.

My commission expires July 15, 1913.

Extract from O'Brien Exhibit A, Being Price List of O'Brien & Co., Importers, Detroit, Mich., First Column, Page 3.

# Whiskies. American.

	Per case.	Per bottle.
Old Crow, B. N.	 \$14.00	\$1.25
Old Crow, 1885	 19.00	1.75

80 Extract from O'Brien Exhibit B, Catalogue of O'Brien & Co., Detroit, Mich., Page 93.

#### American Whiskies.

		Per bottle.
Old Crow, B. B.	 \$12.00	\$1.15
Old Crow, 1885	 19.00	1.75

Affidavit of George G. Brown on Application for Preliminary Injunction.

STATE OF KENTUCKY, County of Jefferson, ss:

George G. Brown, of lawful age, being on his oath sworn, deposes and says: That he is President of Brown-Foreman Company, a Kentucky corporation, having its principal office in the City of Louisville, County of Jefferson, State of Kentucky, and engaged in the distilling of whiskey and in the selling of same; that the affiant has been connected with the distilling industry in the State of Kentucky as a dealer and distiller for thirty-nine years last past; that during all the period of the affiant's connection with said industry, he has been acquainted with the "Old Crow" whiskey of W. A. Gaines & Company and that the name "Old Crow" as used by N. A. Gaines & Company, is a distiller's brand of high reputation and established value and is so recognized by the distillers and wholesale liquor dealers of Kentucky and generally throughout the United States; that affiant has no knowledge of any other use for the name of "Old

Crow" as a distiller's brand of whiskey except the use of W. A. Gaines & Company and that the said brand has been identified with the bottling of whiskey in bond by W. A. Gaines & Company for many years past and in such application the words "Old Crow" are known and recognized as indicating the whisky distilled at the "Old Crow Distillery" of W. A. Gaines & Company and bottled in bond in the distillery warehouse of said W. A. Gaines & Company; that in the opinion of this affiant the application of the words "Old Crow" to any bottled in bond whisky other than the whisky produced at the Old Crow Distillery of the complainant is calculated to deceive and

mislead the ultimate consumer of the contents of the package 81 in which such bond bottling is effected; that affiant has no

pecuniary interest in this cause.

And further affiant saith not.

GEO, G. BROWN. (Signed)

Subscribed and sworn to before me by George G. Brown this 16th day of November, A. D. 1909. My commission expires at the end of the next session of the General Assembly.

SEAL.

E. G. GORDON. Notary Public, Jeff. Co., Ky.

Affidavit of Louis Poock, Filed Nov. 22, 1909.

STATE OF OHIO.

County of Hamilton, ss:

Louis Poock, of lawful age, being on his oath sworn, deposes and says that he is President of Mellwood Distillery Company, a corporation owning and operating the Mellwood Distillery at Louisville. Kentucky, one of the largest producing distilleries of high grade bourbon whiskey; that he is President of the Outerbridge-Horsey Company of Burkittsville, Maryland; that he is President of the National Distributing Company of Cincinnati, Ohio; that he is President of the Buchanan-Anderson-Nelson Company of Cincinnati. Ohio.

That he is very familiar with the leading brands of American whiskies, and particularly the "Old Crow" whiskey of W. A. Gaines & Company with which he has been acquainted since the year 1883. That the affiant's transactions in whiskey have extended practically all over the United States, and to affiant's certain knowledge the name "Old Crow" means everywhere the whiskey of W. A. Gaines & Company and a high grade rye or bourbon whiskey the straight product of distillation.

That affant has no pecuniary interest in this suit.

And further affiant saith not.

(Signed)

LOUIS POOCK.

Subscribed in my presence and sworn to before me this 11th day of November, A. D. 1909.

SEAL.

GEO. A. TURRILL, Notary Public in and for Hamilton County, Ohio. Affidavit of E. H. Taylor, Jr. Filed November 22nd, 1909.

Edmund H. Taylor, Jr., of lawful age, being sworn on his oath

savs:

That from January 1, 1867, he has been engaged in the business of distilling whiskey, and to some extent in the wholesale whisky business, and has a general acquaintance with the whisky trade in the United States. That prior to January, 1867, he was for a number of years engaged in banking business at Frankfort, Ky., in Versailles, Woodford County, Ky., and in Lexington, Fayette County, Ky. That there lived in Woodford County a Scotchman named James Crow who was a skilled distiller, and the whiskey distilled by him had a high reputation for its excellence, and was spoken of and called "Old Crow Whiskey" or "Crow Whiskey."

That for many years before the Civil War said James Crow has been and was distiller for Oscar Pepper on Glenn's Creek in Woodford County, Kentucky, until a short time before he died, and he had assisting him one William Mitchell, who learned to distill whisky under said Crow and according to his formula; and whiskey made at Oscar Pepper's distillery by Crow, and afterwards by William F. Mitchell, was straight whiskey of fine quality and was generally known in the community as "Crow" and "Old Crow" whiskey.

That Oscar Pepper died about the Spring of 1865, and the firm of Gaines, Berry & Company, composed of W. A. Gaines, Hiram Berry and this affiant, leased what had been his distillery property for three years from January 1, 1867, and Crow having died some years before that time, Gaines, Berry & Company employed William F. Mitchell as their distiller, and in January, 1867, commenced and conducted at said distillery the manufacture of whiskey; and the whiskey made by the said firm was called "Old Crow" whiskey, and every package of it so made from January, 1867, was branded "Old Crow" Distillery Copper Distilled Whiskey, Gaines, Berry & Company, Distillers, Woodford Co., Ky."

That the same firm leased and ran another distillery on the same Creek, at which the same high grade of whiskey was manufactured, and every package of whisky there made was also branded with the same brand or trade mark, with the exception that

the name of W. A. Gaines, instead of Gaines, Berry & Co., was used as the distiller. Such firm continued the use of those brands or trademarks at those two distilleries for nearly three years. That having purchased a tract of land on the same Creek, not far from the distilleries above mentioned, they erected thereon a fine distillery to which they gave the name of "Old Crow Distillery," and in 1869 transferred their business of distilling on Glenn's Creek to this new site, where they and their successors continued the manufacture of whiskey, and used the same brands and had William P. Mitchell as the distiller thereat. That at the time of the completion of this new distillery, that property and the trade marks and brands were transferred to the new firm of W. A. Gaines & Company, which firm had as its members those who had constituted the firm of Gaines, Berry & Company, and in addition M. J. Allen, Sherman Paris, and Frank

S. Stevens. That afterwards this affiant sold his entire interest in said firm and its business, trade marks, brands, and good will to M. J. Allen, Frank S. Stevens and to George H. Allen, who then became a member of the firm. Afterwards W. A. Gaines died and G. C. Drane and this affiant were appointed as Gaines' Administrators and as such Administrators said Drane and this affiant sold Gaines' interest in the Distillery property and the trade marks and brands and other interest in the partnership to the surviving members of the firm of W. A. Gaines & Company. That afterwards the partnership of W. A. Gaines & Company became incorporated as W. A. Gaines & Company.

That the firm of Gaines, Berry & Company, and the firm of W. A. Gaines & Company, and the incorporated company of W. A. Gaines & Company, successively, have always manufactured high grade straight whiskey, and successively and continuously have used the trade mark and brand "Old Crow" from January, 1867, until the present time. That each package of whiskey was branded "Old Crow" in the manner before described, and their object was to identity the goods as that manufactured by such firms and corporation at their distillery; and that the goods of said firms and

said company so manufactured were and have been largely advertised on their letterheads, billheads, packages, and literature of different kinds distributed to the trade throughout this country and abroad, and in expensive show cards and advertisements in the trade journals, at the cost of many thousands of dollars; and the same is held and regarded as, and is, a high grade straight whisky and sells at the top of the market.

That the trade, with which affiant is familiar, recognizes the mentioned of Old Crow Whiskey universally as the product of W. A. Gaines & Company at their Old Crow Distillery on Glenn's Creek. That the use of the name and trade mark "Old Crow" as applied to their whiskey, and to their distillery on Glenn's Creek was done by the firm of Gaines, Berry & Company, and by W. A. Gaines & Company, both as a firm and afterwards as a corporation, with the knowledge of Oscar Pepper's widow and children and without objection on their part; and that subsequently James E. Pepper, the son of Oscar Pepper, denominated his father's distillery, which he ran, as the Old Oscar Pepper's Distillery and the product as "Old Oscar Pepper" Whiskey, and that said distillery and its product was continued to be so designated by Labrot & Graham, who succeeded in the ownership and operation of the distillery, and is now so designated by L. Labrot, the present owner.

E. H. TAYLOR, JR.

Subscribed and sworn to before me by Edmund H. Taylor, Jr., this the 17th day of November, A. D. 1909. My commission as Notary Public will expire on the 25th day of January, A. D. 1910.

[SEAL.]

D. W. LINDSEY, JR.,

Notary Public, Franklin County, Ky.

Affidavit of William J. Gorman. Filed November 22nd, A. D. 1909.

William J. Gorman, of lawful age, being on his oath sworn deposes and says that he is Assistant Secretary of W. A. Gaines & Company, complainant herein, and in his said capacity, is familiar with the transactions of W. A. Gaines & Company in its "Old Crow" whiskey, bottled in bond, produced at the Old Crow Distillery, and bottled in the Distillery warehouse of W. A.

Gaines & Company,

That since the registration of the trade mark "Old Crow" involved in this suit, the selling price of the said "Old Crow" whiskey, bottled in bond, is Twelve Dollars and fifty cents per case of twelve full quarts,—said price being based upon sales of one hundred case lots, and the terms being four months' time, or a discount of 4 per

cent for cash, in ten days.

That affiant is informed and believes that the selling price of the bottled in bond whiskey, bottled and shipped by the defendants herein, is Nine Dollars per case of twelve full quarts. That since the registration of the said trade mark "Old Crow" the complainant has shipped the "Old Crow" whiskey bottled in bond bearing the said registered trade mark "Old Crow," from the State of Kentucky to several States of the United States as follows: Iowa, Ohio, Utah, Texas, Idaho, Oregon, Nevada, Georgia, Florida, Montana, New York, Arizona, Missouri, Kentucky, Indiana, Illinois, Colorado, Nebraska, California, Wisconsin, Washington, Michigan, Minnesota, Louisiana, Tennessee, New Jersey, New Mexico, Virginia, South Dakota, Wyoming, Pennsylvania, Massachusetts, West Virginia, Connecticut, District of Columbia.

And further affiant saith not.

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WILLIAM J. GORMAN.

Subscribed in my presence and sworn to before me this 19th day of November, A. D. 1909.

[SEAL.] JESSE P. WILLIAMS, Notary Public, Notary Public, Franklin Co., Ky.

My commission expires Feb. 5, 1910.

Affidavit of Jacob Straub. Filed Nov. 22nd, 1909.

Jacob Straub, of lawful age, being on his oath sworn, deposes and says: That he is the Manager of the Pendennis Club, of Louisville, Jefferson County, Kentucky, and has been connected with that Club for more than twenty-one years last past continuously;

that in the course of his duties in connection with said Club he has had the supervision and handling of large quantities of wine and liquors, including many of the most prominent brands of American whiskies. That during all of said experience the affiant has been acquainted with the "Old Crow" whisky of W. A. Gaines & Company and that the same has been known and called

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for in said Pendennis Club by the name of "Old Crow" alone, without the addition of the name of W. A. Gaines & Company, that the membership of the said Pendennis Club includes a large number of the business and professional men of Louisville and that its guests include visitors from all sections of the United States and from many of the foreign countries; that by a large proportion of said members and guests of the Pendennis Club the said "Old Crow" whiskey is known and used and that in the ordering of the said whiskey the name "Old Crow" alone is customarily used without the addition of W. A. Gaines & Company; that no other "Old Crow" whisky, save that of W. A. Gaines & Company has ever been known to this affiant or offered to him for the use of the said Pendennis Club and that he would not knowingly accept or purchase any other whisky under the name "Old Crow," save that produced by W. A. Gaines & Company, or permit any other whiskey, save the whiskey produced at the "Old Crow" Distillery by W. A. Gaines & Company, to be served when "Old Crow" whiskey is called for.

And further affiant saith not.

JACOB STRAUB.

Subscribed and sworn to before me by Jacob Straub, this 16th day of November, A. D. 1909. My commission expires at the end of the next session of the General Assembly.

SEAL.

E. G. GORDON, Notary Public, Jeff. Co., Ky.

87 Affidavit of James H. Graham. Filed November 22nd, A. D.

James H. Graham, of lawful age, being sworn, on his oath says: That he is a citizen of Frankfort, Franklin County, Kentucky; and that in March, 1878, he became owner of the Old Oscar Pepper Distillery by purchase, and that in August of that year he formed a partnership with Mr. Leopold Labrot, to date back, however, to the date of affiant's purchase of said distillery, the half interest in same being conveyed by affiant to said Labrot. That this affiant and said Labrot, under the partnership name of Labrot & Graham, ran said Distillery up to November, 1899, when affiant sold out to said Labrot who has continued to run said distillery to the present time. That the Old Oscar Pepper Distillery is situated on a branch or fork of Glenn's Creek, about five miles up said Creek from the "Old Crow Distillery" of W. A. Gaines & Company, in Woodford County, Kentucky. That before affiant purchased the "Old Oscar Pepper Distillery" it was known by that name, and was operated by E. H. Taylor, Jr., and that from information and common rumor probably James E. Pepper was interested with Mr. Taylor. That before Taylor, said distillery was run by the firm of Gaines, Berry & Company, but affiant did not visit the distillery at that time so as to have personal knowledge that Gaines, Berry & Company did so operate it.

Affiant says that at the time and for some years before he purchased the Old Oscar Pepper distillery, W. A. Gaines & Company owned and operated the distillery then and now known as the "Old Crow Distillery" on the dividing line of Woodford and Franklin Counties, Kentucky, on Glenn's Creek, and about five miles from said Old Oscar Pepper Distillery. That the firm of Gaines, Berry & Company had also operated this "Old Crow Distillery" before W. A. Gaines & Company did. That the firm of Gaines, Berry & Company was succeeded by the firm W. A. Gaines & Company, which latter firm was succeeded by the corporation named W. A. Gaines & Company, in the ownership and operation of said "Old Crow Distillery," and that during all the time said distillery was so owned and operated by the firms of Gaines, Berry & Company and W. A. Gaines & Company and the corporation W.

88 A. Gaines & Company, said distillery was called by the owners and was known to the public generally and to the whiskey trade as the "Old Crow Distillery" and that during all that time the product of said distillery had been a straight high grade whiskey and has been known as "Old Crow" whiskey and so branded by the producers and so marketed and known to the whiskey trade

generally.

Affiant says that by reason of their management of said "Old Crow Distillery" and the superior quality of the whiskey made by them, said W. A. Gaines & Company have built up a large and very valuable trade in said "Old Crow" whiskey, which is under that brand well and favorably known to the trade. That no other person, firm, or corporation than W. A. Gaines & Company, Gaines, Berry & Company, and the corporation W. A. Gaines & Company, have ever operated any distillery known as the "Old Crow" or "Crow" distillery within affiant's knowledge or information, and that he has never heard of any claim to the title "Old Crow" for a distillery adverse to W. A. Gaines & Company and its predecessors above named.

Affiant says that if he saw a package, barrel, or bottle containing whiskey, and which was branded or labeled with the name "Old Crow," without examining the contents thereof he would suppose and believe that the contents thereof was whiskey made by W. A. Gaines & Co., at its Old Crow Distillery on Glenn's Creek in Wood-

ford County, Kentucky.

Affiant further states, that neither he nor the firm of Labrot & Graham ever claimed that they had any right to use the name "Old Crow" by reason of the fact that the trade mark or brand "Old Crow" was used by Gaines, Berry & Company at the Old Oscar Pepper distillery, and that they never doubted, but always conceded and believed, that said trade mark or brand belonged to said firm of Gaines, Berry & Company, W. A. Gaines & Company, and their successor, the corporation W. A. Gaines & Company.

JAMES H. GRAHAM.

Subscribed and sworn to before me by James H. Graham, this the 18th day of November, A. D. 1909. My commission as Notary Public will expire the 25th day of January, A. D. 1910.

SEAL.

D. W. LINDSEY, Jr., Notary Public, Franklin County, Ky.

Affidavit of Michael Durner. Filed November 22nd, 1909.

Michael Durner, of lawful age, being on his oath sworn, deposes and says:

My place of business is 219 East Third Street, Cincinnati, Hamilton County, Ohio, where I am engaged as a sole trader under the business name of M. Durner & Company in selling whiskey upon commission, in negotiating loans on warehouse receipts issued for

whiskey, and generally in dealing with whiskey collaterals.

I have been engaged in this business for about 35 years last past. My transactions have extended to all the principal business centers of the United States, and have brought me into business relations with the largest dealers in whiskey in those cities, and have made me authoritatively acquainted with the distillers' brands or trade marks. In this way I have learned of and have dealt in "Old Crow" whiskey, and I know the meaning of that brand. It is accepted everywhere in the United States by those acquainted with whiskey as being the brand of W. A. Gaines & Co., applied to the whiskey produced at the "Old Crow" Distillery. When I offer whiskey to the trade as "Old Crow," I am offering W. A. Gaines & Company's whiskey. When I am offered whiskey as "Old Crow" I understand always that W. A. Gaines & Company's whiskey is offered. And that is the way the brand "Old Crow" is used and what it signifies in the price list which I have published for seven years past, and which is one of the Standard periodical price lists used in the whiskey trade of the United States. I present herewith, a specimen copy of that price list, which is marked "Durner Affidavit exhibit."

And further affiant saith not.

MICHAEL DURNER.

90 Subscribed in my presence and sworn to before me this 15th day of November, A. D. 1909.

GEORGE A. TURRULL,

Notary Public in and for

Hamilton County, Ohio.

Extracts from Durner Affidavit Exhibit Price List M. Durner & Co., Whiskey Commission Merchants, Cincinnati, Ohio, January 20th, 1909, Page 22, Column 2.

#### Old Crow:

	Fall	'99	
	Spg.	'00	
	Fall		
	Spg.	'01	
	Fall		
10	Spg.	'02	\$1.78
	Spg.	.03	
	Spg.	'04	1.65
20	Spg.	'05	1.30
	Fall	'05	1.15
25	Spg.	'06	1.00
25	Fall	'06	
25	Spg.	'07	. 821/2
	Spg.	708	.76

Separate Demurrer of Silas Rosenfield. Filed December 6th, 1909.

This respondent by protestation, not confessing or acknowledging any of the matters and things in the said Complainant's Bill to be true in such manner and form as the same are herein set forth and alleged, demurs to said bill for the following reasons:

(1) The said Complainant has not in and by said bill stated any such cause as doth or ought to entitle it to any such recovery or relief as is thereby sought and prayed for from or against this defend-

ant, or for any relief whatsoever.

(2) As to so much of said bill as relates to and is founded upon the Acts of Congress entitled, "An act to authorize the registration of trade marks used in commerce with foreign nations or among the several States and with the Indian Tribes and to the same"

approved February 20th, 1905, (33 Statutes at Large, page 724), and the alleged registration of complainant's alleged trade mark in and to the words "Old Crow" under the said Act as described in Complainant's said bill, and more particularly paragraphs 3 and 4 of said bill—for the reason that the said Act of Congress is unconstitutional in this; that the said Acts of Congress by its terms purports to be based upon the power granted to Congress by the Constitution of the United States in section eight of article one thereof "to regulate commerce with foreign nations and among the several States and with the Indian Tribes," and the provisions of said Act as enacted are not a lawful or proper exercise of the said power granted to Congress by the Constitution aforesaid.

(3) To said bill in so far as the *name* is based upon any supposed right of an accounting or recovery for damages growing out of the alleged infringement of the alleged registered trade mark of complainant and in and to the words "Old Crow" as described in said bill and

particularly in paragraphs 8, 10, 12, 13 and 15 of said bill, praying for an accounting and seeking to recover special damages, and damages in the sum of \$2,000 and loss of profits on account of the alleged

registered trade mark as described to said bill.

For the reason that it does not appear in and by said bill that the said alleged registered trade mark was marked upon its surface or contained the words "registered in United States Patent Office," or "Reg. U. S. Pat. Off." or that same were affixed to said trade mark; nor does it appear in and by said bill that this respondent or respondent Rock Spring Distilling Company was notified by Complainant that respondents or either of them were infringing the said alleged trade mark or rights of complainant, or violating or transgressing any right or rights of complainant whatever.

Wherefore and for divers other good reasons of demurrer appearing in said bill this respondent demurs thereto, and humbly demands the judgment of this court whether he should be compelled to mark

any other and further answer to the said bill, and prays to 92 be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

Solicitors and Attorneys for Respondent Silas Rosenfield.

STATE OF KENTUCKY,

County of Daviess, 88:

Comes now Silas Rosenfield, and makes oath and says that the said foregoing demurrer is not interposed for delay.

SILAS ROSENFIELD.

Sworn and subscribed to before me a Notary Public in and for Daviess County, Kentucky, this 1st day of December, 1909. My commission will expire on the 15th day of Feb., 1912.

[SEAL.] SOPHIA BELL.

SOPHIA BELL, Notary Public in and for Daviess County, Kentucky.

· I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

LUTHER ELY SMITH, Solicitor for Defendant Rosenfield.

Separate Demurrer of Rock Spring Distilling Co. Filed December 6th, 1909.

This respondent by protestation not confessing or acknowledging any of the matters and things in the said Complainant's bill to be true in such manner and form as the same are therein set forth and alleged, demurs to said bill for the reason that it appears in and by said bill and particularly in paragraphs five and six of said bill that the sole connection of this demurrant with the wrongs alleged to have been suffered by complainant, is the alleged ownership by this demurrant of the distillery in which Complainant alleges the

whiskey is made of which complaint is made, but the said bill shows upon its face that this demurrant does not operate said distillery or make said whiskey, but that the said distillery is operated by defendant Rosenfeld under a so-called license or lease or contract al-

leged to have been granted to him by this demurrant; that it does not appear in and by said bill that this demurrant had any other connection whatsoever with the said alleged wrong-

ful acts complained of by complainant.

Wherefore, and for divers other good causes of demurrer appearing in the said bill this respondent demurs thereto and humbly demands the judgment of this court whether it should be compelled to make any other and further answer to the said bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

LUTHER ELY SMITH, SWEENEY, ELLIS & SWEENEY, Solicitors and Attorneys for Respondents Rock Spring Distilling Company.

STATE OF KENTUCKY, County of Daviess, ss:

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Comes now Silas Rosenfeld, Treasurer of Rock Spring Distilling Co., and makes solemn oath and says that he is the Treasurer of the above named respondent Rock Spring Distilling Company, and that the foregoing demurrer is not interposed for delay.

SILAS ROSENFELD, Treas.

Sworn and subscribed to before me a Notary Public in and for Daviess County, Kentucky, this 1st day of December, 1909. My commission will expire on the 15th day of Feb., 1912.

[SEAL.] SOPHIA BELL, Notary Public in and for Daviess County, Kentucky.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

LUTHER ELY SMITH, Solicitor for Respondent Rock Spring Distilling Co.

Order Filing Affidavits in Support of Motion for Preliminary Injunction. Entered December 15th, A. D. 1909.

This day came the complainant, by James L. Hopkins, their counsel, and filed the affidavits of Harry A. Gretter, Herman J. Steinwender, John C. Murphy, Adolph Zika, Louis Idler, Henry Kunz, Harry Blood, Campbell W. Craig, George C. Benz, W. L. Perkins, Jr., George J. Knapp, and a copy of the file wrapper and contents in the matter of the trade mark in suit.

Affidavit of Harry A. Gretter. Filed December 15th, 1909.

Harry A. Gretter, of lawful age, being on his oath sworn, deposes and says: That he is a resident of Frankfort, Kentucky, and is a photographer by occupation; that the photographic print submitted herewith and marked Gretter Exhibit A, is a true and correct photographic representation of the "Old Crow Distillery" of W. A. Gaines & Company, located on Glenn's Creek in Woodford County, Kentucky, and that said photograph was taken by him on the 11th day of April, 1909, the photographic plate being exposed by him at said distillery and subsequently developed and the print made from the negative under his direction at Frankfort, Kentucky.

And further affiant saith not.

HARRY A. GRETTER.

Subscribed and sworn to before me this 27th day of November, 1909.

SEAL.

JESSE P. WILLIAMS, Notary Public,

My commission expires Feb'v 5th, 1910.

Affidavit of Herman A. Steinwender. Filed December 15th, 1909.

Herman A. Steinwender, of lawful age, being on his oath sworn, deposes and says that he is a member of H. A. Steinwender & Company, wholesale wine and liquor dealers in the City of St. Louis, Missouri; that he has been connected with said firm for six years last past. That in the business transactions of said firm, both in buying and in selling, when "Old Crow" whiskey is offered for sale, it is understood to be the "Old Crow" whisky produced at the "Old Crow Distillery" by W. A. Gaines & Company, and no other whisky whatsoever. That when the firm of H. A. Steinwender & Company orders whisky under the name "Old Crow," either direct from the Complainant or through other dealers in the trade, it is always

95 understood that the "Old Crow" whisky of W. A. Gaines & Company is the subject matter of the transaction.

And further affiant saith not.

HERMAN A. STEINWENDER.

Subscribed and sworn to before me this 24th day of November, 1909.

SEAL.

WALTER C. STEIN, Notary Public.

My commission expires Nov. 22nd, 1910.

Affidavit of John C. Murphy. Filed December 15th, 1909.

John C. Murphy, of lawful age, being on his oath sworn, deposes and says:

That he is a Sales Agent of the Heine Safety Boiler Company, a Missouri corporation having its principal offices in the City of St.

Louis, Missouri; that as such sales agent he has traveled throughout a great part of the United States; that prior to his connection with the said Boiler Company, he was, at various times, in the employ of the National Cash Register Company at Chicago, Illinois, and the General Electric Company at Chicago, Illinois; that in said occupation he also traveled throughout a great portion of the United States.

That during about twelve years last past affiant has been acquainted with the "Old Crow" whisky of W. A. Gaines & Company and has used the same in his family for medicinal purposes and has purchased the same for himself for his own use, at hotels, restaurants and bars in various portions of the United States. That he has never known of any "Old Crow" whisky except W. A. Gaines & Company's "Old Crow" whisky; that whenever he has ordered or called for whisky under the name "Old Crow" he has expected and intended to get the whiskey of W. A. Gaines & Company and nothing else, and that if he got anything else in response to such an order he would not be getting what he wanted. That the same thing is true of a great many of the friends and acquaintances and customers of the affiant. and so far as the affiant's experience goes, this is true of the consumers of whiskey generally; that he has frequently heard "Old Crow" whisky ordered in hotels, clubs, restaurants and 96

bars, and has never known or heard of any other whisky being intended by such orders than the "Old Crow" whisky of W. A. Gaines & Company. That affiant has no financial interest in this litigation.

And further affiant saith not.

JOHN C. MURPHY.

Subscribed and sworn to before me this 23rd day of November, 1909.

SEAL.

WALTER C. STEIN. Notary Public.

My commission expires Nov. 22, 1910.

Affidavit of Adolph Zika. Filed December 15th, A. D. 1909.

Adolph Zika, of lawful age, being on his oath sworn, deposes and savs:

That he is a retail dealer in wines and liquors in the City of St. Louis; that his place of business is located at 210 N. Fourth Street, St. Louis, Mo.; that he has been engaged in the retail liquor business in the City of St. Louis, for twenty years last past and during all of that time has been a dealer in "Old Crow" whisky; that by "Old Crow" whisky affiant means the whisky of W. A. Gaines & Company, produced at the "Old Crow" Distillery; that the words "Old Crow" have always had that meaning, not only with this affiant but generally in the retail whisky trade of the City of St. Louis and with the consumers of whisky, that when affiant has ordered whisky by the name "Old Crow" he has always intended the whisky of W. A. Gaines & Company, and if any other whisky than that of W. A.

Gaines & Company had been offered to him under that name it would not have been what he wanted and would not have been

accepted.

Affiant has an extensive retail trade with purchasers calling for "Old Crow" whisky which this affiant and his customers always understood to mean the "Old Crow" whisky of W. A. Gaines & Company, and that is the whisky which they have received in response for "Old Crow."

97 And further affiant saith not.

ADOLPH ZIKA.

Subscribed and sworn to before me this 24th day of November, 1909.

SEAL.

WALTER C. STEIN, Notary Public.

My commission expires Nov. 22, 1910.

Affidavit of Louis Idler. Filed December 15th, 1909.

Louis Idler, of lawful age, being on his oath sworn, deposes and says: That he is Vice President of the A. Moll Grocery Company, a Missouri corporation engaged in business at St. Louis, Missouri, and dealing in groceries and liquors. That he has been connected with the basiness of that Company and its predecessors in business for about twenty-four years last past, during that time he has been acquainted with the "Old Crow" whisky of W. A. Gaines & Company; that during all of that period he has purchased "Old Crow" whisky either from the complainant direct or from wholesale houses and that he has ordered the whiskey under the name "Old Crow" and he has expected and intended to get Complainant's goods and nothing else, and that if any other whisky than that of W. A. Gaines & Company has been delivered to affiant upon an order for "Old Crow," he would not have been getting what he wanted. And so far as his experience goes, this is true of the retail trade generally; that in the ordinary course of the business of A. Moll Grocery Company, that Company has used the words "Old Crow" as denoting and indicating the whisky of W. A. Gaines & Company and to distinguish that whisky from other whisky, and that the name "Old Crow" where it appears in the price list of the said A. Moll Grocery Company, a specimen of which is introduced in connection with the affidavit of George F. Berry, means the "Old Crow" whisky of W. A. Gaines & Company.

And further affiant saith not.

LOUIS IDLER.

Subscribed and sworn to before me this 23rd day of November, 1909.

WALTER C. STEIN,

Notary Public.

My commission expires Nov. 22, 1910.

# 98 Affidavit of Henry Kunz. Filed December 15th, 1909.

Henry Kunz, of lawful age, being on his oath sworn, deposes and says: That he is a member of the firm of Charles Meinecke & Company of San Francisco, California, wholesale liquor dealers; that he has been connected with said firm for 39 years last past. That in the business transactions of said firm, both in buying and in selling, when "Old Crow" whisky is offered for sale, it is understood to be the Old Crow whiskey produced at the "Old Crow Distillery" by W. A. Gaines & Company, and no other whisky whatsoever. That when the firm of Charles Meinecke & Company orders whisky under the name "Old Crow," either direct from the Complainant or through other dealers in the trade, it is always understood that the "Old Crow" whisky of W. A. Gaines & Company is the subject matter of the transaction.

And further affiant saith not.

HENRY KUNZ.

Subscribed and sworn to before me this 30th day of November, 1909.

SEAL.

JAMES J. GLOVER, Notary Public.

My commission expires May 14th, 1913.

Affidavit of Harry Evans Blood. Filed December 15th, 1909.

Harry Evans Blood, of lawful age, being on his oath sworn, deposes and says. That he is a resident of the City of New York, State of New York.

That on the 10th day of September, 1909, he purchased the bottle of whisky bottled in bond and bearing the name Silas Rosenfeld, Distiller, in the City of St. Louis, Missouri, at the place of business of Jere D. Cravens, Seventh & Locust Streets, known as Cambridge Court Cafe. That the said place of business of said Cravens is a bar and restaurant in the basement of the Dolph building, and that the said bottle which is filed as Exhibit B, accompanying

99 the bill of Complaint was the one of a number of similar bottles of whisky marked "Old Crow," and bottled in bond, and bearing the Internal Revenue stamp, indicating that Silas Rosenfeld was the distiller of the contents, and that the said whisky was produced at Distillery No. 18 of the Second Internal Revenue District of Kentucky.

Affiant further states that he is a salesman in the employ of Paris, Allen & Company, of 45 Broadway, New York City, New York, and that prior to his employment with the said Paris, Allen & Company he was in the employ of the National Cash Register Company at Chicago, Cook County, Illinois; that for twenty years last past, he has been acquainted with the "Old Crow" whisky of W. A. Gaines & Company and has bought and sold the same throughout the United States, and that he has purchased the same as an individual con-

sumer of whisky, and he always called for the same by the name "Old Crow" alone, without adding the name of W. A. Gaines & Company, and in calling for "Old Crow" whisky in hotels, restaurants and bars, he has always meant and intended thereby the whisky of W. A. Gaines & Company, and if any other whisky was given him in response to said order he would not be getting what he wanted.

That he has a very wide acquaintance in the wholesale and—liquor trade of the United States from Boston, Massachusetts, to Los Angeles, California; San Francisco, California; Portland, Oregon; and Seattle, Washington, and including all of the principal intermediate cities. That whenever "Old Crow" whisky is called for by that name alone, either by the wholesale or retail trade, or by consumers of whisky, the product of W. A. Gaines & Company's "Old Crow" Distillery is meant and intended thereby, and that the words "Old Crow" alone are used by consumers, retail dealers and wholesale "Old Crow" alone, whenever they are used in whisky transactions, are understood to mean and refer to the Complainant's whisky and to none other.

And further affiant saith not.

HARRY E. BLOOD,

Subscribed and sworn to before me this 30th day of November, 1909.

SEAL.

GEO. H. PROBASCO, Notary Public.

My commission expires April 14th, 1913.

Affidavit of Campbell W. Craig. Filed December 15th, A. D. 1909.

Campbell W. Craig, of lawful age, being on his oath sworn, deposes and says: That he is a wholesale liquor merchant in the City and County of San Francisco, California, and that he is the sole proprietor of the firm of C. W. Craig & Company.

That for about thirty years last past, he has been acquainted with the "Old Crow" whisky of W. A. Gaines & Company, and that his house is an extensive dealer in the "Old Crow" whisky of W. A. Gaines & Company.

That affiant has frequently made purchases of "Old Crow" whisky and in ordering "Old Crow" whisky by that name he always expected and intended to get the whisky of W. A. Gaines & Company and would not accept any other.

That in the course of its business C. W. Craig & Company has received many orders of "Old Crow" whisky by that name and that they have always been filled with the "Old Crow" whisky of W. A. Gaines & Company and with the understanding that that was what the customers meant and intended when they ordered whisky by the name "Old Crow."

That affiant has had many dealings in the "Old Crow" whisky of Complainant with other wholesale whisky dealers and has often been offered whisky under the name of "Old Crow" and has consummated many sales of whisky under the name "Old Crow" to other wholesale liquor dealers, in none of which transactions was the name of W. A. Gaines & Company mentioned, and in all of which transactions it was understood by the parties that the whisky being offered for sale or sold was the whisky of W. A. Gaines & Company and none other.

101 And further affiant saith not.

CAMPBELL W. CRAIG.

Subscribed and sworn to before me this 30th day of November, 1909.

SEAL.

GEO. H. PROBASCO,

Notary Public.

My commission expires April 14th, 1913.

Affidavit of George G. Benz. Filed December 15th, 1909.

George G. Benz, of lawful age, being on his oath sworn, deposes and says: That he is President of George Benz & Sons, a corporation having its principal office and place of business at the City of St. Paul. Minnesota. That he has been connected with the business of that company for about 25 years last past. During that time he had been acquainted with the "Old Crow" whisky of W. A. Gaines & Company; that during all of that period he has purchased "Old Crow" whisky either from the Complainant direct or from wholesale houses and that he has ordered the whisky under the name of "Old Crow" and he has expected and intended to get Complainant's goods and nothing else, and that if any other whisky than that of W. A. Gaines & Company had been delivered to affiant upon an order for "Old Crow" whisky, he would not have been getting what he wanted. And so far as his experience goes, this is true of the liquor trade generally, that in the ordinary course of the business of George Benz & Sons; that Company has used the words "Old Crow" as denoting and indicating the whisky of W. A. Gaines & Company and to distinguish that whisky from other whisky.

And further affiant saith not.

GEORGE G. BENZ.

Subscribed and sworn to before me this 1st day of December, 1909.

[SEAL.] GEORGE C. MacKNIGHT,

Notary Public, Ramsey Co., Munn.

My commission expires Sept. 17th, 1910.

102 Affidavit of William L. Perkins, Jr. Filed December 15th, 1909.

William L. Perkins, Jr., of lawful age, being on his oath sworn, deposes and says: That he is Vice President of W. L. Perkins & Company, a corporation having its principal office and place of business

at St. Paul, Minnesota; that he has been connected with said business for twenty years last past. That in the business transactions of said firm, both in buying and in selling, when "Old Crow" whisky is offered for sale, it is understood to be the "Old Crow" whisky produced at the "Old Crow" Distillery by W. A. Gaines & Company, and no other whisky whatsoever. That when affiant's company orders whisky under the name "Old Crow," either direct from the Complainant, or through other dealers in the trade, it is always understood that the "Old Crow" whisky of W. A. Gaines & Company is the subject matter of the transaction.

And further affiant saith not.

WILLIAM L. PERKINS, JR.

Subscribed and sworn to before me this 29th day of November, 1909.

SEAL.

A. E. HORN, Notary Public, City of St. Paul, Ramsey County, State of Minnesota.

My commission expires October 19, 1913.

Affidavit of George J. Knapp. Filed December 15th, A. D. 1909.

George J. Knapp, of lawful age, being on his oath sworn, deposes

and savs:

That he is 37 years of age and a resident of the City of St. Louis, Missouri, and is Manager of the bar of the Lippe Restaurant Company, and has occupied that position for twelve years last past, with the exception of an absence of about eighteen months; that prior to his present employment affiant had similar employment at the Lindell Hotel, St. Louis, Missouri, for six months, prior to that time he had like employment for a period of two years at the Planters

Hotel, St. Louis, and prior to coming to St. Louis, had been in 103 similar occupation at Detroit, Michigan, Put-in-Bay, Ohio, and Cincinnati, Ohio, and he has been connected with the retail liquor business for approximately twenty years last past; that during that period he has been acquainted with the "Old Crow"

whisky of W. A. Gaines & Company.

That he does the buying of liquors from various wholesale liquor houses and distillers and that when he orders goods under the name of "Old Crow" he expects to and intends to get the "Old Crow" whiskey of W. A. Gaines & Company and nothing else, and that if he got anything else in response to an order for "Old Crow" whisky he would not be getting what he wanted. That when customers ask for "Old Crow" whisky at the bar or in the restaurant of places of the character of Lippe's Bar and Restaurant and the Planters Hotel of St. Louis, they always expect and intend to get the whisky of W. A. Gaines & Company, and that no other whisky is known as "Old Crow" to dealers or consumers so far as this affiant is advised and so far as his experience goes; that whenever affiant has seen "Old Crow" whisky offered for sale in price lists or in the lists of whisky dealers,

he has always understood that W. A. Gaines & Company's whisky was known thereby. That the affiant has purchased goods from A. M. Hellman & Company of St. Louis, and has never been offered any "Old Crow" whisky, or been offered any whisky under the name of "Old Crow" by them.

And further affiant saith not.

GEORGE J. KNAPP.

Subscribed and sworn to before me this 22nd day of November, 1909.

SEAL.

WALTER C. STEIN, Notary Public.

My commission expires Nov. 22, 1910.

Order Filing Stipulation and Affidavits of Defendants on Motion of Complainants for Preliminary Injunction. Entered January 15th, 1910.

This day came the defendants, Rock Spring Distilling Company and Silas Rosenfeld, by their counsel, Sweeney, Ellis & Sweeney, and pursuant to an order of the Honorable Court heretofore

made and entered, filed the following stipulation and affidavits: The defendant filed a stipulation signed by James L. Hopkins, solicitor for complainants, and Luther Ely Smith, solicitor for respondents, wherein it is stipulated and agreed between the complainants and respondents in the above entitled cause that the respondents' exhibits to be used in connection with the affidavits upon the hearing in Louisville, Kentucky, January 20th, 1910, in opposition to complainant's motion for a pre!iminary injunction herein may be shipped direct to Hon. A. G. Ronald, Clerk of the U. S. Circuit Court, Louisville, Kentucky, with the same force and effect as if said exhibits were filed in the United States Circuit Court in and for the Western District of Kentucky, Owensboro Division at Owensboro, Kentucky, in the first instance.

And thereupon in pursuance with an order of this Honorable Court heretofore made and entered, filed the affidavits of A. Hirsh, Silas Rosenfeld, Arthur Rosenfeld, Moritz Hellman, Frederick A. Hugo, Elmer E. Pearcy, Seymour Rice, Irving H. Heller, Joseph Simon, Grant Willis, W. B. Pratt, O. Ulman, John Doreity, Kirby Harding, Edwin A. Glaser, Fred S. Friend, Seymour Rice, and

Adolph H. Rosenfeld.

Which affidavits are to be read by the respondent in opposition to the complainant's motion for a preliminary injunction herein and for all and every purpose which in the judgment of this Honorable Court said affidavits are competent or relevant to be considered in connection with the hearing which is set for consideration January 20th, 1910.

Affidavit of Abraham Hirsch. Filed January 15, 1910.

STATE OF KENTUCKY,

County of Daviess, ss:

Abraham Hirsch, being on oath duly sworn, says:

I am the President of the Rock Spring Distilling Company, a corporation incorporated under the laws of Kentucky, having its principal place of business at Owensboro, Kentucky, and have been connected with and a stockholder in that company since its incorporation in 1886.

105 I am, and for the past 27 years have been familiar with all the leading brands and makes of whiskey produced in Kentucky, including the whiskey called and designated by complainant as "Old Crow."

The Rock Spring Distilling Company's distillery is capable of producing and does produce (being Distillery No. 18, Second District of Kentucky), the highest grade of fine whiskey which it is possible in the most advanced state of the distiller's art to produce, and the said distillery of the Rock Spring Distilling Company in each of the years since the incorporation of the Rock Spring Distilling Company has been capable of producing and has produced the highest grade of fine whiskies which it was possible in the most advanced state of distiller's art to produce in such years respectively.

That on the — day of ——, 1903, the Rock Spring Distilling Company leased its plant for a term of — years to Silas Rosenfeld hereinafter called the lessee, for the purpose of distilling whiskey from grain in the same way and by the same process as the Rock Spring Distilling Company had heretofore been distilling it to enable the more readily any of the patrons of the whiskey produced at its said plant (Distillery No. 18, Second District of Kentucky), to have the same distilled in the purchaser's name as distiller in accordance with the provisions of the United States Internal Revenue Law and the laws of the State of Kentucky.

During the past five years the firm of A. M. Hellman & Company of St. Louis, Missouri, and their successors the Hellman Distilling Company have selected and brought from the Rock Spring Distilling Company the very best grade of choicest bourbon whiskey produced by said lessee at said distillery No. 18, Second District of Kentucky.

On or about the — day of May, 1904, during the distilling season of the spring of 1904, A. M. Hellman, Sr. member and managing partner of the co-partnership of A: M. Hellman and Company selected the choicest grade of bourbon whiskey made at the Rock Spring Distilling Company's distillery and contracted for a run of approximately 300 barrels of choicest bourbon whiskey of the same character, quality and excellence as that which he, the said

A. M. Hellman had selected to be produced at the Rock Spring Distilling Company's Distillery (No. 18, Second District of Kentucky), for and under the name of A. M. Hellman and Company. And the said contract was duly fulfilled, and there was produced thereunder in the name of the said firm of A. M. Hellman

and Company a run of high grade whiskey of the same kind, character, quality and flavor as that selected by A. M. Hellman as aforesaid and the said whiskey so produced was placed in bond in the distillery warehouse of the Rock Spring Distilling Company in the name of and as the property of the said firm of A. M. Hellman and Company.

And thereafter as affiant is informed and believes and states to be true, the Hellman Distilling Company succeeded to all rights, property, assets, business good will, trade marks and brands of the firm of A. M. Hellman & Company including the said whiskey produced under the said contract of 1904 with A. M. Hellman and Company aforesaid, and including a certain trade mark or brand known as "Old Crow," "Celebrated Crow" and "Celebrated Crow Bourbon."

And thereafter on the — day of February, 1905, during the distilling season of the spring of 1905, the Hellman Distilling Company by its president Moritz Hellman, selected and contracted with the Rock Spring Distilling Company for a run of approximately 300 barrels of whiskey to be distilled by said lessee at the Rock Spring Distilling Company's distillery in the name of the Hellman Distilling Company the said whiskey being identical in kind, character, quality and excellence, with that selected by him, the said Moritz Hellman as aforesaid, and being also identical in kind, character and quality with that selected by A. M. Hellman and produced the preceding year under the said contract with A. M. Hellman and Company. And affiant further states that similar contracts were made with the Hellman Distilling Company on the same terms and conditions in other years, including the year 1909 for a similar run of whiskey, the same being selected by Moritz Hellman for the Hellman Distilling Company as aforesaid, being identical in kind, character, quality and excellence with that theretofore selected by A. M.

Hellman and Moritz Hellman as aforesaid, and produced in the name of the firm of A. M. Hellman and Company and its successor the Hellman Distilling Company as hereinbefore described, and all of said contracts were duly fulfilled and high grade genuine straight bourbon whiskey was produced thereunder identical in kind, character, quality and excellence with the said whiskey selected by A. M. Hellman and Moritz Hellman as aforesaid; and the said whiskey when produced was placed in the distillery warehouse of the

Rock Spring Distilling Company.

Affiant further states that heretofore, to-wit, on or about the — day of ——, 1909, the Hellman Distilling Company contracted with the Rock Spring Distilling Company through the said lessee to bottle at said distillery, in accordance with the Internal Revenue Laws of the United States the said whiskey identical in kind, character, quality, excellence and flavor with that theretofore selected by A. M. Hellman and Moritz Hellman as aforesaid, and then in the distillery warehouse of the Rock Spring Distilling Company at Owensboro, Kentucky, the said bottling to be done in bond by the said lessee, the Hellman Distilling Company supplying all cases branded and marked and all bottled, labels, corks and other supplies necessary to

complete the bottling according to law, for which service of bottling the Hellman Distilling Company agreed to pay and did pay a sum per case to the said lessee and the Rock Spring Distilling Company, the regular price to a distiller for supplies, bottling and casing, including the case and bottle stamps, viz: \$1.50 per case for ½ gallons, quarts and fives; \$2.00 per case for pints; \$2.50 per case for halfpints; and affiant further states that the said runs of whiskey have been produced according to said contracts respectively and have been are are being bottled at the distillery of the Rock Springs Distilling Company for the Hellman Distilling Company according to said agreement as to bottling and according to law.

Affiant further states that the said whiskey which has been duly made and produced at the distillery of the Rock Spring Dis-

tilling Company for the Hellman Distilling Company and its 108 predecessors is a high grade choice Bourbon whiskey selected by the said A. M. Hellman and Hellman Distilling Company as aforesaid; that said whiskey would be shipped to the Hellman Distilling Company in St. Louis from the warehouse unmarked and unbranded and delivered or shipped according to its directions to be marked and branded by the Hellman Distilling Company itself, except for the said additional contract with the Hellman Distilling Company for the bottling and casing of the said whiskey at the distillery as aforesaid that acting solely as the agent for and under the directions of the Hellman Distilling Company said Rock Spring Distilling Company and said lessee bottles and cases the said whiskey in bottles and cases marked with the figure of a crow surrounded by a circle marked "Established 1863" with the name "Hellman Distilling Company, Proprietor" in prominent letters, in connection with the words "Celebrated Old Crow" and "Old Crow."

Affiant further states he is familiar with said labels and brands and that the same are clear and plain, and distinctly indicate that the goods bearing same are the property and product of the Hellman

Distilling Company and no one else.

Affiant further states that the said whiskey of the Hellman Distilling Company bottled for it as aforesaid is not an inferior or spurious whiskey at all, but it is a genuine high grade choice straight whiskey, and is the equal or superior in quality of complainant's so-called Old Crow whiskey, and excels in every essential respect the so-called private bottling of W. A. Gaines and Company's Old Crow which complainant fosters, encourages and promotes; and the cost of production, the skill, care and attention devoted to the manufacture of Hellman's Old Crow is equal to or greater than is the case with Complainant's alleged Old Crow whiskey.

Affiant further states that neither the Rock Spring Distilling Company or anyone connected with it or for it nor any officer thereof or stockholder therein has ever at any time sold or offered to sell any whiskey under the name "Old Crow" or "Crow" and has never held

itself or anyone connected with it out to the public in general or to any individual as having any interest whatever in the sale or distribution of Hellman's Old Crow or "Celebrated Old Crow" or the "Old Crow" brand of whiskey of any other person,

firm or corporation, nor has it sold or offered to sell or solicit at Owensboro, Kentucky, or elsewhere or to ship from its distillery premises Distillery No. 18, Second District of Kentucky, or elsewhere any barrels or cases of whiskey bearing an "Old Crow" brand or label to any one, nor has it made any shipment of any case or package, or barrel of whiskey bearing the words "Old Crow" excepting those bottled in bond for the Hellman Distilling Company under the contract aforesaid and then only to it direct or to its order as instructed to do by Hellman Distilling Company; and the Rock Spring Distilling Company has no interest or concern in the brand or name under which the Hellman Distilling Company might or did sell or market the said high grade choice Bourbon whiskey which it had selected and contracted for.

That the said bottling and labeling of said Old Crow whiskey at the said distillery was done alone for the Hellman Distilling Company under the contract aforesaid, but on the same terms and under the same conditions as said Rock Spring Distilling Company and its said lessee extend to and the same service for other parties who enter into similar contracts for a run of whiskey and on the same terms and conditions as other distillers customarily extend to and do the

same service for other parties similarly contracting.

That neither the Rock Spring Distilling Company nor any one connected with it now or heretofore has or ever has any interest direct or indirect of any nature whatsoever in the brand "Old Crow," "Crow" or "Celebrated Crow" and has not now and never has had any connections with said brand or trade mark or the goods bearing same except in the said bottling of the Hellman Distilling Company's high grade choice Bourbon whiskey under said agreement with said Hellman Distilling Company as herein set out. And all this it did in perfect good faith and without any intent or purpose to infringe the rights of complainants or any one and affiant says defendant did not infringe upon the rights of complainant in the execution

That neither the Rock Spring Distilling Company nor its officers nor agents or representatives nor servants nor any one of them is in any way connected with or interested in the sale or distribution of Hellman's "Old Crow" and have no interest therein nor

of its contracts with the Hellman Distilling Company.

derive a profit therefrom.

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That your deponent is informed and believes that prior to the commencement of this action there was determined in the Circuit Court of Appeals for the United States, Eighth District a certain suit in which action complainant herein was the complainant and the members of the firm of A. M. Hellman and Company were defendants, said decision being reported in 161 Federal Reporter, page 495; that in said action it was finally determined that defendants therein had the right by reason of priority of adoption and continuous use to use the brand or trade mark "Old Crow," "Celebrated Crow," "Celebrated Crow Bourbon," that complainant thereafter presented to the Supreme Court of the United States its petition for writ of certiorari to issue to the Circuit Court of Appeals for the Eighth Circuit to review said judgment but that said petition was, after full

presentation by learned counsel in their briefs, denied on to-wit, the 19th day of October, 1908; that all of said facts were known to complainant and also the Rock Spring Distilling Company and its said lessee and the Hellman Distilling Co., long prior to the filing of this suit and long prior to the entering into the said agreement between the Hellman Distilling Co., and the said lessee of Rock Spring Distilling Co., for the bottling of said Old Crow whiskey as aforesaid.

Affiant further states that no script label was used by the Rock Spring Distilling Company or its lessee, or any one for it, under its contract with the Hellman Distilling Co., or at all, after July 21, 1909, and no label bearing the words "Old Crow" in script was used by the Rock Spring Distilling Co., or its lessee, Silas Rosenfeld, or any one for it or them, or at all, after the 16th of June, 1909, but that after the last mentioned date the only labels used upon

bottles of Hellman's "Old Crow" bottled in bond, or at all, were labels bearing the words "Old Crow" in black letters.

(Signed)

A. HIRSCH.

STATE OF KENTUCKY,

County of Daviess, 88:

Abraham Hirsch, being on his oath duly sworn, says that the facts and things stated in the foregoing affidavit are true, and that the matters and things set forth as being true upon information and belief affiant has been informed are true and he verily believes that they are true.

A. HIRSCH.

Subscribed and sworn to before me, a Notary Public in and for the County of Daviess, State of Kentucky, this the 14th day of January, 1910.

(Signed) SOPHIA BELL,

[SEAL.] Notary Public in and for the County of
Daviess, State of Ky.

My commission will expire February 15, 1912.

Affidavit of Silas Rosenfeld. Filed January 15th, A. D. 1910.

Silas Rosenfeld, being on oath duly sworn says:

I am the Treasurer of the Rock Spring Distilling Company, and have been connected with and a stockholder of that company since —.

I am and for the past 15 years have been familiar with all the leading brands and makes of whisky produced in Kentucky, including the whisky called and designated by Complainant as "Old Crow."

On the 18th day of December, 1903, I leased from the Rock Spring Distilling Company its distillery (No. 18 2nd Dist. of Kentucky) at Owensboro, Kentucky and since that date I have been in possession of and have operated and am in possession of said distillery and in proper season I now operate same, producing in said distillery the highest grade of choice bourbon whiskey and I have produced the highest grades of choice Bourbon whisky at said distillery each year since I entered into said lease.

On or about the 28th day of May, 1904, during the 1904 spring distilling season, I received an order through the Rock Spring Dis-

tilling Company coming from the late A. M. Hellman of the firm of A. M. Hellman and Company, St. Louis, to make 112 for his firm and in its name a run of approximately 300 barrels of high grade choice bourbon whiskey, which he selected and ordered, and I complied with the order and produced at the said distillery a run of the choice high grade Bourbon Whisky which he had selected and ordered; and the whisky so produced was duly placed in the distillery warehouse of the Distillery, and thereafter the Hellman Distilling Company succeeded to all rights, property, business good will, trademarks and other property of the said A. M. Hellman & Company, as I was informed and believed and now state to be true including the said whisky in bond and the trademark "Crow" and "Old Crow" and "Celebrated Crow Bourbon." And on the 21st, day of Feb., 1905, during the 1905 spring disfilling season I received a similar order from the Rock Spring Distilling Company from the Hellman Distilling Company through Moritz Hellman, its president who selected and ordered a similar run of whisky of the same character, quality, excellence and flavor as that chosen by and produced for A. M. Heilman & Company as aforesaid.

And similar runs of whisky of the same character, quality excellence and flavor were selected and ordered from and produced by me for the Rock Spring Distilling Company for the Hellman Distilling Company in subsequent years including the year 1909.

And on or about the 23rd day of March, 1909, the Hellman Distilling Company entered into an agreement through the Rock Spring Distilling Company with me to bottle in bond according to aw the said whisky selected and ordered and produced as aforesaid, and agreed to pay for same the regular rates charged by any distiller to any customer for such services, including necessary supplies, tamps, etc., as follows:

\$1.50 per case for ½ gallon, Quarts and fives; \$2.00 per case for pints; \$2.50 per case for half pints; the Hellman Distilling Company supplying all bottles, labels, brands, cases, corks and imilar supplies. And in accordance with said contract I have been and am bottling said whiskey for the Hellman Distilling Company.

I have not, nor has anyone representing me any interest direct or indirect in the brand "Old Crow" or "Crow" except for this additional contract for bottling at the distillery, would ship the whiskey produced as aforesaid in barrels to the Iellman Distilling Company of its order to St. Louis or elsewhere, be marked, if desired, by the Hellman Distilling Company as

hey might wish. This whiskey is not a "spurious straight whiskey," but choice ligh grade Bourbon. I have acted in good faith throughout and have not sold nor expect to sell any whiskey under the name "Crow." (The whiskey is produced by me for the Hellman Distilling Co., in blank under one contract; under an entirely different contract I bottle that whiskey in bottles and under labels furnished

me by the Hellman Distilling Co.)

Before entering into this contract I was informed and believed that the Hellman Distilling Co., by virtue of the decision of the United States Circuit Court of Appeals for the 8th Circuit (and the virtual affirmance of same by the Supreme Court in the case of W. A. Gaines & Co., vs. Kahn, et al., 161 Fed Rep. 495) had a perfect right to use the words "Crow" and "Old Crow" on whiskey of whatsoever kind.

Affiant further states that heretofore, to-wit, in the month of May, 1909, information came to the Rock Spring Distilling Co., and to affiant that W. A. Gaines & Company had raised some objection to Hellman's Old Crow as bottled at the Rock Spring Distilling Co. Affiant states that thereupon he wrote to W. A. Gaines & Co., under date of May 24th, 1909, a letter, a carbon copy of which is attached hereto and marked Rosenfeld's Exhibit A. Having received no reply to said letter the Rock Spring Distilling Co., on the 7th day of June, 1909, wrote to complainant a letter, carbon copy of which it attached hereto and marked Rosenfeld's Exhibit B. In connection with said second letter a copy of said first letter was mailed under the same cover to complainant. Affiant further states that no response or acknowledgment was ever received from W. A. Gaines & Company to either of said letters, excepting this suit.

Affiant further states that no script label was used by the Rock Spring Distilling Co., or its lessee, or any one for it, under its contract with the Hellman Distilling Co., or at all, after July 21, 1909, and no label bearing the words "Old Crow" in script was used by the Rock Spring Distilling Co., or its lessee, Silas Rosenfeld, or any one for it or them, after the 16th day of July, 1909, but that after the last mentioned date the only labels used upon bottles of Hellman's "Old Crow" bottled in bond or at all, were labels bearing the words, "Old Crow" in block letters.

SILAS ROSENFELD.

STATE OF KENTUCKY, County of Daviess, ss:

Silas Rosenfeld being on his oath sworn says that the facts and things stated in the foregoing affidavit are true, and that the matters and things set forth as being true upon information and belief affiant has been informed are true and he verily believes that they are true.

SILAS ROSENFELD.

Sworn and subscribed to before me a Notary Public in and for the

County of Daviess, State of Kentucky, this the 14th day of January, 1910.

SEAL.

SOPHIA BELL,

Notary Public in and for the County of Daviess, State of Ky.

My commission will expire on February 15th, 1912.

EXHIBIT WITH AFFIDAVIT OF SILAS ROSENFELD. Filed Jan'y 15th, 1910.

Brands:

115

Hill & Hill Old Kentucky Colonel Bourbon. Tip Top L. I. Monarch Kentucky Climax Anapolis Rye J. T. Welch

Rock Spring Distilling Co., Incorporated, Distiller of Fine Hand Made Sour Mash and Rye Whiskies.

OWENSBORO, KY., May 24th, '09.

Messrs. W. A. Gaines & Co., Frankfort, Ky.

Gentlemen: A rumor through a reliable source has reached us that you are contemplating an action against us for infringment, &c., because of the use of the "Old Crow" label on whiskey belonging to A. M. Hellman & Co. and Hellman Distilling Co., withdrawn from bond tax paid for them, to be bottled in bond at our distillery warehouse.

We have no intention, wish or purpose to infringe upon your rights or anyone's or do ought that would be unfair to anyone in

the conduct of our business.

For each of the several years past (Spring 1904 to Spring 1909) Messrs. A. M. Hellman & Co., and their successors, the Hellman Distilling Company, St. Louis, Mo., have had made a crop of whiskey at our distillery under their name as distillers, and when withdrawn from bonded warehouse to have their trade brand put on the commercial head, and also to have same bottled in bond under their trade mark or label.

They directed that, some of their whiskey be withdrawn tax paid for bottling in bond, put in their "Old Crow" cases, with their "Old Crow" labels on the bottles, stating that the controversy with you in regard to their right to use their "Old Crow" brand and label had been determined in their favor by the U. S. Court of Appeals, with a copy of the Court's opinion for our information.

After due and careful consideration of the decision and all facts in the case we are advised by a special and General Counsel that Hellman and his successors have the right to use the "Old Crow" label such as they ask to have placed on the bottles of whiskey bottled

in bond at our distillery.

That we may perform our duties as per the terms of our contract with A. M. Hellman & Co., and the Hellman Distilling Co., and without infringing on your rights or doing anything unfair to you, we ask what objection you have to the label, etc., being used in the manner mentioned.

Very truly yours,

ROCK SPRING DISTILLING CO., Per SILAS ROSENFELD, Treasurer.

(Copy)

116 Exhibit Filed with Affidavit of Silas Rosenfeld, Filed January 15th, A. D. 1910.

Brands:

Hill & Hill
J. T. Welsch
Old Kentucky Colonel
Tip Top
L. I. Monarch
Kentucky Climax
Anapolis Rye

Rock Spring Distilling Co., Incorporated, Distiller of Fine Hand Made Sour Mash and Rye Whiskies.

OWENSBORO, Ky., June 7th, '09,

Messrs, W. A. Gaines & Co., Frankfort, Kv.

GENTLEMEN: On the 24th ult, we addressed you (a copy of the letter enclosed and being without any acknowledgment of the receipt by you of the letter inquire if it came to your hands.

Very truly yours,

ROCK SPRING DISTILLING CO., Per J. D. S.

(Copy.)

Affidavit of Arthur Rosenfield. Filed January 15th, 1910.

Arthur Rosenfeld being on his oath duly sworn says that he is and for 7 years last past has been a resident of the City of St. Louis, State of Missouri, and that during all of said times he has represented as sales agent the Rock Spring Distilling Company and Silas Rosenfeld, lessee of the Rock Spring Distilling Company, owner of distillery No. 18 Second District of Kentucky at Owensboro Kentucky.

Affiant further states that he has known the Hellman Distilling Company of St. Louis and its predecessors in business, the firm of

A. M. Hellman & Company for the past 12 years, and that he knew the late A. M. Hellman personally from the year 1897 until his death, in the year 1904. Affiant further states that the late A. M. Hellman was and for many years prior to his death had been familiar with and knew the high grade choice bourbon whiskey produced at the said distillery No. 18 Second District of Kentucky at Owensboro.

Affiant further states that in the spring of 1904 the late A. M. Hellman known to affiant as a member of and managing partner

in the firm of A. M. Hellman & Company in the City of St. Louis, selected the choicest quality of high grade whisky produced at said distillery No. 18 Second District of Kentucky at Owensboro and ordered through this affiant a run of approximately 300 barrels of said whisky to be produced at said distillery No. 18 Second District of Kentucky Owensboro, Kentucky, said whiskey to be a high grade choice bourbon whiskey, the best whiskey produced at said distillery.

Affiant further states that he duly transmitted said order to Silas Rosenfeld to bottle said whiskey as aforesaid, and that said order was duly fulfilled, and said whiskey of the kind, quality and trade ordered was produced for and under the name of A. M. Hellman and Company distillers, and in accordance with said contract.

Affiant further states that in the spring of 1905, Moritz Hellman being then the president of the Hellman Distilling Company ordered through affiant a run of approximately 300 barrels of choice bourbon whiskey to be produced at distillery No. 18 Second District of Kentucky, at Owensboro, Kentucky of the same kind, quality, excellence and flavor as that ordered the preceding season by A. M. Hellman for the firm of A. M. Hellman and Company as aforesaid. And affiant further states that he duly transmitted said order to Silas Rosenfeld distiller operating said distillery as aforesaid, and said order was filed and said whiskey was produced in accordance with the terms of the agreement in the name of the Hellman Distilling Company distillers.

Affiant further states that other orders were received by him from the said Moritz Hellman acting for the Hellman Distilling Company

in the subsequent years of 1906, 1907, and 1909, and were
the same grade quality, excellence and flavor was duly produced in the name of the Hellman Distilling Company in each of

said years respectively.

Affiant further states that in the spring of 1909 he received from the said Moritz Hellman acting for the said Hellman Distilling Company ofders for the bottling of said whiskey at the said distillery under the terms of and in accordance with the provisions of the United States Internal Revenue Law, and the laws of the State of Kentucky of the said whiskey ordered by and distilled for the firm of A. M. Hellman and Company and the Hellman Distilling Company as aforesaid, the Hellman Distilling Company to supply all bottles, cases, corks, labels and other supplies necessary and to pay for services rendered in bottling and casing said whiskey in bond at said distillery the usual rate paid for the same or similar services at any distillery in the State of Kentucky.

And it was then and there agreed and specified that said whiskey to be bottled in bond at said distillery No. 18 Second District of Kentucky as aforesaid was to bear the trade mark "Old Crow" belonging to the Hellman Distilling Company, and the name of the

Hellman Distilling Company.

Affiant further states that said orders given by Mortiz Hellman for

the Hellman Distilling Company was duly transmitted to Silas Rosenfeld, distiller operating said distillery as aforesaid, and as affiant is informed and believes, was and still is being fulfilled.

ARTHUR ROSENFELD.

Sworn and subscribed to before me a Notary Public in and for the City of St. Louis, State of Missouri, this 10th day of January, 1910. My commission will expire February 2, 1912.

LOUIS H. BAUMAN.

Notary Public in and for the City of St. Louis, Missouri.

Affidavit of Elmer E. Pearcy. Filed January 15th, 1910.

Affiant states that his name is Elmer E. Pearcy, that he is and has been an attorney for 5 years, practicing in the City of St. 119 Louis; that he was from January, 1907, to November 1st.

1909, in the office of Klein & Hough, attorneys at Law in the City of St. Louis, that in connection with his duties in said office he assisted in preparation for trial in the United States Circuit Court the case of W. A. Gaines & Company vs. Max Kahn, et al. (5096), that he also assisted in the preparation of the brief of appellant in the same case on appeal to the United States Circuit Court of Appeals (Max Kahn et al., vs. W. A. Gaines & Company No. 2700, U. S. Circuit Court of Appeals 8th Circuit; and that he is familiar with the briefs of counsel on both sides throughout that case, including the briefs on petition for writ of certiorari in the United States Supreme Court.

Affiant further produces herewith briefs of counsel for W. A.

Gaines & Company as follows:

Brief in the United States Circuit Court marked "Pearcy's Exhibit A'

Brief in United States Circuit Court of Appeals (8th Circuit)

marked "Pearcy's Exhibit B"

Brief and motion to stay issuance of Mandate in United States Circuit Court of Appeals, Eighth Circuit, marked "Pearcy's Exhibit C"

Brief in United States Supreme Court marked "Pearcy's Ex-

hibit D"

Petition for writ of Certiorari United States Supreme Court marked

"Pearcy's Exhibit E.

Affiant states that he is familiar with W. A. Gaines and Company's "Old Crow" as described in the affidavit of George F. Berry in this case, and that said whiskey of W. A. Gaines and Company is sold and marked in the City of St. Louis as "A Blend," that bottles bearing the words "W. A. Gaines & Company Old Crow" are distinctly marked "A Blend."

Affiant further states that heretofore to-wit, in the City of St. Louis, he bought bottles of W. A. Gaines and Company's Old Crow whiskey marked "A Blend" as follows:

1. One Bottle Old Crow distilled by W. A. Gaines & Company, bottled by Steinwender Sellner Mercantile Company, St. Louis, Missouri, at Lindell Buffett 712 Washington Avenue, St.

Louis, Missouri, Marked Pearcy's Exhibit "F."

120 2. One bottle Old Crow distilled by W. A. Gaines & Company bottled by H. L. Griesedieck Distilling Company, St. Louis, Missouri, at saloon of Carl E. Eberth on the north side of Chestnut street between Broadway and Fourth streets, St. Louis, Missouri, and marked Pearcy's Exhibit "G."

3. One bottle Old Crow distilled by W. A. Gaines and Company bottled by J. Simon and Sons, St. Louis, Missouri, at Wolff-Wilson Drug Co., 6th and Washington Avenue, St. Louis, Missouri, marked

Pearcy's Exhibit "H."

4. One bottle Old Crow distilled by W. A. Gaines & Company, bottled by G. Riesmeyer Distilling Company St. Louis, Missouri, at Brinkman's Cottage, Bar Broadway and Lucas, St. Louis, Missouri,

and Marked Pearcy's "Exhibit I."

5. One bottle Old Crow distilled by W. A. Gaines and Company bottled by David Nicholson Grocery Company, St. Louis, Missouri, at the Lindell Buffett 712 Washington Avenue, St. Louis, Missouri and marked Pearcy's Exhibit "J."

ELMER E. PEARCY.

Sworn and subscribed to before me a Notary Public in and for the City of St. Louis, State of Missouri, this 10th day of January, 1910. My commission will expire February 2, 1912.

LOUIS H. BAUMAN, Notary Public in and for the City of St. Louis, State of Missouri.

Affidavit of Seymour Rice. Filed January 15th, A. D. 1910.

Seymour Rice of lawful age being duly sworn on his oath states that he knows the Old Crow label used by W. A. Gaines & Company, and by wholesale dealers, jobbers and bottlers with the approval of W. A. Gaines & Company, and that said Old Crow label is used both upon blended whiskey and straight whiskey; that affiant on the 6th day of January, 1910, bought of John F. Bell at his Saloon at Northeast corner of 12th and Walnut Streets, in Kansas City, Jack-

son County, Missouri a certain bottle marked with the words "Old Crow" "W. A. Gaines & Co.," and the same is marked Respondents' Exhibit "A" on said bottle by the Notary and is filed

with this affidavit.

And affiant further states that he is familiar with the bottled in bond "Old Crow" whiskey of the Hellman Distilling Company, and that the same is a high grade, choice bourbon whiskey, and that the same are distinctly marked with the figure of a crow, and with the name of the Hellman Distilling Company, and that no one not even a causual observer would be deceived or mislead into mistaking same for W. A. Gaines' whiskey bearing the labels and marks "Old Crow."

SEYMOUR RICE.

STATE OF MISSOURI,

County of Jackson, 88:

On this January 6th, 1910, personally appeared before me, Seymour Rice personally known to me as the person described in and signing the foregoing affidavit, and being by me on his oath duly sworn, the said affiant states that the matters and things set forth in said affidavit are true, the said affidavit was subscribed to in my presence.

My commission will expire October 23rd, 1910.

[SEAL.] ELIAS GREENMAN, Notary Public, Jackson County, Missouri,

Affidavit of Irving H. Heller. Filed January 15th, 1910.

Irving H. Heiler being on his oath duly sworn states that he is a resident of the City of St. Louis, State of Missouri, that he is and at all times herein mentioned was employed by the Hellman Distilling Company; that on January 6th, 1910 he bought of Leo P. A. Klix of 2000 Cass Avenue in the City of St. Louis, a bottle of whiskey marked Old Crow A blend; Affiant states that said Klix is the proprietor of a saloon at said street number, and said Klix stated to affiant that he bought said whiskey at \$10 a case.

Affiant requests the Notary to mark the said Bottle of whiskey (which bottle bears the name Kohring Distilling Company)

122 Heller's Exhibit A, which is accordingly done.

IRVING H. HELLER.

STATE OF MISSOURI,

City of St. Louis, 88:

Subscribed and sworn to before me a Notary Public in and for the City of St. Louis, State of Missouri, this 10th day of January, 1910. Commission expires February 2, 1912.

[SEAL.] LOUIS H. BAUMAN, Notary Public in and for the City of St. Louis, Missouri.

Affidavit of Grant Willis. Filed January 15th, 1910.

Affiant states that he is familiar with Hellman's Old Crow Bottled in bend whiskey; that he has seen bottles on exhibition at William Kelley's, Moberly, Mo., and that the marks upon same are so plain and unmistakable that no person of ordinary intelligence not even a casual observer could mistake same for anything else than the goods they purport to be, namely the special selection and product and property of the Hellman Distilling Company.

GRANT WILLIS.

STATE OF MISSOURI,

County of Randolph, ss:

Personally appeared before me Grant Willis personally known to me as the person described in and signing the foregoing affidavit and being by me on his oath duly sworn, the said affiant states that the matters and things set forth in said affidavit are true, the said affidavit was subscribed to in my presence. My commission will expire June 2nd, 1910.

SEAL.

A. B. LITTLE,

Notary Public in and for the County of Randolph, State of Missouri.

Affidavit of W. B. Pratt. Filed January 15th, 1910.

Affiant states that he is familiar with Hellman's Old Crow Bottled in bond whiskey; that he has seen bottles on exhibition at Wm.

Kelley's, John Q. Kelley, Charles Domback and that the marks upon same are so plain and unmistakable that no

person of ordinary intelligence not even a casual observer could mistake same for anything else than the goods they purport to be, namely the special selection and product and property of the Hellman Distilling Company.

W. B. PRATT.

STATE OF MISSOURI,

County of Randolph, ss:

Personally appeared before me W. B. Pratt personally known to me as the person described in and signing the foregoing affidavit and being by me on his oath duly sworn, the said affiant states that the matters and things set forth in said affidavit are true, the said affidavit was subscribed to in my presence. My commission will expire June 2nd, 1910.

[SEAL.]

A. B. LITTLE, and for the County

Notary Public in and for the County of Randolph, State of Missouri.

Affidavit of Kirby Hardin. Filed January 15th, 1910.

Affiant states that he is familiar with Hellman's Old Crow Bottled in bond whiskey; that he has seen bottles on exhibition at Wm. Kelley's, Moberly, Mo., and that the marks upon the same are so plain and unmistakable that no person of ordinary intelligence not even a casual observer could mistake same for anything else than the goods they purport to be, namely the special selection and product and property of the Hellman Distilling Company.

KIRBY HARDIN.

STATE OF \_\_\_\_\_, County of \_\_\_\_\_, ss:

Personally appeared before me Kirby Hardin personally known to me as the person described in any signing the foregoing affidavit and being by me on his oath duly sworn, the said affiant states that the matters and things set forth in said affidavit are true, the said affi-

davit was subscribed to in my presence. My Commission will expire June 2nd, 1910.

A. B. LITTLE, SEAL. Notary Public in and for the County of Randolph, State of Missouri.

124 Affidavit of Fred S. Freind. Filed January 15th, A. D. 1910.

Affiant states that he is familiar with Hellman's Old Crow Bottlein Bond whiskey, that he has seen Bottles on exhibition at Hoffman's Saloon, 522 W. 3rd St., St. L., Mo., at Frank J. Dickmann's Saloon, 602 Washington Ave., St. Louis, Mo., J. J. Stafford's Bar, 394 W. Euclid Ave., St. Louis, Mo., at Mann's Buffet, 3558 Grand Ave., St. Louis, Mo., and that the marks upon the same are so plain and unmistakable that no person of ordinary intelligence not even a casual observer could mistake same for anything else than the goods they purport to be, namely, the special selection and product and property of the Hellman Distilling Company.

FRED S. FREIND. Of Freind Bros. Bakery, 913 Soulard, St. Louis, Mo.

STATE OF MISSOURI,

County of St. Louis, 88:

Personally appeared before me Fred S. Freind personally known to me as the person described in the foregoing affidavit, and being by me on his oath duly sworn, the said affiant states that the matters and things set forth in said affidavit are true, the said affidavit was subscribed to in my presence.

My commission will expire April 21, 1912.

ADEUL HOBBS, SEAL. Notary Public in and for the City of St. Louis,

State of Missouri.

Affidavit of Jos. Simon. Filed January 15th, A. D. 1910.

Affiant of lawful age states that he is familiar with Hellman's Old Crow Bottled in Bond Whiskey; that he has seen bottles on exhibition at the saloon of P. P. Hopkins, 320 West 9th Street, in Kansas City, Jackson County, Missouri, and that the marks upon the same are so plain and unmistakable that no person of ordinary intelli-

gence not even a casual observer could mistake same for anything else than the goods purport to be, namely, the special 125 selection and product and property of Hellman Distilling

Company.

JOS. SIMON.

STATE OF MISSOURI,

County of Jackson, ss:

On this 6th day of January, 1910, personally appeared before me Jos. Simon personally known to me as the person described in and

signing the foregoing affidavit, and being by me on his oath duly sworn, the said affiant states that the matters and things set forth in said affidavit are true, the said affidavit was subscribed to in my presence.

My Commission will expire October 23rd, 1910.

[SEAL.] ELJAS GREENMAN,

Notary Public, Jackson County, Missouri.

Affidavit of John Dorrity. Filed January 15th, A. D. 1910.

Affiant of lawful age states that he is familiar with Hellman's Old Crow Bottle- in Bond Whiskey; that he has seen bottles on exhibition at the saloon of E. O. Rank, 1111 Grand in Kansas City, Jackson County, Missouri, and that the marks upon the same are so plain and unmistakable that no person of ordinary intelligence not even a casual observer could mistake same for anything else than the goods purport to be, namely, the special selection and product and property of Hellman Distilling Company.

JOHN DORRITY.

STATE OF MISSOURI,

County of Jackson, ss:

On this 6th day of January, 1910, personally appeared before me John Dorrity personally known to me as the person described in and signing the foregoing affidavit, and being by me on his oath duly sworn, the said affiant states that the matters and things set forth in said affidavit are true, the said affidavit was subscribed to in my presence.

My Commission will expire October 23rd, 1910.

SEAL.

ELIAS GREENMAN,

Notary Public, Jackson County, Missouri.

126 Affidavit of Edwin V. Glaser. Filed January 15th, 1910.

Affiant states that he is familiar with Hellman's Old Crow Bottlein Bond whiskey, that he has seen bottles on exhibition at Zims Bar
Company, at 1108 N. Vandevevter, Ave., St. Louis, Mo., at The
Broadway Cafe, No. 203 N. Broadway, St. Louis, Mo., at Frank
John's Cafe, cor. Grand Ave. & Morgan St., St. Louis, Mo., and at the
A. B. C. Bar, No. 110 N. Broadway, St. Louis, Mo., and that the
marks upon same are so plain and unmistakable that no person of
ordinary intelligence, not even a casual observer could mistake same
for anything else than the goods they purport to be, namely, the
special selection and product and property of the Hellman Distilling
Company.

EDWIN V. GLASER, Morris Glaser Co., 208 N. 4th St., St. Louis, Mo. STATE OF MISSOURI.

City of St. Louis, 88:

Personally appeared before me Edwin V. Glaser personally known to me as the person described in and signing the foregoing affidavit and being by me on this oath duly sworn, the said affiant states that the matters and things set forth in said affidavit are true, and said affidavit was subscribed to in my presence. My commission will expire April 21, 1912.

SEAL.

ADNUL HOBBS.

Notary Public in and for the City of St. Louis, Mo.

Affidavit of Seumour Rice, Filed January 15th, A. D. 1910.

Seymour Rice of lawful age being duly sworn on his oath states that he knows the Old Crow label used by W. A. Gaines & Company. and by wholesale dealers, jobbers and bottlers with the approval of W. A. Gaines & Company, and that said Old Crow label is used both upon blended whiskey, and straight whiskey; that affiant on the 6th day of January, 1910, bought of Grant Blake at his saloon at No. 103 E. 9th Street in Kansas City, Missouri, a certain bottle marked with the words "Old Crow," and the same is marked Respondents' exhibit "B" and is marked by the Notary and is

127 filed with this affidavit.

And affiant further states that he is familiar with the bottled in bond "Old Crow" whiskey of the Hellman Distilling Company, and that the same is a high grade, choice bourbon whiskey,

and genuine straight whiskey bottled in bond.

Affiant further states that he is familiar with the bottles and cases in which the Hellman Distilling Company's Celebrated Old Crow bottled in bond bourbon whiskey is sold, and that the same are distinctly marked with the figure of a crow, and with the name of Hellman Distilling Company, and that no one not even a casual observer could be deceived or misled into mistaking same for W. A. Gaines' whiskey bearing the labels and marks "Old Crow."

SEYMOUR RICE.

Affidavit of Adolph H. Rosenfeld. Filed January 15th, 1910.

Adolph H. Rosenfeld, being duly sworn on his oath states that on the 8th day of January, 1910, he obtained at number 257 Sixth Avenue, County and City of New York, a label which is hereby annexed and marked Exhibit "A" and hereby made part hereof. That on the 8th day of January, 1910, at the Southwest Corner of Sixth Avenue and 23- street in County and City of New York, he purchased of Wm. B. Biker & Son Company a bottle purporting to contain "Old Crow" whiskey upon which bottle no government stamp appeared; that he paid ninety-eight cents therefor and after said purchase deponent wrote his name "A. H. Rosenfeld" on the label and directed the said bottle be expressed to Silas Rosenfeld, Owensboro, Ky.

ADOLPH H. ROSENFELD.

STATE OF NEW YORK, County of New York, ss:

Personally appeared before me Adolph H. Rosenfeld personally known to me as the person described in and signing the foregoing affidavit, and being by me on his oath duly sworn, the said affiant states that the matters and things set forth in said affidavit are true and the said affidavit was subscribed to in my presence.

128 My commission will expire March 30, 1910.

[SEAL.] WILLIAM C. RELYAE,

Notary Public in and for the County

of New York, State of New York.

Affidavit of O. Ulmaun. Filed January 15th, A. D. 1910.

Affiant of lawful age states that he is familiar with Hellman's Old Crow Bottle- in Bond Whiskey; that he has seen bottles on exhibition at the saloon of Joe Zeigler, 109 West 9th Street, in Kansas City, Jackson County, Missouri, and that the marks upon the same are so plain and unmistakable that no person of ordinary intelligence not even a casual observer could mistake same for anything else than the goods purport to be, namely, the special selection and product and property of Hellman Distilling Company.

O. ULMAUN.

STATE OF MISSOURI, County of Jackson, ss:

On this 6th day of January, 1910, personally appeared before me 0. Ulmaun personally known to me as the person described in and signing the foregoing affidavit, and being by me on his oath duly sworn, the said affidavit states that the matters and things set forth in said affidavit are true, the said affidavit was subscribed to in my presence.

My commission will expire October 23rd, 1910.

[SEAL.] ELIAS GREENMAN, Notary Public, Jackson County, Missouri.

Affidavit of Frederick A. Hugo. Filed January 15th, 1910.

Frederick A. Hugo being duly sworn on his oath says that he has been connected with the Hellman Distilling Company and its predecessors in business, the firm of A. M. Hellman and Company since April, 1893; that in the Spring of 1904 affiant was present and heard a conversation that took place at the office of the firm of A. M. Hellman and Company between the late A. M. Hellman, a mem-

ber of the firm of A. M. Hellman & Co. and Mr. A. Rosenfeld, personally known to affiant then and at all times since as representing Silas Rosenfeld, a distiller of Owensboro, Kentucky, lessee of the Rock Spring Distilling Company, and also representing the Rock Spring Distilling Company; that A. M. Hellman ordered through the said A. Rosenfeld a run of approximately 300 barrels

14-311

of choice grade of Bourbon whiskey produced at the Rock Spring

Distilling Company.

Affiant further states that he was present at a similar conference between the said A. Rosenfeld and Moritz Hellman in the early part of the year 1905; that Moritz Hellman then was and at all times since has been president of the Hellman Distilling Company and that Moritz Hellman ordered through the said A. Rosenfeld a run of a choice grade of Bourbon whiskey produced at said distillery of the Rock Spring Distilling Company at Owensboro, Kentucky, the same as that ordered by said A. M. Hellman the previous year.

Affiant further states that he was present and heard similar orders given by the said Moritz Hellman to the said A. Rosenfeld in the early part of the subsequent years of 1906, 1907 and 1909; that in the spring of 1909 affiant was present and heard the said Moritz Hellman make a contract through the said A. Rosenfeld for the bottling in bond of the said choice bourbon whiskey then in the distillery warehouses of the Rock Spring Distilling Company at Owensboro, Kentucky. The Hellman Distilling Company to supply all bottles, cases, labels, corks and other necessary supplies, to pay for the bottling of said whiskey the regular price usually paid for such services; said labels to bear the Hellman Distilling Company's name and the trademark "Old Crow."

Affiant further states to his knowledge all of the foregoing contracts were duly carried out. Affiant states that the glass sign "Celebrated Crow Bourbon I. and L. M. Hellman, St. Louis," referred to in the record in the case of Kahn vs. Gaines (2700 U. S. C. C. of Appeals, 8th Circuit) in this affiant's testimony is said case (record in that case page 427) is identified as Hugo's Exhibit A.

and is filed as a part of this affiant's deposition.

Affiant further states that it is not true that the Hellman Distilling Company or the respondents for it, or either of the respondents put up or bottled any whiskey under labels with the words "Old Crow" thereon in script, on or after July 21st, but on the contrary at all times after said date and for a considerable period prior to said date all of the Hellman Distilling Company's bottled in bond Old Crow was put up in bottles bearing the words "Old Crow" in block letters, and not in script at all.

FREDERICK A. HUGO.

Sworn and subscribed to before — a Notary Public in and for the City of St. Louis, State of Missouri, this 10th day of January, 1910. My commission will expire Sept. 25th, 1911.

[SEAL.] EMMA LOVEJOY,

Notary Public in and for the City of St. Louis, Missouri.

Affidavit of Moritz Hellman. Filed January 15th, A. D. 1910.

Affiant Moritz Hellman states that he is a resident of the City of St. Louis and that he was one of the defendants in the case of W. A.

Gaines and Company vs. Kahn, et al. (No. 5096 U. S. C. C. Eastern District of Missouri, No. 2700 U. S. C. C. of Appeals 8th Circuit, No. 455 October Term, 1908, U. S. Supreme Court), which case is reported as follows:

155 Fed. 639; 161 Fed. 495; 88 C. C. A. 338; 212 U. S. 572.

Affiant further states that he is the president of the Hellman Distilling Company a corporation, succeeding to and conducting a liquor business in the City of St. Louis, theretofore conducted by the firm of A. M. Hellman and Company prior to the death of the late A. M. Hellman, on to-wit, Dec. 14th, 1904, which said firm was composed of the late A. M. Hellman and this affiant. Affiant states that in the said suit of W. A. Gaines & Co. vs. Max Kahn, et al., this affiant together with his codefendant appealed from the de-

cision of the United States Circuit Court, filing in said Court the record, complainant's exhibit herein to-wit, Berry's exhibit No. 20; that said cause was submitted to said court upon brief and argument and thereafter in due course an opinion was rendered dismissing the bill of W. A. Gaines & Company, a certified copy of said opinion being filed herewith and marked Hellman's exhibit A.

Affiant further states that thereafter W. A. Gaines & Company filed its motion to stay mandate and brief in support of same in the United States Circuit Court of Appeals on to-wit, the 18th day of June, 1908, at St. Paul, Minnesota (Pearcy's Exhibit C) and after said motion was submitted upon argument and brief the said court entered its order denying said motion to stay issuance of mandate, a certified copy of said record entries is filed herewith and marked Hellman's Exhibit B.

Affiant further states that thereafter W. A. Gaines and Company filed its petition in the United States Supreme Court for writ of certiorari in said cause, and after submission of said petition upon briefs, said petition was denied. Certified copies of said record entries in said order are filed herewith and marked Hellman's Exhibit-C and D, respectively. Affiant further states that the Hellman Distilling Company was on to-wit, the 24th day of June, 1907, by supplemental bill of W. A. Gaines and Company in said cause in the United States Circuit Court for the Eastern District of Missouri made a party defendant in said case, the main case being then pending in the United States Circuit Court of Appeals on appeal from the decree of the Circuit Court; that thereafter on to-wit, the 5th day of September, 1907, complainant secured the entry of a decree pro confesso against the Hellman Distilling Company, which decree pro confesso was set aside September 7th, 1907, the Hellman Distilling Company entering its appearance to said supplemental bill; that thereafter upon motion duly made and considered it was ordered by the court that an injunction issue against the Hellman Distilling Company and the same be perpetual in the event that W. A. Gaines and Company prevailed in the main case then pending on appeal in the United States Circuit Court of Appeals, but to be void in the event that defendants in the main case prevailed, a certified copy of said supplemental bill, motions, orders, injunctions and the record entries of same is filed herewith and marked Hellman's Exhibit E.

Affiant further states that upon the dismissal of the bill of W. A. Gaines and Company in said case by the United States Circuit Court of Appeals and the denial of the petition for writ of certiorari by the United States Supreme Court the Hellman Distilling Company again placed upon the market whiskey under the name "Old Crow" as it

had a right to do.

Affiant further states that when the Hellman Distilling Company took over the business theretofore conducted by A. M. Hellman and Company it acquired certain whiskey then in bond in the distillery warehouse of the Rock Spring Distilling Company at Owensboro, Kentucky; that the said whiskey was produced in the spring of 1904, at the special instance and direction of the late A. M. Hellman, that thereafter in the spring of 1905, 1907, 1906 and 1909, affiant acting for the Hellman Distilling Company, elected to have produced another run of the same kind of whiskey and accordingly ordered and directed that a similar run of the same whiskey, identical in quality, character and excellence be produced at the same distillery for the Hellman Distilling Company; that said whiskey was so produced of the same character, quality and excellence and was placed in the distillery warehouse of the Rock Spring Distilling Company at Owensboro, Kentucky.

Affiant states that the whiskey so produced and stored in the distillery warehouse of the Rock Spring Distilling Company as aforesaid, was similar in kind, quality and excellence to that used in Hellman's Old Crow Whiskey, and Hellman's Celebrated Crow Bourbon, which said whiskey was so marked and branded by the Hellman Distilling Company and its predecessors as and sold under the name of Old Crow and Hellman's Celebrated Crow Bourbon.

Affiant further states that in the spring of 1909, he made a contract through Arthur Rosenfeld representing Silas Rosenfeld and the Rock Spring Distilling Company (Silas Rosenfeld lessee

Spring Distilling Company; for the bottling in bond of said high grade, bourbon whiskey produced as aforesaid, then in the distillery warehouse of the Rock Spring Distilling Company; that the Hellman Distilling Company supplied all bottles, cases, corks and other supplies necessary, including the labels; that said labels bore the name Hellman Distilling Company proprietors, and that the upper left hand corner of figure of the bird "Crow" in a circle surrounded by the legend "Established 1863"; that for said service the Hellman Distilling Company paid the distiller the usual price per case according to size of bottles used.

Affiant further states that every possible precaution is being taken by the Hellman Distilling Company to exercise such rights and only such rights as it is entitled to under the decision of the United States Circuit Court of Appeals in and for the 8th Circuit; that upon the receipt of information in to-wit, the month of May, 1909, that complain-t objected to the labels upon the Old Crow bottled in bond of the Hellman Distilling Company, the Hellman Distilling Company out of superabundance of caution and in order to meet ever the most captious criticism prefixed to its label and brands the word "Hellman's" in connection with "Celebrated" so that said brands and labels in all cases read "Hellman's Old Crow," or "Hellman's Celebrated Old Crow"; that all whiskey which the Hellman Distilling Company is bottling or causing to be bottled in and for a long time past has been bottled and sold under labels and brands bearing the figure of a crow and surrounded by the words "Established 1863," the words "Hellman's Celebrated Old Crow, Hellman Distilling Company, St. Louis, Mo." as indicated by the following exhibits which are marked as follows:

Hellman's Exhibit F. (case used in bottled in bond goods);

Hellman's exhibit G (a bottle); Hellman's Exhibit H (a label); Hellman's Exhibit I (bottle).

Affiant states that it is not true that respondents or either of them have used the words "Old Crow" in script in labels or upon bottles or bottled in bond whiskey since July 21, 1909, but on the contrary at all times from and after said date and for a period prior to said date the said Silas Rosenfeld used upon the said Hellman Distilling Company's Old Crow Bottled in bond whis-

key labels bearing the words Old Crow in black letters, and no other

labels whatsoever were used upon said whiskey after said date.

MORITZ HELLMAN.

Sworn and subscribed to before me a Notary Public in and for the City of St. Louis, State of Missouri this 10th day of January, 1910. My commission w.?! expire September 25th, 1911.

[SEAL.] EMMA LOVEJOY,

Notary Public in and for the City of St. Louis, Missouri.

EXHIBIT A WITH THE AFFIDAVIT OF MORITZ HELLMAN. Filed January 20th, A. D. 1910.

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1907.

No. 2700.

Max Kahn, Administrator of the Estate of Abraham M. Hellman, and Moritz Hellman, Appellants,

W. A. Gaines and Company (a Corporation), Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri,

Mr. Jacob Klein and Mr. Luther Ely Smith (Mr. Warwick M.

Hough and A. J. Freiberg, were with them on the brief) for appellants.

Mr. James L. Hopkins (Mr. Daniel W. Lindsey was with him on the brief), for appellee.

Before Sanborn, Circuit Judge, and Philips, District Judge.

PHILIPS, District Judge, delivered the opinion of the court.

The appellee (complainant below), obtained decree in the Circuit Court establishing its asserted claim to the words "Old Crow" as a trademark, enjoining appellants (defendants below), from the use thereof in their business, and finding the defendants guilty of unfair competition in business and ordering an accounting.

The original bill was filed in November, 1904.

The bill alleges that the complainant is the sole and exclusive owner of a trademark for whiskey consisting of the words "Old Crow," which words were open to adoption as a trademark for whiskey in the year 1867, when the complainant's predecessor in business, Gaines, Berry & Co., adopted and commercially applied the said trademark for whiskey distilled by them, and that it acquired by assignment said trademark, which has been continuously applied by it and its predecessors in business upon packages containing whiskey from the year 1867 to the time of filing the amended bill.

The bill further alleges that in 1835 one James Crow became domiciled upon Glenn's Creek, Woodford County, Kentucky, when and where he began the manufacture of whiskey of superior quality, which became designated about that time as "Crow" or "Old Crow," and that he was continuously engaged in the distillation of whiskey as "Crow" or "Old Crow" to his death, in 1855. That at that time a considerable quantity of said whiskey remained upon the market and was commercially known and dealt in until the year 1867; that no whiskey was produced during said period anywhere to which the words "Crow" or "Old Crow" were applied as a trademark; that in that year, a predecessor of complainant, to-wit, Gaines, Berry & Co., began the production on said Glenn's Creek of their whiskey using the same process and material theretofore used by said Crow; that from 1835 to this time, the words "Old Crow" have been applied continuously to whiskey produced by the process of Crow and to no other whiskey whatever; that the distillation and production of said whiskey has always been on said Glenn's Creek and not elsewhere.

The bill further alleges that Abraham M. Hellman and Moritz Hellman, the defendants, had been guilty of fraudulent acts and unfair competition in selling a spurious compounded liquor as and for the complainant's whiskey, to its damage in the sum of \$5,000.00;

and prayed for an accounting.

The answer denied specifically the allegations of the bill, alleged the ownership of the word "Crow," "Old Crow," "J. W. Crow," and the celebrated "Crow Bourbon," together with a figure of a crow in connection with their own business upon packages of whiskey in their and their predecessor's business, and so continued

the use thereof from the year 1863 and prior thereto; alleging that the whiskey sold by complainant under the words "Old Crow" was an un-refined harmful and deleterious article, and that the whiskey sold by them was a blend largely free from impurities. The replication was general.

The defendants filed a cross bill claiming the trademark in question and asking for an injunction. This need not be considered, as at the hearing the defendant's counsel declined to insist upon any

affirmative relief.

The evidence tended to show that a man named James Crow, usually called "Jim Crow" and sometimes known as "Crow," or "Old Crow" began the manufacture of whiskey in Woodford County, Kentucky, about the year 1850. The evidence does not show that he ever owned or operated any distillery in his own right, but worked for persons owning distilleries. He died about 1855. Prior to his death he worked at various distilleries in that neighborhood, to-wit, at the Edwards Distillery, at Anderson Johnson's Distillery, at Jack Johnson's Distillery, at Johnson & Yancey's, at the Oscar Pepper's Distillery, and at Captain Henry's Distillery, Whiskey made by him was called "Crow" or "Old Crow" as stated by one of the witnesses, just as whiskey made by Taylor was called "Old Taylor."

The process employed by Crow was what is known as "Hand made" whiskey, but there was no secrecy about his process, nor did it differ materially from that employed by other distilleries of the same period. He used in the manufacture the grain grown in the neighborhood, which was not different from that grown in the Western States. When he worked at Johnson & Yancey's Distillery, it was not known as "Crow's" Whiskey, but as "Johnson & Yancey's." The old Oscar Pepper's Distillery, at which Crow at one time worked,

was run by various distilleries from 1855 to 1865. This whiskey was called "Old Oscar Pepper," and was sometimes called "Old Crow." The men who worked with him understood the process employed by Crow and used it in other distilleries.

The co-partnership firm of Gaines, Berry & Co. began business as distillers in Woodford County, Kentucky, in 1867, and operated the old Pepper distillery as claimed successors. This concern was later succeeded by W. A. Gaines & Co., a co-partnership, which, on the 9th day of July, 1882, filed in the Patent Office at Washington City, application for registering the following as trademark:

"Old Crow Distillery, Woodford County, Kentucky. Copper Dis-

tilled whiskey, W. A. Gaines, Distiller."

Accompanying this application was the statement that "this trademark we have used in our business since January, 1870." In 1887 W. A. Gaines & Company incorporated under the same name. In June, 1904, shortly before the institution of this suit and after the controversy had arisen between the complainant and the defendants respecting the use of the name of "Crow" or "Old Crow" in business, the complainant corporation filed in the Patent Office application to register as a trademark the words "Old Crow." The sworn statement of the officer of the Company accompanying the application asserted that:

"This trademark has been continuously used by the said W. A. Gaines & Company and its predecessors since the year A. D. 1835."

To say the least of it, these different statements show some juggling

with facts and disclose inconsistent positions.

The record does not show any written devolution of title or right of trademark passing from Gaines, Berry & Co., to W. A. Gaines & Company and from the latter to the complainant corporation. Be this as it may, no unprejudiced mind can read the evidence in this case without the impression that the conception of a trademark in the words "Crow" or "Old Crow" did not enter the mind of Gaines, Berry & Co., prior to 1870; and they may not under the issue presented by the pleadings, lay any claim thereto anterior to 1867.

It is conceded that after 1870, Gaines, Berry & Company and W. A. Gaines and their successors, W. A. Gaines & Company,

built up a large successful business in the manufacture of whiskey, which has extended throughout the country, and that their whiskey, under the designation of "Old Crow," attained wide celebrity. The question remains, however, to be answered, has the complainant maintained by proof the assertion that the defendants, or their predecessors in business, wrongfully invaded its exclusive right

to the use of the words "Crow" or "Old Crow" in business?

The evidence, without contradiction, establishes the following facts: that as early as 1862, the firm of L and L. M. Hellman, composed of Isaac Hellman and Louis M. Hellman, were engaged in the wholesale liquor business on Pine Street in the City of St. Louis, Missouri, that as early as 1862 or 1863 on the whiskey barrels employed in their trade, they had a bird with wings spread, in imitation of a crow burnt into the head of the barrel and the word "Crow" or the words "Old Crow" were burnt beneath this figure. This fact is affirmed by the testimony of Mr. Herman A. Haeussler, an Attorney at Law of St. Louis, whose reputation for intelligence and integrity is such as to entitle it to full credence. The firm of lawyers with which he was connected, whose office was next door to the business house of the Hellmans, acted as counsel for I, and L. M. Hellman, in the conduct of their business. Mr. Haeussler testified that as early as 1862-3, they had a brand of "Crow" Whiskey; that he saw the barrels on the sidewalk ready to ship with the figure of a crow either on the barrels or on the signs (and he thinks the barrels), with the word "Crow." The evidence further shows that as early at 1865, they had signs in frame- prepared, displayed in the window of their storehouse, like Exhibit No. 6 represented by the following cut, large numbers of which were used in connection with their whiskey trade:

## DEFENDANTS EXHIBIT No. 6

Celebrated

(The cut here copied shows a picture of a barrel and a bird.)

Crow Bourbon. I. & L. M. Hellman, St. Louis.

139 Some of the books of said firm kept at that time were in evidence and showed sales of whiskey sometimes designated as "Crow" and "J. W." or "J. C. Crow." That they used also the designative term "Old Crow" appears in the testimony of several witnesses. Mr. Charropin of Covington, Louisiana, testified that he entered the employ of I. and L. M. Hellman about November, 1866, and continued therein until 1870; that he traveled first through Illinois and parts of Missouri, and afterward in the South as far as New Orleans and in Tennessee, Arkansas and Mississippi. He gave the names of parties to whom he had sold Hellman's whiskey, and deposed that he sold to customers "Old Crow" whiskey which the Hellman's handled, and that he remembered it was the brand used at the house at the time. Mr. Schaeffer, of Yazoo City, Mississippi, testified that he had dealings with I. and L. M. Hellman, in 1866 and probably the latter part of 1865, and that he purchased liquor from them under the name of "Crow" or "Old Crow."

"Q. Will you describe what marks, if any, these barrels bore?

A. They had on one end of the barrel a bird with wings spread out burnt in the head of the barrel and the words "Old Crow" were burnt under them; they were all burnt, not marked; burnt in the wood."

Mr. Heron, of Memphis, Tennessee, testified that he entered the employ of I. and L. M. Hellman, in September, 1865, and remained with the firm until 1882 or 1883, as assistant rectifier. He identified Exhibit as similar to the one used when he went there.

"Q. Now, will you state, Mr. Heron, how frequently the firm sold whiskey as "Old Crow" whiskey during the time you were in the

employ of the firm?

A. Well, I couldn't say now often I sold it, but to the best of my knowledge, there was very seldom a month or week that some did not go out.

Q. By whom was the "Old Crow" sold by the firm made?

A. It was blended right in the house. You could call it blending

or compounding right in the house."

This condition continued up to 1867, during which the bill alleges the claimed trademark had not been appropriated by the complainant. In August, 1867, Isaac Hellman died. The business of this house has been continuously conducted in St. Louis. up to the time of this litigation, by the brother and their sons who succeeded thereto, doing business under the name of I. and L. M. Hellmon, employing the same brands and designation in business. Their trade was confined principally to states down the Mississippi

River, and Southwest. Several of the men who worked for this house between 1862 and 1870, as well as several of the traveling salesmen of the house are living and gave their depositions in this case. Since 1867, this house has conducted its business as theretofore with no knowledge carried home to its members that the complainant, or its predecessors in business, were asserting any proprietary right to the use of the word "Crow" or "Old Crow" in trade. The evidence fails to show that the Hellmans, prior to this controversy, ever heard of Glenn's Creek, in Woodford County, Kentucky, The whiskey sold by them carried with it, plainly marked on the packages the fact that it was the whiskey of I. and L. M. Hellman of St. Louis, Missouri, or the name of the firm at the time in busi-There is not a particle of evidence in this record to warrant the imputation that at any time or place, the defendants ever represented that their whiskey was manufactured on Glenn's Creek, or that it was the manufacture of the complainant. There is no evidence that any purchaser from them was ever deceived into the belief that he was obtaining from them whiskey manufactured by the Glenn's Creek monopoly. There is, therefore, no foundation in fact or law for the charge of unfair competition.

After alleging in the bill of complaint that by reason of the defendants' unfair competition, the complainant has been damaged in the sum of \$5,000.00 and its vast business jeopardized and threatened with destruction by the defendants' competition, its counsel to impair the evidence that the Hellmans had sold whiskey as far back as 1863, under the name of "Crow" and "Old Crow," tacked course in argument by asserting that this use was so rare as to subject it to

the maxim de minimus lex non curat. The right of the
141 defendants to use in their trade the designative words "Old
Crow" or "Crow" cannot be measured by the extent to which
they employed it, whether more or less frequent at times. It is sufficient to protect them from the charge of an unlawful invasion of
the complainant's claimed monopoly that they used in connection
with their business as whiskey dealers the trade name in question
prior to any appropriation thereof by the complainant, and that they
have so continued to use it. Neither can their right to use it, ad libitum, be destroyed by the overshadowing comparative amount of the

complainant's sales under the designation of "Old Crow" whiskey, nor by the asserted superiority of its product.

Passing by the criticism made by defendants' counsel of the word "Old Crow" as a trademark, on the ground that in its origin it referred merely to the name of "Crow" as the compounder of that grade of whiskey, and that its later use was merely designative of the quality of the article, and, therefore, it might not constitute a technical trademark if the complainant employed the words "Old Crow" and "Crow" in its trade as designating the quality of the whiskey sold by it, the defendants are not guilty of an invasion of the as serted exclusive monopoly of the complainant.

The bill stigmatizes the defendants' business as fraudulent in imposing upon the public a blended whiskey, impure and deleterious.

And what it lacks in proof of this its counsel has undertaken to

supply by invective and epithets.

The learned trial Judge, from his opinion in the record, seemed impressed as to this charge of the bill by the opinion of the Kansas City Court of Appeals in the case of W. A. Gaines & Company v. the E. Whyte Grocery Fruit and Wine Co. (107 Mo. App. 570). It is assigned for error that the court admitted in evidence the entire record, including the voluminous evidence in the bill of exceptions in that case. In view of the conclusion reached by us on the merits, we may pass by this criticism with the observation, that while the evidence in that case could not be employed as proof of the matters

in contestation in the case here under review against this appellant who was not a party to that suit, it could be considered by the Chancellor for his information as to the scope of the decision in that case as a precedent. (Liebig's Extract of Meat Co. vs. Libbey, et al., 103 Fed. 87-89; N. Y. Filter Mfg. Co. vs. Jackson, 112 Fed. 678-680; Liebig's Extract of Meat Co. vs. Walker, 115 Fed. 822-825; American Bell Tel. Co. vs. Wallace Electric Co., 37 Fed. 672; Rose vs. Fretz, 98 Fed. 112; Adams vs. Tannage Patent

Co., 81 Fed. 179.)

The evidence especially on the part of the defendants, in the case under review is so materially different in character and effect from that in the case tried in the Jackson County Circuit Court, as also that of Gaines & Co. vs. Leslie, 54 N. Y. Supp. 421, cited by complainant's counsel, as to render them of no controlling force on the facts involved in and the principles of law applicable to this case.

The only evidence touching the character of the whiskey sold by the Hellmans is, that it was blended whiskey—a mixture of so-called straight whiskey with refined spirits from which, the blenders claimed the largest possible percentage of impurities were removed. Whether this made it better or worse than that manufactured by the complainant, does not affect this case. No customer of the Hellmans is complaining, and the complainant has failed to show that the defendants palmed off their whiskey on anybody as that of the com-

plainant's manufacture.

The complainant lays much stress upon the situs of its distillery on Glenn's Creek in Woodford County, Kentucky, as if there were some peculiar virtue in the air and water of that place adapted to this distillation of whiskey, which it had in some way wholly appropriated. The evidence does not show that Glenn's Creek in any way entered into the composition of the whiskey. The water used came from the springs some distance from the Creek, in no wise different from other springs in the limestone region of the Blue Grass District of Kentucky, we fail to perceive the relation of all this to the claimed trademark.

As there was no secret about the process of distillation employed by James Crow, which the complainant assumed the follow, as "hand-made" whiskey (and there was some evidence that the complainant now employs machinery in some material

respect in the process of manufacture), the use of which process is not secured to the complainant by any patent, and as the defendants

have not claimed to use either Kentucky corn, water or air in the composition of their blended whiskey, and did not represent that it came from Glenn's Creek, all these matters are quite immaterial on

the issue of unfair competition in trade.

After the careful consideration of the mass of relevant and irrelevant evidence in this record our conclusion is: (1) that inasmuch as the defendants' predecessors in business prior to the use of the adopof the designative word "Crow" or the words "Old Crow" as a trademark, employed those words in descriptive terms in connection with their business as dealers in whiskey in St. Louis, Missouri; that the said predecessors and the defendants so continued to use the same, to a limited extent, up to the time of the institution of this suit, in good faith, they are not guilty of infringing the complainant's claimed trademark; and, (2) that the defendants are not guilty of having engaged in unfair competition with the complainant in the prosecution of their business.

It results that the decree of the Circuit Court must be reversed, and the case remanded with direction to the Circuit Court to dis-

miss the bill of complaint.

Filed April 27th, 1908.

A true copy,

Attest: [SEAL.]

JOHN D. JORDAN,

Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

EXHIBIT B FILED WITH THE AFFIDAVIT OF MORITZ HELLMAN, FILED JANUARY 15TH, 1910.

Filed January 20th, 1910.

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1908.

No. 2700.

Max Kahn, Administrator, &c., et al., Appellants, v.
W. A. Gaines & Company.

144 Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Thursday, June 18th, 1908.

This cause *come* on to be heard on the motion of appellee for an order staying the mandate herein pending an application to the Supreme Court of the United States for a writ of certiorari herein, and was argued by Mr. Alexander E. Horn, in behalf of counsel

for appellee, in support of said motion and by Mr. Luther E. Smith,

opposing.

On consideration whereof, it is now here ordered by this court that said motion for a stay of mandate, be, and the same is hereby denied.

EXHIBIT C FILED WITH THE AFFIDAVIT OF MORITZ HELLMAN, FILED JAN'Y 15TH, 1910.

Filed January 20th, 1910.

Supreme Court of the United States, October Term, 1908.

No. 455.

W. A. Gaines & Company, Petitioner,

VS.

MAX KAHN, Administrator of the Estate of Abraham Hellman, and MORITZ HELLMAN.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

On consideration of the petition for a writ of Certiorari herein to the United States Circuit Court of Appeals for the Eighth Circuit, and of the argument of counsel thereupon had, as well in support of as against the same, it is now here ordered by the Court that said petition be, and the same is hereby denied. October 19th, 1908.

EXHIBIT D FILED WITH THE AFFIDAVIT OF MORITZ HELLMAN, FILED HEREIN ON JANUARY 15TH, 1910.

Filed January 20th, 1910.

Supreme Court of the United States, October Term, 1908.

No. 455.

W. A. GAINES & COMPANY, Petitioner,

VS.

MAX KAHN, Administrator of the Estate of Abraham Hellman, and Moritz Hellman.

145 Petition for Writ of Certiorari to the United States Circuit
Court of Appeals for the Eight. Circuit.

1908, July 6. Petition for writ of certiorari and Exhibit thereto, notice and proof of service filed.

1908, Oct. 13. Petition submitted.

1908, Oct. 19. Ordered that petition be denied.

To the Honorable Judges of the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri:

W. A. Gaines & Company, a Kentucky corporating having its principal office and place of business in the City of Frankfort,

County of Franklin, State of Kentucky, and being a critizen of the State of Kentucky, by leave of court first had and obtained brings this its Supplemental bill of Complaint against Max Kahn, Administrator with the will annexed of the estate of Abraham Hellman, deceased, a citizen of Missouri, and resident of the City of St. Louis, and State of Missouri, Moritz Hellman, a citizen of the State of Missouri, and a resident of the City of St. Louis in said State, and Hellman Distilling Company, a Missouri corporation having its principal office and place of business in the City of St. Louis, in the Eastern Division of the Eastern District of Missouri, and there-

upon your orator complains and says:

That since this cause has been at issued, and while proofs were being taken herein, respondents Moritz Hellman and Max Kahn, Administrator of the estate of Abraham M. Hellman, deceased, sold conveyed, transferred and set over unto the Hellman Distilling Company, a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, which said corporation was incorporated after this cause was at issue, all of the assets of the business theretofore conducted by the said Respondents Moritz Hellman and Max Kahn, Administrator, of the estate of Abraham M. Hellman, deceased, under the firm name and style of A. M. Hellman & Company.

That your orator is informed and believes, and therefore avers the fact to be, that the said Hellman Distilling Company has continued the sale of spurious whiskey under your orator's trade-

tinued the sale of spurious whiskey under your orator's trade-146 mark consisting of the words "Old Crow" and that the said corporation is now engaged in making and bottling a spurious whiskey not the product of your orator's Old Crow Distillery, to which whiskey the said Hellman Distilling Company is applying your orator's trademark for whiskey consisting of the words "Old

Crow" without your orator's license or consent and in violation of your orator's trademark rights.

And your orator in this behalf avers that the said acts of the said Hellman Distilling Company are continuing and are placing your orator's rights in and to its said trademark in jeopardy, and that unless restrained by the injunctive power of this Honorable Court, the said acts of the said Hellman Distilling Company will totally destroy your orator's said trademark rights, or will cause irreparable injury to your orator's said trademark rights and to your orator's good will.

That your orator's said trademark rights and good will are of the value of more than Five Thousand (\$5,000,00) Dollars, and that the amount in controversy herein is in excess of Two Thousand

(\$2,000.00) Dollars, exclusive of interest and costs.

Wherefore, inasmuch as your orator is without adequate or any remedy, save in this Honorable Court, and to the end therefore, that the Respondent Hellman Distilling Company, may if it can, show cause why your orator should not have the relief hereby prayed for, and that the said Respondent Hellman Distilling Company may be compelled to make a full, perfect and complete disclosure and discovery of, all and singular, the matters aforesaid as fully as if interrogated as to each, and that the said Respondent Hellman Distilling Company may be decreed, according to the best and utmost of its knowledge, remembrances, information and belief, full, true direct and perfect answer hereunto make; but not under oath (an answer under oath being hereby expressly waived) and your orator prays that the said Respondent Hellman Distilling Company be made party—Respondent herein and that the said Hellman Distilling Company, its agents, servants, and employees, and each of them, are forever and perpetually enjoined and restrained

by writ of injunction, issuing out of and under the seal of 147 this Honorable Court, from making, selling, keeping on hand for sale, advertising for sale, any whiskey not the produet of your orator's Old Crow Distillery situate in Woodford County. Kentucky, and to which your orator's trademark for whiskey consisting of the words "Old Crow," or the pictorial representation of a crow, or either said words or picture, are applied or affixed in any manner whatsoever, and that the said Respondent Hellman Distilling Company be decreed to account for all gains and profits in this behalf by the said Respondent unlawfully realized, and for the damage which your orator has sustained by reason of the said fraudulent and unlawful acts of the said Respondent Hellman Distilling Company, and that, to that end, upon the final hearing of this cause, your orator be granted not only the injunctive relief herein prayed for, but granted an order referring this cause to a Master in Chancery of this Court, to take, state and report unto this court, a full, true and complete account of the said profits and damages, and that judgment be rendered in favor of your orator

May it please your Honors to grant unto your orator not only a writ of injunction conformable to the prayer of the Supplemental bill, but also a writ of Subpœna and Respondendum of the United States of America, directed to the said Hellman Distilling Company, commanding it on a day certain therein to be named to abide and perform all and singular such orders and decrees in the premises as to your Honors shall seem proper and conformable to the principles

against the said Respondent Hellman Distilling Company upon the

of equity and good conscience.

report of the said Master:

JAMES L. HOPKINS,
Solicitor for Complainant.
JAMES L. HOPKINS AND
D. W. LINDSEY,
Of Counsel for Complainant.

And afterwards, to-wit, on the 5th day of September, A. D. 1907, the following among other proceedings were had and appear of record in said cause, to-wit:

(Order to Take Bill Pro Confesso as Against Hellman D. Co.)

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5096.

W. A. Gaines and Company, Complainant,

Max Kahn, Administrator with the Will Annexed of the Estate of Abraham M. Hellman, Deceased, Moritz Hellman, and Hellman Distilling Company, Respondents.

Order to Take Bill Pro Confesso as Against Hellman Distilling Company.

The subpora addressed to Hellman Distilling Company in the above entitled cause having been returned, which return had been filed, and it appearing therefrom that the said subpora was duly served on Hellman Distilling Company, one of the respondents herein, and no appearance having been entered on the part of said respondent, or demurrer or plea, or answer filed, aithough such appearance should have been entered or pleading filed on or before the Rule Day in September, 1907; therefore on motion of James L. Hopkins, solicitor for the complainant, it is ordered and decreed that the bill, amended bill and supplemental bill, herein be taken proconfesso as to said respondent, Hellman Distilling Company.

JAMES L. HOPKINS, Solicitor for Complainant,

Dated this 5th day of September, 1907.

And afterwards to-wit: on the 7th day of September, A. D. 1907, the following among other proceedings were had and appear of record in said cause, to-wit:

5096.

W. A. Gaines and Company, Complainant, vs. Max Кана, Administrator, etc., Defendants.

On motion of the defendant Hellman Distilling Company appearing by H. H. Raeussler, it is ordered that the decree pro confesso entered on September 5th, 1907, be and the same is hereby set aside and said defendant granted leave to enter its appearance by its said solicitor, which is now done.

DAVID P. DYER, Judge.

September 6th, 1907.

And thereafter to-wit, on the 7th day of October, 1907, there was filed in said cause a Motion to Stay Proceedings on Supplemental bill, which said motion is in words and figures as follows, to-wit:

In the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

In Equity. No. 5096.

## W. A. GAINES & COMPANY

VS.

MORTIZ HELLMAN and MAX KAHN et al.

Come now defendants Mortiz Hellman and Max Kahn, administrators of the estate of the late Abraham M. Heilman, deceased, by their attorneys, Messrs. Klien & Hough, and the Hellman Distilling Company, by its attorney, Harry H. Haeussler, Esq., and show to the Court that heretofore, to-wit, on the 24th day of June, 1907, an interlocutory decree of injunction against defendants Moritz Heliman and Max Kahn, was entered in this cause, restraining said defendants from using the words "Old Crow" or "Crow" in or upon whiskey not the product of complainant, and for an accounting.

And thereafter, to-wit, on the — day of July, 1907, defendants Mortiz Hellman and Max Kahn, prayed, and were granted an appeal from said interlocutory order, to the United States Circuit Court of Appeals, for the Eighth Circuit, and their appeal bond was duly tendered to the Judge of this Court, and approved.

And defendants further show to the Court that thereafter a supplemental bill was filed in this cause against defendant Hellman Distilling Company, charging that since this cause has been at issue, and while proofs were being taken, defendants Moritz Hellman and Max Kahn, Administrator of the estate of Abraham M. Hellman, sold, conveyed, transferred and set over unto the Hellman Distilling Company, a corporation of the State of Missouri, all of the assets of the business there-fore conducted by defendants Moritz Hellman and Max Kahn under the firm name of and style of A. M. Hellman & Company, and that the Hellman Distilling Company has continued the sale of whisky under the words "Old Crow"; and in and by said supplemental bill complainant prays the Court to enjoin the Hellman Distilling Company from said alleged wrongful acts, and further asks for an accounting.

150 It appearing from the face of the said supplemental bill that the same matters and things are involved as were determined by the Court heretofore, in its decision upon complainant's bill, defendants' cross bill, and the issues framed thereunder, respectively, defendants move the Court to enter its order staying further proceedings under the said supplemental bill, until the said

appeal heretofore taken by defendants Moritz Hellman and Max Kahn, as aforesaid, from said interlocutory order of injunction, be determined by the Circuit Court of Appeals for the Eighth Judicial Circuit, saving and reserving to all of the parties their respective rights arising from or growing out of the existing state of the pleadings.

KLEIN & HOUGH.

Attorneys for Defendants Moritz Hellman and Max Kahn, Administrator of the Estate of the Late Abraham M. Hellman, Deceased, HARRY H. HAEUSSLER.

Attorney for Defendant Hellman Distilling Company.

To complainant in the above entitled cause or its attorneys and solicitors:

Take notice that the above motion will be called to the attention of the Court at 2 o'clock P. M. Saturday, October 5th, 1907, or as soon thereafter as counsel can be heard.

HARRY H. HAEUSSLER, Attorney for Hellman Distilling Company. KLEIN & HOUGH.

Attorneys for Moritz Hellman and Max Kahn, Adm'r, etc.

An-thereupon, to-wit on the 7th day of October, 1907, there was filed in said cause Supplemental Decree and Order Restraining proceedings under supplemental bill.

(Supplemental Decree and Order Restraining Proceedings under Supplemental Bill.)

In the Circuit Court of the United States, Eastern Division of the Eastern District of Missouri.

151 In Equity. No. 5066.

W. A. Gaines & Company, Complainant,

Max Kahn, Administrator with the Will Annexed of the Estate of Abraham H. Hellman, Deceased, Moritz Hellman, and Hellman

Distilling Company.

Supplemental Decree and Order Restraining Proceedings under Supplemental Bill.

This cause coming on — the heard this 5th day of October, 1907, upon the motion of the Respondent Hellman Distilling Company, to stay the proceedings under the Supplemental Bill heretofore filed herein by leave of court, and the parties being present by their consent, and due consideration being had of said motion, it is ordered, adjudged and decreed that the Respondent Hellman Distilling Company, its officers, directors, stockholders, agents, servants, and employes, and each of them, be and they are hereby enjoined and restrained from making, advertising for sale, keeping on hand for sale,

or in any manner dealing in any whiskey bearing the names "Crow," "Old Crow," "P. Crow," or "J. W. Crow," or any other combination of words or letters containing the word "Crow" or bearing the pictorial representation of a crow, not distilled and produced by the complainant, W. A. Gaines & Company, at its Old Crow Distillery in Woodford County, Kentucky, and from in any manner selling or passing off upon the public any whiskey as and for the whiskey made, produced and sold by the Complainant under its trademark consisting of the words "Old Crow," not made and produced by the Complainant, W. A. Gaines & Company; this injunctive order to remain in force and effect until the appeal heretofore taken in this case by Moritz Hellman and Max Kahn, Administrator with the will annexed of Abraham M. Hellman, deceased, to the United States Circuit Court of Appeals for the Eighth Circuit is determined; if the decree of this court be affirmed, this injunctive order is to be thereupon made perpetual; if the decree of this Court be reversed, this injunctive order is thereupon to terminate and to be of no force and effect. And it is further ordered, adjudged and decreed by the court that all proceedings under the Supplemental Bill herein be stayed and suspended during the pendency of the aforesaid appeal in the said United States Circuit Court of Appeals for the Eighth 152 Circuit October 7th, 1907.

DAVID P. DYER, Judge.

We agree to the entry of the above and foregoing decree and order.

JAMES L. HOPKINS,

Solicitor and of Counsel for Complainant. HARRY H. HAEUSSLER.

Solicitor and of Counsel for Respondent Hellman Distilling Company.

And thereafter, to-wit, on the 8th day of October, 1907, there was filed in said cause Supplemental Injunction, which said Supplemental Injunction is in words and figures as follows, to-wit:

(Supplemental Injunction.)

In the Circuit Court of the United States, Eastern Division of the Eastern District of Missouri.

In Equity. No. 5096.

W. A. Gaines & Company, Complainant,

MAX KAHN, Administrator of the Estate of Abraham M. Hellman, Deceased, Moritz Hellman, and Hellman Distilling Company, Respondents.

Injunction.

The President of the United States to Hellman Distilling Company, its Agents, Servants, and Employes, Greeting:

Whereas, it has been represented to us in the Circuit Court of the nited States for the Eastern Division of the Eastern Judicial Dis-

trict of Missouri, in the Eighth Circuit, that the Complainant W. A. Gaines & Company is the sole and exclusive owner of the trade mark for whiskey consisting of the words "Old Crow"; and

Whereas, Hellman Distilling Company has been made a party

hereto by a Supplemental Bill herein filed; and

Whereas, an injunction has issued herein on Final hearing against Max Kahn, Administrator of the Estate of Abraham M. Hellman, deceased, and Moritz Hellman, Respondents herein, and an appeal has been taken from said injunction and order of this Court to the

Circuit Court of Appeals for the Eighth Judicial Circuit; and 153 Whereas, you, the said Hellman Distilling Company, by your counsel, moved this Court to suspend proceedings under

the said Supplemental Bill pending the determination of said appeal; Now, therefore, you the said Hellman Distilling Company, your agents, servants, workmen and employes are strictly commanded and enjoined, until the further orders of this court, under the pains and penalties which may fall upon you, and each of you, in the case of disobedience, that you forthwith refrain from infringing upon the said trade mark of the Complainant and from making, advertising for sale, keeping on hand for sale, or in any manner dealing in any whiskey bearing the names "Crow," "Old Crow," "P. Crow" or "J. W. Crow," or any other combination of the words or letters containing the word "Crow," or bearing the pictorial representation of a crow, not distilled and produced by the complainant, W. A. Gaines & Company at its Old Crow Distillery in Woodford County, Kentucky, and from in any manner selling or passing off upon the public any whiskey not made and produced by the complainant W. A. Gaines & Company, as and for the whiskey made, produced and sold by Complainant under its trade mark consisting of the words "Old Crow."

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 7th day of October, 1907, and in the 132 year of the Independence of the United States of America. Issued at office under the seal of said Court in the City of St. Louis, in said Division of the said District, the day and year last aforesaid.

SEAL.

JAMES R. GRAY, Clerk.

(Order of July 10th, 1908.)

W. A. GAINES AND COMPANY, Complainant,

MAX KAHN, Administrator of the Estate of the Late Abraham M. Hellman, Deceased, and Moritz Hellman, Defendants.

Now on this day, this cause coming on again to be further heard and to be disposed of in conformity with the mandate of the 154 United States Court of Appeals, heretofore received by this Court and filed herein on the 29th day of June, 1908, and it appearing to the Court that the appeal taken by the Respondents

from the interlocutory judgment and decree rendered and entered of record in this Court against the said Respondents on the 24th day of June, 1907, and at the March Term, 1907, of this Court, to the United States Circuit Court of Appeals for the Eighth Circuit, has been duly heard by the said Circuit Court of Appeals, upon the transcript of the record in said cause, brought into the said Circuit Court of Appeals on said appeal, and upon the argument of counsel transcript of record in said cause, and that upon consideration thereof it was ordered, adjudged and decreed by the said Circuit Court of Appeals that the said decree of this Court in this cause be reversed with costs, and that the respondents recover against the said W. A. Gaines and Company, a corporation, the sum of \$920.20 for their costs in this behalf expended and have execution therefor.

And it further appearing to the Court from the mandate of the said Circuit Court of Appeals that said cause was remanded to this Court with directions to dismiss the bill of complainant as of April 27th, 1908, and this Court was commended that execution and further proceedings be had in this cause in conformity with the opinion and decree of the said Circuit Court of Appeals, also filed herein, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Now therefore, in conformity with and in obedience to the said mandate it is considered, adjudged and decreed by the Court that the injunction be granted by this Court in and by said interlocutory decree, be, and the same is hereby dissolved and for naught held, and that the said interlocutory decree against the said respondents and in favor of the complainant, be and the same is now set aside, annulled

and for naught held.

And it is further ordered, adjudged and decreed by the Court that the complainant's bill and supplemental bill be, and the same are hereby dismissed for want of equity, and the said respond-155

ents recover of and against the complainant, W. A. Gaines and Company, a corporation, the said sum of \$920.20 adjudged in their favor by the said Circuit Court of Appeals, and that they also recover from said complainant all the costs of this Court taxable in their favor, or incurred, in their behalf, and in favor of their solicitors and counsel, and that they have execution therefor.

(Signed) DAVID P. DYER, Judge.

Received, filed and entered July 10, 1908.

JAMES R. GRAY, Clerk.

O. K.

J. L. HOPKINS, Counsel for Compt.

Order of Submission on Demurrers and Motion for Preliminary Injunction. Entered January 20th, A. D. 1910.

This day came the complainant by James L. Hopkins and George W. Jolly, its counsel, and filed the affidavit of George W. Berry herein. Came also the defendants by Luther Eli Smith and W. T.

Ellis, their counsel.

This cause coming on to be heard upon the defendants' demurrers to the complainant's bill of complaint, as also upon the complainant's motion for a preliminary injunction heretofore entered herein, and having been argued by counsel, and the court not being sufficiently advised thereof, takes time.

Affidavit of George F. Berry. Filed January 20th, A. D. 1910.

George F. Berry, of lawful age, being on his oath sworn, deposes and says: That he is an officer of the complainant corporation, as re-

cited in his former affidavit now on file herein.

That he has read the affidavits of the defendants with reference to the srious bottlings of Complainant's "Old Crow" whiskey upon the labels on which appear the words "a blend." That in regard to each and all of the said bottlings so labeled, the contents of such bottlings are and have always been a mixture of two or more different ages of the genuine "Old Crow" whiskey produced by the Complain-

ant at the Old Crow Distillery, that the contents of such bot-156 tles consequently were and are the genuine "Old Crow" whiskey of the Complainant and that the same were not a blend in the sense in which the term "blend" has been applied by the United States Circuit Court of Appeals of the Eighth Circuit to the mixture of straight whiskey and refined spirits, which was made and sold by the defendants (in the case of Kahn vs. Gaines, 161 Federal Rep. 195). That the words "a blend" have been placed upon all the said labels on account of the great uncertainty which has attended the interpretation of the Pure Food Act of June 30th, 1906; which uncertainty is evidenced by the difference between the several opinions rendered by Attorney-General Bonaparte, President Roosevelt, Solicitor-General Bowers and President Taft. That the word "blend," as applied to the several bottlings of "Old Crow" in question, means and has always meant a mixture of different ages of the same straight whisky produced at the same distillery, the entire contents being "Old Crow" whisky without the addition of any other distilled spirits. That the complainant, W. A. Gaines & Company, has never authorized nor licensed, nor permitted the mixture of any other spirits with its "Old Crow" whisky and that said W. A. Gaines & Co., has been the complainant in several hundred suits for infringement against persons dealing in spurious "Old Crow" whisky, in none of which, save in the case of Kahn vs. Gaines, supra, has the complainant been defeated. That there are now in force and effect in the United States more than one hundred decrees of perpetual injunction against various defendants, who have mixed "Old Crow" whiskey or other whisky with neutral spirits, or have used neutral spirits and coloring and flavoring matter to produce a mixture, which they labeled or branded and sold as and for the genuine "Old Crow" whisky of the complain-

And further affiant saith not.

GEORGE F. BERRY.

Subscribed and sworn to before me by George F. Berry this 19th day of January, 1910.

SEAL.

OTHO SELBACH, Notary Public, Jefferson Co., Ky.

My commission expires Feb. 13th, 1910,

157 Order Entered by Judge Evans Feb. 2nd, 1910.

The defendant, Silas Rosenfeld, having in open Court withdrawn the second ground urged in his demurrer to the bill of complaint and the questions otherwise arising upon his demurrer and that of defendant Rock Spring Distilling Company to the bill of complaint, and also the questions arising upon the motion of the complainant for a temporary injunction pendente lite, having been argued and fully considered at this term, and the court being advised, delivered an opinion in writing, which is filed. Pursuant thereto it is ordered, adjudged and decreed that the demurrers to the bill of complaint filed by the defendants respectively be and each of them is overruled. It is further ordered, adjudged and decreed that the complainant's motion for a temporary injunction pendente lite be and the same is overruled and denied but without prejudice to its rights to renew the same if so advised after the defendants have answered the bill. It is further ordered that the defendants do each answer or plead to the bill on or before the next March Rules.

Opinion Delivered by Hon. Walter Evans, Judge. Filed February 2nd, 1910,

The complainant having, in 1909, obtained under the Act of Congress, approved February 20th, 1905, (33 Stats. 724), entitled "an Act to authorize the registration of trade marks used in commerce with foreign nations, or among the several states, or with Indian tribes, and to protect the same," registration of its trade mark Old Crow as applied to bourbon and rye whiskies, brought this suit in equity wherein, among other things, is sought an injunction against the defendants for their alleged use of the words Old Crow upon their whiskies. The defendants filed demurrers to the bill upon several grounds stated therein, and the complainant has

158 moved the court for a temporary injunction pendente lite. The questions arising upon both were argued at the same time. Without any elaboration of the reasons therefor the court has

reached the following conclusions, namely:

1. The second ground stated in the demurrer of Silas Rosenfeld was expressly withdrawn at the hearing, and has not, for that reason, been considered by the Court. This ground of demurrer called in question the constitutionality of the Act referred to.

2. The first ground of his demurrer, shortly stated, is that there is no equity in the bill. If the facts stated in that pleading are true we think that, prima facie, they show (under section 16 of the Act) a right to register the trade mark and a claim at least to some relief

as against the alleged acts of the defendants. Whether a right is shown to all the relief prayed is not now material if the complainant shows itself entitled to any. This ground of demurrer is not sustainable

3. The third ground of his demurrer, for similar reasons, can not be sustained, although it may be that at the final hearing of the cause "no damages shall be recovered" because of the failure to give notice of the registration in the manner required by Section 28 of the Act, that Section referring, apparently exclusively, not to an injunction but to the recovery of "damages." The demurrers of Silas Rosenfeld will, therefore, be overruled.

The demurrer of the defendant Rock Spring Distilling Company must also be overruled. The grounds of that demurrer appear to overlook the very explicit averments of the 8th paragraph of the bill of complaint, which expressly charge against both defendants

the acts complained of.

## Motion for an Injunction.

While in disposing of the demurrer we take all of the averments of the bill of complaint to be true, this is not the case when we came to consider the motion for a temporary injunction. The real facts must then come into play, and we find from the testimony that the words Old Crow, as applied to whiskey, were first used probably in 1835 by a distiller named James Crow, who operated in Woodford

County, Kentucky. He continued to use it until his death in 1855, and afterwards, except as it appeared on his own 159 whiskey in stock, no one seems to have used the words in that connection until in 1867, one Mitchell, formerly in some way associated with Crow, and who had thus acquired a knowledge of Crow's formula for making bourbon whiskey, began to use the words Old Crow, or at least the word Crow in connection with whiskey. that year one of the predecessors of the complainant, probably combining in some way with Mitchell, either as a partner or employer, begun the use of the trade name Old Crow, and thence in succession the right to use it came to the complainant. Probably forty years' use of the trade mark would establish the user's right to it, and if there had been no conflict of rights, probably the exclusive ownership But in 1863 one Hellman, to whose right apparently Rosenfeld has succeeded, begun the use of the word Crow in connection with the word James or the initial J or the word Old, and also in connection with the picture of the raven, and they have used it more or less ever since in connection with whiskey. So that possibly on two different lines, acting independently of each other, the trade mark Crow or Old Crow has been used for over forty years by each of the parties or those whom they respectively succeed. While it is quite certain that the brand Old Crow in connection with whiskey was first adopted and first used by James Crow in Kentucky, it was admitted at the hearing that the complainant had not traced any title to the brand by devise or transfer of any sort back to Jame Crow, but only back to Mitchell, who began to use it in 1867. I

may be that the complainant and its predecessors, finding the trade name or trade mark Old Crow unappropriated by anybody in Kenmean to say that the use by complainant and those under whom it claims would not, if that use had for a long time been exclusive, entitled the complainant to register the trade mark as the owner thereof under the Act, but as at this preliminary stage we find that Rosenfeld and those under whom he claims have used the words Old Crow on whiskey for even a longer period than the complainant, we

no not feel disposed, on a hearing upon affidavits merely where the witnesses have not been cross-examined, to say that clear grounds have been made out for an injunction pendente We by no means intend to state any definite opinion as to the lite. rights of either party in this litigation. What we say is intended to be limited to the exact expressions used. Of course the Act of Congress gives the "Owner" and no one else the right to register a trade mark, and while prima facie the granting of registration implies ownership, the proceedings in the Patent office are ex parte, and the prima facie presumption of ownership may be rebutted and overcome where rights against others are claimed under a registration, and the testimony heard on the motion we are now considering has at least a tendency in that direction—a tendency which makes us at least hesitate to grant the motion. We shall want to see a clearer and more condensed statement by the witnesses of the important facts, and if that end is held in view we think irreparable injury cannot be done to either side during the brief time actually necessary to a development of the facts of this case. The clearness and distinctness which we have have in mind cannot be promoted, we think, by the promiscuous dumping into the case of great piles of pamphlets and periodicals filed with extraneous matter, and bearing very little if any upon the merits of the controversy. It cannot be expected that the court will examine in detail a suit case full of such matter in order to get at the few essential facts of a case like this.

The motion for a temporary injuction pendente lite will be denied but without prejudice to its renewal if, during the preparation of the

case the complainant shall be so advised.

Joint Plea of Rock Spring Distilling Company and Silas Rosenfield. Filed March 7th, A. D. 1910.

These defendants respectively by protestation not confessing or acknowledging all or any of the matters and things in said complainant's bill to be true in such manner or form as the same are therein set forth and alleged.

For plea to the whole of said bill these respondents say that: 161 Complainant in and by its said bill avers that it is the sole and exclusive owner of the words "Old Crow" as a trade mark for whiskey, and that as such owner it registered the said words as a trade mark upon straight rye and bourbon whiskey in the United States Patent - under the Act of Congress of February 20th, 1905, and certificate of registration of said words as said trade mark was

issued to complainant on to-wit, the 20th day of July, 1909. An Complainant in and by its said bill claims no right whatever in a to the said words "Old Crow" as a trade mark for whiskey or in connection with whiskey or in connection with said words except a such sole or exclusive owner as aforesaid, and under the said ce tificate of registration issued to complainant as such owner as aforesaid.

The respondents show to the court that Complainant's cause of action, if any, as the same is sought to be stated in and by the sai bill, is completely barred in this, that complainant's alleged righ as sole and exclusive owner, or owner of the words "Old Crow" as trade mark for whiskey, for straight rye or bourbon whiskey, or an whiskey after full and just hearing upon pleadings and proofs du taken have been adjudicated and determined by a court of con petent jurisdiction to-wit, the United States Circuit Court of Appea for the Eighth Circuit adversely to complainant in suit heretofo instituted by complainant against Abraham M. Hellman and Mori Hellman in the United States Circuit Court in and for the Easter Division of the Eastern Judicial District of Missouri; that the He man Distilling Company, a corporation of the State of Missouri, the immediate successor in business of the firm of A. M. Hellman ar Company comprising Moritz Hellman and Abraham M. Hellma defendants in said suit, including the business, trade, good will, trade marks and the trade mark Old Crow involved in said suit; that a the alleged wrongful acts charged against respondents herein we done by Respondent Rosenfeld under and by virtue of a contract agency with the said Hellman Distilling Company for the bottling

its Old Crow whiskey in bond.

Respondents further aver that heretofore to-wit, on the -162 day of September, 1904, complainant herein filed its petitic in the Circuit Court of the City of St. Louis, State of Missour against the late Abraham M. Hellman and Moritz Hellman cor prising the firm of A. M. Hellman and Company, the immedia predecessor in business of the Hellman Distilling Company, and said petition complainant alleged that it had the exclusive right ar title to the words Old Crow as and for a trade mark for whiskey, th its said alleged rights therein had been acquiesced in by the pr ducers and consumers of whiskey throughout the world; and th said words had never been lawfully applied to any whiskey but the produced by complainant, and its predecessors and distilled by the at their distilleries in Woodford County, Kentucky, that the defen ants named therein (said Abraham M. Hellman and Moritz He man, comprising the firm of A. M. Hellman and Company), ha infringed complainant's alleged rights in the premises by marking and branding whiskey dealt in by them with the words Old Cro and prayed judgment against said defendants an account of sa wrongful acts in the sum of \$10,000 and costs.

Respondents further aver that thereafter on the — day of Nover ber, 1904, the said petition theretofore filed in the Circuit Court the City of St. Louis, Missouri, by complainant was dismissed at thereafter on to-wit, the 11th day of November, 1904, complainant

filed its bill of complaint in the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, against said Abraham M. Hellman and Moritz Hellman, comprising the firm of A. M. Hellman and Company; that thereafter on to-wit, the 14th day of December, 1904, the said Abraham M. Hellman died on to-wit, the 29th day of December, 1904, the said cause was revived against Max Kahn, administrator of the said late Abraham M. Hellman, deceased, and said cause continued to be prosecuted against the said Kahn and Moritz Hellman. That complainant in and by its said bill filed in the United States Circuit Court in Missouri as aforesaid, charged that complainant was the lawful owner of the trade mark for whiskey containing the words Old Crow, that com-

plainant had registered same in the United States Patent office in Washington as a trade mark for whiskey; that the respondents therein had infringed complainant's alleged trade mark rights in relation to the words "Old Crow" and had been guilty of acts of unfair competition against complainant in that they had sold an alleged spurious whiskey not the product of complainant marked and branded with the words Old Crow and complainant in said bill prayed that the respondents be perpetually enjoined from continuing said alleged unlawful acts, and that an accounting be had to ascer-

tain Complainant's loss of profits and damages.

Respondents interposed a demurrer to said bill which demurrer was after argument sustained by the court, thereafter an amended bill was filed in which complainant again averred that it was the sole and exclusive owner of the trademark for whiskey consisting of the words Old Crow, and that the said words then were and during their use by complainant and its predecessors had been applied to packages containing whiskey by marking, printing, stamping, branding and labeling; that complainant's predecessors had adopted said words as a trademark in the year 1867, and had continuously used same as a trademark for same ever since; that the respondents had infringed complainant's alleged trademark rights in connection with said words and had been guilty of acts of unfair competition against complainant in that they had sold packages containing whiskey not the product of complainant, marked and branded with the words Old The said amended bill prayed for an accounting and for a perpetual injunction against the respondents therein. A demurrer to said bill having been overruled respondents answered denying specifically each and every allegation contained in complainant's said amended bill, and affirmatively averred that the words Old Crow or Crow in connection with the figure of the bird crow had been lawfully adopted by their predecessors in business in the year 1863 or prior thereto by branding, stamping, printing, and labeling said symbol and said words upon barrels, kegs, boxes and bottles containing whiskey made and sold by them, and had been con-

tailing whiskey made and sold by them, and had been continuously used as a trademark for their whiskey ever since. Complainant filed its replication traversing specifically the allegations in the answer. The case being at issue proofs were taken both by complainant and respondents and thereafter on to-wit the 29th day of May, 1907, said cause was heard in the United States

Circuit Court in and for the Eastern Division of the Eastern Judicial District of Missouri and was submitted, thereafter on to-wit the 13th day of June, 1907, the Court handed down its decision and in connection therein, an opinion, granting complainant's prayer for permanent injunction and accounting; and thereafter on to-wit, the 24th day of June, 1907, decree of court was duly entered in accordance with said opinion. Thereafter the said respondents therein duly perfected their appeal from said decree to the United States Circuit Court of Appeals for the 8th Circuit and said cause came on for hearing on to-wit, the 22nd day of January, 1908, in said Court, and was duly submitted upon oral argument and briefs both by appellants and appellee, and thereafter on the 27th day of April, 1907, the United States Circuit Court of Appeals handed down its decision reversing said decree and remanding the same to the Circuit Court with directions to dismiss complainant's said bill on the ground that the evidence clearly showed that the predecessors in business of appellants therein had adopted the word- Old Crow as a trademark for whiskey as early as the year 1863, and the evidence failed to show that complainant's predecessors in business had used the words Old Crow as a trademark for whiskey prior to the year 1870; in conclusion the Court found as follows:

"After a careful consideration of the mass of relevant and irrelevant evidence in this record, our conclusion is: (1) That inasmuch as the defendants (appellants) predecessors in business, prior to the use or adoption of the designative word "Crow" or the words "Old Crow" as a trademark, employed those words as descriptive terms in connection with their business as dealers in whiskey in St. Louis, Missouri; that said predecessors and the defendants so continued to use the same, to a limited extent, up to the time of the institution of this suit in good faith, they are not guilty of in-

fringing the complainant's claimed trademark; and (2) That the defendants (appellants) are not guilty of having engaged in unfair competition with the complainant in the prosecu-

tion of their business."

Thereafter on the 18th day of June, 1908, complainant filed its motion in the United States Circuit Court of Appeals praying that court to stay the issuance of its mandate to the Court below pending application by complainant to the United States Supreme Court for a writ of certiorari; which said motion was then and there denied. That thereafter on to-wit the 5th day of October, 1908, complainant presented in the Supreme Court of the United States its petition for writ of Ceritorari directed to the United States Circuit Court of Appeals for the 8th Circuit commanding that court to certify and send up the record in said cause, which said petition was on to-wit the 19th day of October, 1908, denied.

That theretofore on to wit, the 24th day of June, 1907, pending appeal from said decree of the said United States Circuit Court in and for the Eastern Division of the Eastern Judicial District of Missouri, complainant by supplemental bill filed in said cause prayed that the Hellman Distilling Company, successors in business of the said firm of A. M. Hellman and Company, be made a party

defendant in said cause, and that the said Hellman Distilling Company be perpetually enjoined, and that an account be had against the said Hellman Distilling Company in like manner and form as complainant had theretofore prayed against the said Abraham M. Hellman and Moritz Hellman; thereafter on to-wit the 5th day of September, 1907, complainant secured the entry of a decree pro confesso against the said Hellman Distilling Company which decree pro confesso was set aside on the 7th day of September, 1906, the Hellman Distilling Company then and therein entering its appearance to said supplemental bill; thereafter upon motion duly made and considered it was ordered by the Court that an injunction issue against the Hellman Distilling Company, and that the same be perpetual in the event that compainant prevailed in the main cause then pending on appeal in the United States Circuit Court of Appeals, but said injunction to be void in 166 the event that defendants prevailed in the main cause then on appeal. Respondents further aver that upon the issuance of the mandate of the United States Circuit Court of Appeals on to-wit, the 27th day of June, 1908, the entry of same in the Circuit Court on to-wit the 10th day of July, 1908, the entry of same in the Circuit Court on to-wit the tenth day of July, 1908 (the order therein being attached hereto and made a part of this plea), and the denial by the United States Supreme Court of complainant's petition for writ of certiorari as aforesaid, complainant's said cause was determined in favor of the said Moritz Hellman and Max Kahn, administrator, appellant and original respondents as aforesaid, and immediate predecessors in business of the said Hellman Distilling Company, and the said injunction theretofore issued against the said Hellman Distilling Company become void.

Respondents further aver that in complainant's former suit, filed, prosecuted and determined as aforesaid the same alleged rights of complainant in and to the words Old Crow in connection with whiskey were directly involved as in complainant's said bill herein, that the same wrongful acts by way of infringement and unfair competition were charged against respondents therein as against

respondents herein.

Respondents further show that respondent Rosenfeld herein is in privity of contract with the said Hellman Distilling Company, successors in business of the said firm of A. M. Hellman and Company as aforesaid, and that all the acts and things charged to have been done in violation of complainant's alleged rights in and to the words Old Crow as a trademark for whiskey by respondents or either of them were done by respondent Rosenfeld under and by virtue of a contract of Agency with the said Hellman Distilling Company n relation to the bottling of the Hellman Distilling Company's Old Crow whiskey, in this that heretofore, to-wit, on the - day of — - 1904, the late A. M. Hellman senior member of the firm of A. M. Hellman and Company, composed of Abraham M. 67 Hellman and Moritz Hellman, selected on behalf of said firm of A. M. Hellman and Company the choicest grade of bourbon whiskey made at the certain distillery No. 18 2nd U. S.

Internal Revenue District of Kentucky and then and ever since operated by respondent Rosenfeld, and on behalf of the A. M. Hellman and Company contracted for a run of approximately 300 barrels of the said choicest grade of Bourbon whiskey to be produced at the said distillery, the same to be identical in quality, kind and excellence as that which he, the said Abraham M. Hellman, had selected; that said Abraham M. Hellman was and for many years prior thereto had been familiar with the product of said distillery, and then was and had been familiar with the said choicest grade of Bourbon whiskey produced at said distillery; that the said Moritz Hellman is the President of the said Hellman Distilling Company and at all times since the incorporation of said Company has been the president of the said Hellman Distilling Company; that heretofore to-wit on the - day of - 1905, the said Moritz Hellman as president of the Hellman Distilling Company, on behalf of the said Hellman Distilling Company selected and contracted for a similar run of whiskey to be distilled and produced at the said distillery No. 18 2nd U. S. Internal Revenue District of Kentucky in the name of the Hellman Distilling Company, the said whiskey to be identical in kind, character, quality and excellence as that theretofore selected by the said A. M. Hellman for and on behalf of the firm of A. M. Hellman and Company as aforesaid; and similar contracts were made by the Hellman Distilling Company through its president, the said Moritz Hellman, on the same terms and conditions in the year 1906, 1907 and 1909 for similar runs of whiskey, the said whiskey being selected by the said Moritz Hellman for and on behalf of the Hellman Distilling Company as aforesaid and being identical in character, kind, quality and excellence with that theretofore selected and contracted for by A. M. Hellman and Moritz Hellman as aforesaid; and all and singular the said contracts were duly fulfilled, and a high grade, genuine

Bourbon whiskey was produced thereunder in said years and each of them respectively, identical in kind, character, quality and excellence with the said whiskey selected by A. M. Hellman and Moritz Hellman as aforesaid; said whiskey when produced was placed in the distillery warehouse of said distillery No. 18, Second U. S. Internal Revenue District of Kentucky in each of said years respectively, and was stored in said warehouse and continued to be stored in said warehouse until ordered out by the Hellman Distilling Company under and in accordance with

the U. S. Internal Revenue Laws and Regulations.

That heretofore to-wit, the — day of —— 1909 the Hellman Distilling Company contracted for the bottling as said distillery in accordance with the United States Internal Revenue Laws and Regulations relating to the bottling of whiskey in bond at the distillery, of the said whiskey then in storage in the said distillery warehouse as aforesaid; which said whiskey had been selected by and produced for the said Hellman Distilling Company and A. M. Hellman and Company as aforesaid. And the said bottling was accordingly done by respondent Rosenfeld operating said distillery, the Hellman Distilling Company supplying all cases, branded and

marked and all labels, bottles, corks and other supplies necessary to complete the bottling according to law; that the Hellman Distilling Company supplied labels for bottles bearing the figure of the bird Crow surrounded by a circle containing the words "Established 1863" and also the words "Hellman's Celebrated Old Crow Bottled in bond whiskey, Hellman Distilling Company proprietors, St. Louis, Mo., and the wooden cases bore a brand identical with said labels, and respondent Rosenfeld duly fulfilled the said contract in the premises, and the said whiskey bottled, labeled and cased as aforesaid was shipped from said distillery to the place of business of the Hellman Distilling Company in St. Louis, or such other points as the Hellman Distilling Company might or did direct, and that no act had been done by respondents or either of them except as heretofore set out, and all the acts and things done

by respondent Rosenfeld under its said contract with the said Hellman Distilling Company were done under and in 169 pursuance of the foregoing contracts and under and in reliance upon the aforesaid decrees and orders of the said courts as

Respondents further aver that neither of these respondents had or claims any right or interest in or title whatsoever to the Hellman Distilling Company's said trademark, or any license thereunder, nor has either of these respondents ever been connected with said trademark in any manner whatsoever, except under and by virtue of the aforesaid contract between respondent Rosenfeld and

the Hellman Distilling Company.

Wherefore, complainant's alleged rights in the premises herein have been completely and finally adjudicated and determined adversely to complainant, and complainant's alleged right of action herein is completely barred. All of which matters and things these respondents do aver to be true, and they plead same in bar of complainant's said bill, and pray the judgment of this Honorable Court whether they ought to be required to make any other or further answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

W. T. ELLIS. LUTHER E. SMITH, Solicitors, Counsel for Respondents.

Petition of the Hellman Distilling Company. Filed March 7th, 1910

Now comes the Hellman Distilling Company and shows to the Court that it is a corporation organized and doing business under the laws of the State of Missouri; that it is the successor in business of the firm of A. M. Hellman and Company, composed of Abraham M. Hellman and Moritz Hellman, liquor dealers in the City of St. Louis; that your petitioner is the owner of the words Old Crow and Crow, and the figure of the bird Crow as a trademark for whiskey, as same has been used by your petitioner and its predecessors 70 continuously in and upon packages containing whiskey sold

by your petitioner and its predecessors continuously since the year 1863; that the alleged wrongful acts complained of by complainant W. A. Gaines and Company in the certain cause No. 237 now pending in this court, wherein W. A. Gaines and Company a corporation is complainant and the Rock Spring Distilling Company and Silas Rosenfeld are respondents, were done by respondent Rosenfeld therein under and by virtue of a contract of agency subsisting between said Rosenfeld and your petitioner providing for the bottling of your petitioner's Old Crow Whiskey by respondent Rosenfeld in bond and in conformity with the Internal Revenue Laws and Regulations of the United States. That neither said Rosenfeld nor said Rock Spring Distilling Company has or claims any right under, interest in — title to your petitioner's said trademark, except to fulfill said contract of agency.

Wherefore, your petitioner prays for leave to be made a partyrespondent in the said cause, and for leave to defend said cause, and your petitioner presents herewith its plea to be filed in said cause in the event that its petition herein is granted by this honorable Court.

W. T. ELLIS, LUTHER E. SMITH, Solicitors for Hellman Distilling Company.

Order of Submission on Motion of Hellman Distilling Company for Leave to Intervene. Entered April 22nd, 1910.

This day came the complainant, by James L. Hopkins, its counsel. Came also the defendants, Rock Spring Distilling Company and Silas Rosenfeld, by Luther Eli Smith and W. T. Ellis their counsel. Came also the Hellman Distilling Company by Luther Eli Smith and W. T. Ellis, its counsel. This cause coming on to be heard upon the sufficiency of the joint plea of Rock Spring Distilling Company and Silas Rosenfeld, as also upon a motion of the Hellman Distilling Company for leave to intervene as a party respondent herein and to file its plea, having been argued by

171 counsel, and the court not being sufficiently advised, takes time.

Opinion, Delivered May 2nd, 1910, by Judge Walter Evans.

In its bill the complainant avers that it is the owner of a trademark consisting of the words Old Crow, which for a long time it has used in connection with whiskey; that as such owner in the year 1909 it applied for and obtained from the Commissioner of Patents a registration of said trademark pursuant to the Act of Congress in that behalf, and that the defendants at and before the filing of the bill were using the said trademark in connection with whiskey, thus infringing complainant's rights greatly to its injury. An injunction and an accounting were prayed. The defendants filed a joint plea wherein they averred that the matters and claims set up in the bill had previously been finally adjudicated in and by another court of competent jurisdiction. The complainant set the plea down for

argument, and meantime the Hellman Distilling Co. filed its petition asserting that it was the real owner of the trademark Old Crow, that it had been adjudged to be so in a suit brought by the complainant, and that the defendants were using it solely as its agents and under contract with it, and thereupon it prayed that it might be admitted as a party to the action, so that it might defend its title to the trademark. Both the plea and the petition were argued at the same time.

## Petition for Leave to Intervene.

The petition for leave to intervene is based, as we have stated, upon the ground that the petitioner owns the trademark in contest, and that it is being used by the defendants as its agents and under its authority. With the petition is tendered a plea to be filed should the petition be granted. It was avowed at the argument, and no doubt correctly, that the petitioner was bound by contract to defend this suit on behalf of the defendants thereto, and that in fact it is defending it. This greatly modifies if it does not remove any particular necessity for the intervention asked. As an original 172 proposition I certainly should strongly feel the stress of the request for leave to intervene, but I am not prepared, as yet, to clearly see a way to avoid the force of Judge Lurton's ruling in Toler vs. East Tennessee Railway Co., 67 Fed. 170, although it may not have been intended to apply to such a case as this. Besides it is elementary that an estoppel by judgment works as well in favor of or against those who are in privity as for or against those who were actual parties to the litigation in which the judgment was rendered. It is asserted that the defendants, Rock Spring Distilling Co., and Silas Rosenfeld are in privity with the petitioner, and we may asname without at present so deciding that that is true, but if so, then hey have as much right to please the estoppel of the judgment etling the proprietorship of the Old Crow Brand in bar of Complainant's claim thereto as the petitioner in person would have.

For these reasons the petition of the Hellman Distilling Co. will be denied, and in consequence its motion to file a plea herein will

lso be denied.

# Sufficiency of Defendants' Plea.

Choosing not to reply to the joint plea of the defendants, the omplainant has set it down for argument under Equity Rule 33. It thus admitted that the averments of the plea are true. (Rhode sland vs. Massachusetts, 14 Peters 257, United States vs. California, cc., Co., 148 U. S. 39.) This being so, the question is, is the plea cod? It states, in detail, the facts relied upon in bar of complainant's action. Disregarding the details, we think the facts stated in the plea are as follows, to-wit, 1st, that heretofore, viz., in 1904, the complainant instituted its action in equity in the Circuit Court of the United States for the Eastern District of Missouri against Abraham M. Hellman, & Moritz Hellman, partners doing business as

A. M. Hellman & Company, in which the complainant alleged itself to be the owner of the trademark "Old Crow" for whiskey, and that it was being used and that complainant's rights therein were being infringed by the firm of A. M. Hellman & Co., 2nd, that relief appropriate to such a state of fact was prayed, 3rd, that in said action the complainant also charged the said A. M. Hellman &

Co., with unfair competition in respect to the use of the brand "Old Crow" on Whiskey, and also prayed for relief appropriate to that charge, 4th that said defendants appeared in the action and contested the same on the merits, 5th, that in the said action such proceedings were had as resulted finally, under the mandate of the United States Circuit Court of Appeals for the Eighth Circuit, in a judgment on the merits that the complainant's action should be and that accordingly it was dismissed by the judgment of the said Circuit Court on the 10th day of July, 1908, and that the said Circuit Court of Appeals directed the entry of the judgment aforesaid upon the ground that there had been a use, in good faith, of the brand "Old Crow" on whiskey by the defendants in that action and their predecessors prior to any adoption thereof as a trademark by the complainant or its predecessors, 6th, that while the said action was pending in the said Circuit Court of Appeals for the Eighth Circuit, viz., on June 27th, 1907, a supplemental bill was filed therein by the complainant by which the Hellman Distilling Co., as the successor of the firm of A. M. Hellman & Co., was made defendant in said action, and 7th, that the final Judgment therein stands in full force and unreversed.

In addition it is also shown that the defendants who are charged in the bill of complaint in this case with using and infringing the trademark "Old Crow" on whiskey, are doing so only as the agents or employes of the Hellman Distilling Co., and for its use alone, and upon these facts the plea avers that there is a privity between the firm of A. M. Hellman & Co., and the Hellman Distilling Co., the successor of said firm and the defendants Rock Spring Distilling Co. and Silas Rosenfeld. In our opinion this conclusion is justified.

The bill of complaint in this action is based, in large measure, upon a registration of the trademark "Old Crow" secured by the complainant under the Act of Congress approved February 20th, 1905. Is appears therefrom that on February 26th, 1909, the complainant made its application under the Act as owner of the trademark, and

the Commissioner of Patents allowed the registration on July 20th, 1909. This of course was long after the final judgment above described. There is no intimation in the bill that the application for the registration was otherwise than ex parte, and we shall assume that it was entirely so. We think that assumption is a fair one, and we think it is equally fair to assume that the complainant in its application made no allusion to the judgment of the court in the previous litigation. Nevertheless, under Section 16 of the Act the registration is, itself, prima facie evidence of ownership. Under these circumstances what effect should the registration and the resulting prima facie evidence of ownership have on the previous judicial determination that prior to the adoption by the complainant

defendants in the previous litigation and their predecessors had used the words "Old Crow" as descriptive terms in connection with their business as dealers in whiskey is a question of importance. It would be difficult to maintain the proposition that Congress intended or that the courts should hold that a final adjudication as to the ownership of a trademark, or a plea of res adjudicata based thereon could be evaded or made insecure by a subsequent registration by the losing party upon an ex parte application unless there is an express averment that the rights of the winning party has been purchased before the registration. Nevertheless the question is not altogether free from doubt because, while the Court's opinion does, the final judgment entered does not, in express terms, mention the matter of ownership—the phrases used in the judgment being that the bill be dismissed for want of equity. But when the pleadings are considered, so far as we can ascertain their substance from the plea, there is satisfactory assurance that the question of the ownership of the trademark was put in issue and vigorously contested. That issue was originally decided in favor of the complainant by the Circuit Court, but its judgment thereon was reversed on appeal with directions to dismiss the action. The grounds for this direction were stated in the opinion of the Circuit Court of Appeals, and were to the effect that there had been a prior use, in good faith, by defendants and their predecessors of the brand "Old Crow" on whiskey several years before any adoption of it as a trademark by the complainant or its predecessors. We think the necessary effect of this fact, was the defeat of the complainant's claim, of ownership and that this was the basis of the direction to the Circuit Courts. As the very same question must be the vital one to be determined in this case every reason upon which the salutary doctrine, of estoppel by former adjudication is based, must apply, and it seems to the Court that the effect of the judgment pleaded cannot and should not be avoided, as between the parties to this action by the subsequent registration, in the absence of a showing that previous thereto complainant had acquired the rights of its late opponents. Otherwise the registration was wholly ineffective as to them. What effect it may have upon other persons we need not inquire. Confining its effects to the parties to this suit and those to whom they stand in privity we have concluded that the plea should be allowed. And not only so, but as the plea in all substantial respects seems to meet and satisfy all the claims of the bill it ought, in law and equity,

favor. Horn vs. Detroit Dry Dock Co., 150 U. S. 625. Unless some other course is shown to be proper a final judgment

to avail the defendants so far as to require a final decree in their

may be prepared.

Order Entered May 21st, A. D. 1910, by Judge Walter Evans.

The parties came by their counsel of record and pursuant to the opinion of the court filed herein on the 2nd day of May, 1910, it is ordered, adjudged and decreed that the joint plea of the defendants filed herein should be and it is sustained and that the objections of the complainant hereto are overruled.

And thereupon the complainant tendered and with the leave of

the court was permitted to file its replication to the said plea.

176 Replication of W. A. Gaines & Company. Filed May 21st, 1910.

This replicant, saving and reserving unto itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the joint plea of the Respondents Rock Spring Distilling Company and Silas Rosenfeld, for replication thereunto sayeth that it does and will ever maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by these Respondents, and that the plea of said Respondents is uncertain, evasive, and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, confessed, or avoided, traversed, or denied, is true, all which matters and things this replicant is ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly — as in and by its said bill it has already prayed.

D. W. LINDSEY,
G. W. JOLLY AND
JAMES L. HOPKINS,
Solicitor- for Complainant.

Order Filing Stipulation as to Proof. Entered by Judge Evans July 18th, 1910.

This day came the Complainant, by James L. Hopkins and D. W. Lindsey, its counsel. Came also the defendants by W. T. Ellis and Luther Ely Smith, their counsel. The parties by their respective counsel filed their written stipulation herein, which is in words and figures as follows, to-wit:

"It is stipulated by and between the complainant and the respondents in the above entitled cause that the record in the case of Max Kahn, administrator et al. vs. W. A. Gaines & Co., case No. 2700 in the United States Circuit Court of Appeals in the 8th Circuit, disclosed the following facts and the following proofs taken in that case, and the same shall be considered in evidence in this case:

(1) That complainant herein as plaintiff filed its petition in the Circuit Court, City of St. Louis, State of Missouri, to the December Term, 1904, against Abraham M. Hellman and Moritz Hellman (co-partners — A. Hellman and Company) as defendants on the — day of September, 1904, as the same appears at pages 925-927 (Vol. 2) both inclusive of said transcript of record, and shall be printed as part of the record in this case.

(2) That complainant herein on to-wit, the 11th day of Novem-

ber, 1904, filed its Bill in Equity as complainant in the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, against A. M. Hellman and Moritz Hellman as defendants, which said bill appears at pages 914 to 924, (Vol. 2) both inclusive of said transcript of record, and shall be printed as part of the record in this case.

(3) That thereafter on to-wit, the 3rd day of March, 1905, complainant herein filed its amended bill in said cause in the United States Circuit — for the Eastern Division of the Eastern Judicial District of Missouri, which said amended bill appears at pages 5 to 12, both inclusive of said transcript, and shall be printed as part of

the record in this case.

(4) That on to-wit, December 14th, 1904, Abraham M. Hellman respondent in said cause died, and thereafter said cause as to him was duly revived in the name of Max Kahn as Administrator of his estate.

(5) That on to-wit, the 5th day of June, 1905, the respondents named in said amended bill filed their answer thereto, which answer appears in said transcript of record at pages 15 to 28 inclusive, and

shall be printed as part of the record in this case.

(6) That thereafter on to-wit, the 13th day of June, 1905, complainant filed its replication to said answer, its said replication appears at page 29 of said transcript of record, and shall be printed as part of the record in this case.

(7) That proofs were taken and a hearing had before said court. and the cause was submitted upon argument and brief on towit the 31st day of May, 1907, that on to-wit, June 13th, 178 1907, the Court rendered the opinion named in complainant's

stipulation and reported in 155 Fed. Rep. 639-645.

(8) That thereafter said cause was duly appealed by respondents to the United States Circuit Court of Appeals, and was duly submitted upon oral arguments and briefs in the said Court on to-wit,

the 22nd day of January, 1908.

(9) That on to-wit, the 27th day of April, 1908, the United States Circuit Court of Appeals handed down its decision reversing said cause and remanding it to the Circuit Court with directions to dismiss the bill, which opinion is found in 161 Federal at page 495

and shall be printed as part of the record upon this appeal.

(10) That thereafter to-wit on the 18th day of June, 1908, complainant filed its motion in the United States Circuit Court of Appeals praying that Court to stay the issuance of its mandate to the Court below, which said motion is filed herewith and marked Respondents' Exhibit A, and shall be printed in the transcript of this record.

(11) That on to-wit, the 18th day of June, 1908, said court entered its order denying said motion which order is filed herewith as Respondents' Exhibit "B" and shall be printed as part of the tran-

script of record.

(12) That thereafter on to-wit, the 5th day of October, 1908, complainant represented in the Supreme Court of the United States its petition for writ of certiorari directed to the United States Circuit Court of Appeals for the 8th Circuit praying that that Court be commanded to certify and send up the record in said cause, which said petition is filed herewith and marked Complainants' Exhibit "C,"

and shall be printed as part of the transcript of record.

(13) That thereafter on to-wit, the 19th day of October, 1908, the Supreme Court of the United States entered its order denying said petition, a copy of which said order is filed herewith and marked Respondents' Exhibit "D" which shall be printed as part of this transcript, being also reported as follows:

W. A. Gaines & Co. vs. Kahn et al., 212 U. S. 572.

179 (14) Than on to-wit the 24th day of June, 1907, pending appeal from the decree of the said United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri in said cause, complainant by supplemental bill filed in said cause prayed that the Hellman Distilling Company, successors in business of the firm of A. M. Hellman and Company be made a party respondent, and prayed the same relief against the said Hellman Distilling Company as had theretofore been prayed against the original respondents, a copy of said supplemental bill together with the record of the proceedings thereon and the order of the court, that an injunction issue against the said Hellman Distilling Company to be perpetual in the event that complainant prevailed in the main cause then pending in the United States Circuit Court of Appeals on appeal, but to be void in the event that respondents prevailed in the main cause then an appeal is filed herewith and marked Respondents' Exhibit "E," and shall be printed as part of the transcript,

(15) On to-wit, the 10th day of July, 1908, the mandate of the United States Circuit Court of Appeals was entered upon the records in the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, a copy of said order being filed herewith and marked Respondents' Exhibit "F," which shall be

printed as part of said transcript.

It is further stipulated and agreed that at the taking of proofs under the issues joined upon Respondents' Plea either party may refer to the said transcript of record, and introduce in evidence any portion of said record, and such portion so introduced shall be printed as part of the transcript on Appeal.

JAMES L. HOPKINS &
D. W. LINDSEY,
Counsel for Complainants,
W. T. ELLIS AND
LUTHER ELY SMITH,
Counsel for Respondents.

180 Order Submitting Renewed Motion for Temporary Injunction. Entered by Judge Walter Evans February 2nd, 1912.

This day came the complainant and defendants by their respective counsel of record, and complainant pursuant to leave to this

Court to renew its motion for a temporary or preliminary injunction herein comes and hereby renews said motion, and hereby moves the Court to grant a temporary or preliminary injunction in accordance with the prayer of the bill of complaint herein, and said motion having been argued by counsel and the Court not being sufficiently advised thereof, takes time.

Order Striking Out Renewed Motion for Temporary Injunction. Entered by Judge Walter Evans February 7th, A. D. 1912.

The Court being sufficiently advised of the motion for a temporary injunction made herein by the complainant on the 2nd inst., delivered an opinion in writing, which is filed, and in accordance therewith it is ordered, adjudged and decreed that the said motion should be and it is stricken out, the purpose being to leave open to the complainant the leave heretofore given to renew the motion for a temporary injunction if so advised after the defendants had filed their answer to the bill of complaint.

Opinion Delivered February 7th, 1912, by Hon. Walter Evans, Judge.

In considering the motion made on the 2nd inst., for a temporary injunction, we find that a similar motion was heretofore made, and that on February 2nd, 1910, in an opinion then filed we very explicitly stated the reasons for denying it. Those reasons yet have all the force they then had. In the order then entered overruling the motion it was provided that the action of the Court should be "without prejudice to its" (Complainant's) "rights to renew the same if so advised after the defendants have answered the bill." One decision of such a motion was final unless something new occurred. On one condition the court gave leave to renew the

motion, namely, it might be done after answer filed, some-181 thing occurring at the time, we suppose, which suggested the possibility that the answer, when it came in, might change the situation especially as an answer would never come in if the plea of a former adjudication is sustained. Instead of availing itself of the provision in the order to which we have referred, the complainant has prematurely entered another motion which raises precisely the same questions as the one disposed of two years ago. Instead of repeating the judgment then reached the motion will be stricken out as an attempt to retry a matter already adjudicated. It may illustrate the situation to state that the defendants, instead of answering, filed a plea of a former adjudication, which, when set down for argument, was held to be sufficient in point of law. The grounds for so holding were stated in an opinion filed May 2nd, 1910. Afterwards issue was taken upon the facts stated in the plea. Upon that issue the defendants promptly took their testimony.

Though it is not yet apparent that much if any testimony other than the record in the former suit could be made available or competent at the hearing of the plea of former adjudication, and although testimony in chief taken before answer to the merits and replication thereto might be prematurely taken under equity rul 66 and 67 the complainant has not only delayed completing taking of its evidence on the plea, but now in open court insists the its time therefor should be extended 60 days longer. If the preress of the case has been procrastinated, obviously it was by tault of the complainant. It does not seem in any wise to have a titled itself to the right to renew a motion once disposed of after for argument, though leave to renew it was then given on one conditionly, which condition has not yet arisen. Action on the plea has been delayed by the complainant. No answer has been filed, at one need not be filed until the plea has been finally disposed of.

The motion for a temporary injunction will, therefore, be strick out instead of being denied. This course will leave the provisions the order of February 2nd, 1910, in force when the condition there

stated shall have arisen.

182 Order Filing Stipulation, Entered by Judge Walter Eva. Filed February 14th, 1912.

This day appeared the complainant and defendants by their spective counsel, and filed a stipulation in writing, which is as flows:

"The parties hereto hereby stipulate as follows:

1. That all affidavits and exhibits filed by the complainant a by the defendants upon the original motion for preliminary injurtion herein may be considered as being in evidence upon the issuraised by the bill, the joint plea and the replication thereto; with a same probative force and effect as testimony taken under the 67 rule in equity as amended; subject to the reservation by defendation of objections to the same as a whole, and each and every part there upon the grounds of irrelevancy, immateriality and every other ground except incompetency.

2. Complainant in consideration of the foregoing cause closes testimony and defendants waive the taking of rebuttal testimony.

3. The cause is thereupon agreed to be submitted to the Countition without argument, and upon the briefs now on file.

Signed this — day of February, 1912.

JAMES L. HOPKINS, D. W. LINDSEY, TRABUE, DOOLAN & COX, Solicitors and of Counsel for Complainant.

W. T. ELLIS AND LUTHER ELY SMITH,

Solicitors and of Counsel for Defendants."

It is now ordered that this case be submitted to the Court, with argument, upon the briefs heretofore filed upon the sufficiency the plea filed by the defendants herein. Order Entered by Judge Evans February 27th, A. D. 1912.

Pending the consideration of the questions arising upon the hearing of the plea of the defendants, and which questions were submitted for determination by the stipulation filed an order entered herein on the 14th instant, the court this day delivered an opinion in writing, which is filed, and in accordance therewith it is ordered, adjudged and decreed by the court that the defendants and each of them may, if so electing and desiring on or before the April rules, of 1912, file an answer or answers herein to such averments or to such

part or parts of the bill of complaint, if any, as may not be fully met or covered by the defendants' said plea. Should such answer or answers be filed within that time, the court may thereafter consider and determine whether such plea and answer or answers may be considered together as one pleading. Meantime the court will not now proceed to the consideration of the questions involved in the said submission.

Opinion Delivered February 27th, A. D. 1912, by Judge Walter Evans.

In two opinions delivered in this cause—one on February 2nd, 1910, and the other on May 2nd, 1910,—the court expressed its views on certain phases of the litigation. Unless written opinions are futile they may be referred to in connection with what we are about to say, though we shall briefly quote from each of them.

The case is now before us under submission upon the questions arising on the defendants' plea of former adjudication. Pending that submission and pending the consideration of the questions involved we shall enter an order giving the defendants permission, if so advised and if so electing on or before the next April rules, to file an answer in respect to such matters, if any, presented by the bill of complaint, which the plea may not fully meet, and if this permission is availed of by the defendants and an answer is filed we can thereafter determine whether the plea and answer may not be considered together and as one pleading. The authorities for this may be found in what Mr. Justice McLean said in Lewis vs. Baird, (No. 8316), 15 Federal Cases, column 1, page 459; in what Judge Wheeler said in Mercantile Trust Co. vs. Missouri, K. & T. Ry. Co., 84 Fed. 379-393, in considering equity rules 32 and 37, in Vol. 1, Street's Federal Equity Practice, Sections 980 and 833, and also in what was said by Mr. Justice Story in his work on Equity Pleadings in the Chapter on Pleas. It may not be out of place to state not only the authorities which guide us to this course, but also some of the reasons which impel us to it. It may be remembered that in considering the motion for a temporary injunction, and upon the opinion filed February 2nd, 1910, was delivered, we said:

"We find from the testimony that the words Old Crow, as applied to whiskey, were first used probably in 1835 by distiller named James Crow, who operated in Woodford County,

He continued to use it until his death in 1855, and

afterwards, except as it appeared on his own whiskey in stock, no one seems to have used the words in that connection until in 1867, when one Mitchell, formerly, in some way associated with Crow, and who had thus acquired a knowledge of Crow's formula for making bourbon whiskey, begun to use the words Old Crow or at least the word Crow in connection with whiskey. In that year one of the predecessors of the complainant, probably combining in some way with Mitchell, either as a partner or employer, began the use of the trade name Old Crow, and thence in succession the right to use it came to the complainant. Probably forty years' use of the trade mark would establish the user's right to it, and if there had been no conflict of rights, probably the exclusive ownership of it. in 1863 one Hellman, to whose rights apparently Rosenfeld had succeeded, began the use of the word Crow in connection with the word James or the initial J or the word Old, and also in connection with the picture of the raven and they have used it more or less ever since in connection with whiskey. So that possibly on two different lines, acting independently on each other, the trade mark Crow or Old Crow has been used for over forty years by each of the parties or those whom they respectively succeed. While it is quite certain that the brand Old Crow in connection with whiskey was first adopted and first used by James Crow in Kentucky, it was admitted at the hearing that the complainant had not traced any title to the brand by devise or transfer of any sort back to James Crow, but only back to Mitchell, who began to use it in 1867. It may be that the complainant and its predecessors, finding that trade name or trade mark Old Crow unappropriated by anybody in Kentucky. adopted it and continued to use it as their own. I do not mean to say that the use by complainant and those under whom it claims would not, if that use had for a long time been exclusive, entitled the complainant to register the trade mark as the owner thereof under the act, but as at this preliminary stage we find that 185 Rosenfeld and those under whom he claims have used the words Old Crow on whiskey for even a longer period than the complainant, we do not feel disposed, on a hearing upon affidavits merely where the witnesses have not been cross-examined, to say that clear grounds have been made out for an injunction pendente We by no means intend to state any definite opinion as to the rights of either party in litigation. What we say is intended to be limited to the exact expressions used. Of course the Act of Congress gives the 'owner' and no one else the right to register a trade mark, and while prima facie the granting of registration implies ownership, the proceedings in the Patent Office are ex parte. and the prima facie presumption of ownership may be rebutted and overcome where rights against others are claimed under a registration, and the testimony heard on the motion we are not considering has at least a tendency in that direction-a tendency which makes

After the denial of the motion for a temporary injunction and after the case advanced a further step the complainant, under Equity

us at least hesitate to grant the motion."

Rule 33 set down the plea for argument which step of course admitted, for that occasion, that the averments of the plea were true. In holding the plea to be sufficient in law, in the opinion thereon delivered May 2nd, 1910, after stating the averments of the plea,

among other things, the court said:

"The Bill of Complainant in this action is based, in large measure apon a registration of the trade mark 'Old Crow' secured by the complainant under the Act of Congress, approved February 20th, 1905. It appears therefrom that on February 26th, 1909, the complainant made its application under the Act as owner of the trade mark, and the Commissioner of Patents allowed the registration on July 20th, 1909. This of course was long after the final judgment above described. There is no intimation in the bill that the application for the registration was otherwise than ex parte, and we shall assume that it was entirely so. We think that assumption is a fair one, and we think it is equally fair to assume that the complainant in its application made no allusion to the judgment of the court in 186 the previous litigation. Nevertheless, under Section 16 of the Act the registration is, itself, prima facie evidence of the ownership. Under these circumstances what effect should the regis-

tration and the resulting prima facie evidence of ownership have on the previous judicial determination that prior to the adoption by the complainant and its predecessors of the words 'Old Crow' as a trade mark the defendants in the previous litigation and their predecessors had used the words 'Old Crow' as descriptive terms in connection with their business as dealers in whiskey is a question of importance. It would be difficult to maintain the proposition hat Congress intended or that the courts should hold that a final adjudication as the ownership of a trade mark, or a plea of res adudicata based thereon could be evaded or made insecure by a subequent registration by the losing party upon an ex parte applicaion unless there is an express averment that the rights of the wining party had been purchased before the registration. Nevertheess the question is not altogether free from doubt because, while he court's opinion does, the final judgment entered does not, in xpress terms mention the matter of ownership—the phrase used in he judgment being that the bill be ownership—the phrase used in he judgment being that the bill be dismissed for want of equity. But when the pleadings are considered, so far as we can ascertain heir substance from the plea, there is satisfactory assurance that the uestion of the ownership of the trade mark was put in issue and igorously contested. That issue was originally decided in favor the complainant by the Circuit Court, but its judgment thereon as reversed on appeal with directions to dismiss the action. rounds for this direction were stated in the opinion of the Circuit ourt of  $\Lambda$ ppeals, and were to the effect that there had been a prior se, in good faith, by the defendants and their predecessors of the rand of 'Old Crow' on whiskey several years before any adoption f it as a trade mark by the complainant or its predecessors. ink the necessary effect of this fact was the defeat of the comlainant's claim of ownership, and that this was the basis of the

directions to the Circuit Court. As the very same question must be the vital one to be determined in this case every reason upon which the salutary doctrine of estoppel by former adjudication is based, must apply, and it seems to the court that the effect of the judgment pleaded cannot and should not be avoided, as between the parties to this action by the subsequent registration, in the absence of a showing that previous thereto complainant had acquired the rights of its late opponents. Otherwise the registration was wholly ineffective as to them. What effect it may have upon other persons we need not inquire. Confining its effect to the parties to this suit and those to whom they stand in privity we have concluded that the plea should be allowed."

The judgment relied upon in the plea as a bar to complainant's cause of action became final in July, 1908. The bill of complaint

avers:

"And your Orator shows unto Your Honors that on the 26th day of February, A. D. 1909, your Orator then being the sole and exclusive owner of the said trade mark by virtue of priority of adoption and use of the same as a trade mark for whiskey by its predecessors, did file in the Patent Office of the United States, under and in pursuance of the provisions of the Act of Congress entitled, 'An Act to authorize the registration of trade marks used in commerce with foreign nations or among the several States or with Indian tribes, and to protect the same, approved February 20th, 1905, 33 Statutes at Large, 724, an application for the registration of the said trademark, in writing, addressed to the Commissioner of Patents, and signed by your Orator as the applicant, specifying the name, domicile location and citizenship of your Orator, the class of merchandise and the particular description of goods comprised in such class to which the said trade mark is appropriated by your Orator; the description of the trade mark itself, and a statement of the mode in which same is applied and affixed to the goods, and the length of time during which the trade mark had been used; together with a drawing of the trade mark signed by your Orator or its attorney, and the number of specimens of the trade mark, five in number, as actually used, and

being the number of such specimens required by the Commissioner of Patents; and that thereupon your Orator paid into the Treasury of the United States the sum of Ten Dollars, and complied with all of the other regulations not hereinbefore specified, which had been prescribed by the Commissioner of Patents and were

then in force and effect.

"And your Orator respectfully represents that thereafter and on the 20th day of July, A. D. 1909, the Commissioner of Patents having caused an examination to be made and having caused the said trade mark to be published in the Official Gazette of the Patent Office, and no notice of opposition having been filed within the time limited by the law, a certificate of registration of the said trade mark was issued, in due form of law, under the seal of the Patent Office of the United States, signed by the Acting Commissioner of Patents of the United States and numbered 74537, wherein and whereby the said trade mark was duly registered to your Orator and its successors or assigns, the said certificate to remain in force for twenty years, unless sooner terminated by law; as will by the said certificate of registration, or a duly certified copy thereof, ready in court to be produced, and whereof your Orator herein and hereby makes profert more fully and at large appear. That the said trade mark, as so registered, is being, and for many years past has been used by your Orator in commerce among the several States as a trade mark for straight rye

whiskey and straight bourbon whiskey."

A copy of the application for registration was filed with the bill but it does not appear from that pleading that the complainant complied with the provisions of Section 3 of the Act of February 20th, 1905, which requires that every applicant for registration of a trade mark under the Act shall, before the issuance of the certificate, designate by notice in writing to be filed in the Patent Office some person on whom the process or notice of proceeding shall be served. We incline to think that this provision was jurisdictional. But whether so or not, the facts in the premises no doubt may be inquired into if the rights of other parties are involved. Certain it is that the bill does not indicate that this provision of the statute was complied with, nor

that the defendants in this case nor the defendants in the case mentioned in the plea of former adjudica-189 tion as having the ownership of the trade mark sought registered were given notice of the proceedings that they had any knowledge of it in any way. After the averments which we have copied the bill proceeds to charge the infringement complained of. It will be seen from what we have said that this is an action upon a trade mark, the registration of which was applied for quite six months after the judgment became final, which is relied upon as a former adjudication of the questions of the ownership of the trade mark. The trade mark registered is undoubtedly the same as that which was in litigation in the previous suit. The ownership is the principal thing, the registration an incidental thing. The judgment referred to in the plea stood unreversed when the application for registration was made, and the bill in no way shows or even indicates that the proceeding in the Patent Office was any other than a purely one-sided ex parte affair. Before it can have the effect of reversing and setting at naught the judgment pleaded in bar of the bill a new principle of law must be established. We repeat that we have personally supposed and yet suppose that the proceeding in the Patent Office was altogether ex parte wherein the complainant failed to disclose to that office the existence of the decree in the case theretofore decided to the effect that the complainant was not the owner of the trade mark sought to be registered. We have thought and vet think the judgment was binding as between the parties to that litigation on and their privies notwithstanding the registration, as we could not impute to Congress a contrary purpose nor a desire to permit the Patent Office in any event to reverse a judicial determination of the question of ownership, and certainly not in a proceeding purely ex parte, and of which the real owner had no notice, and which was instituted for the sole purpose of having a mere registration made. The plea submitted for present consideration is in a suit upon the

registered trade mark which possibly carried with it a presumption. under Section 16 of the Act of ownership, even as against a former adjudication, if we are allowed to make latitudinous construction of the section. After the court held the plea to be good in sub-190 stance the complainant took issue upon the truth of the averments of the plea, and over eighteen months were spent in desultory efforts to take proof upon the issues thus raised. I have personally thought and yet think that the plea if sustained by the testimony, meets the whole case inasmuch as it refutes the very basis of the registration obtained by the complainant by showing the previous adjudication to the effect that the complainant was not the owner of the trade mark at all, though it had stated to the contrary in its application. Logically the prima facie presumption created by the statute and the ex parte proceedings was over borne by the previous adjudication, even if Congress could be supposed to have intended to overthrow, by a one-sided proceeding for mere registration. the solemn judgment of the Circuit Court of Appeals. This view seems certainly to meet the substantial justice and law of the case. But suppose that this view is wrong when strictly technical rules are applied and enforced as against the more substantial features of justice, and suppose that it should be held that, in form at least, the plea did not cover the whole case but only what had occurred before the registration, then in view of the large record accumulated in the case and of the great expense of a reversal, should that occur, it seems to me that it would be far better to give the defendants at least an opportunity for electing and if so desiring of answering the averments of the bill showing registration, and to raise such issues thereon as may be desired, and also as to the charges of infringement. advised it seems to me, before we decide the plea, that the defendants should have an opportunity to answer any part of the bill which, technically speaking, may not be met by the plea, if any such there be.

Section 1 of the Act provides that "the owner of a trade mark used in commerce with foreign nations, or among the several States, or with Indian tribes \* \* \* may obtain registration for such trade mark by complying with the following requirements," etc. Were those requirements complied with? is an essential question.

Section 3 is as follows:

"That every applicant for registration of a trade mark, or for renewal of registration of a trade mark, who is not domiciled within the United States, shall, before the issuance of the certificate of registration, as hereinafter provided for, designate, by a notice in writing, filed in the Patent Office, some person residing within the United States on whom process or notice of proceedings affecting the right of ownership of the trade mark of which such applicant may claim to be the owner, brought under the provisions of this Act, or under other laws of the United States, may be served, with the same force and effect as if served upon the applicant or registrant in person. For the purpose of this Act it shall be deemed sufficient to serve notice upon such applicant, registrant, or representative by leaving a copy of such process or notice addressed to him at

the last address of which the Commissioner of Patents has been notified."

Among other things Section 16 provides "that the registration of a trade mark under the provisions of this Act shall be prima facie evidence of ownership."

And Section 21 is in this language:

"That no action or suit shall be maintained under the provisions of this Act in any case when the trade mark is used in unlawful business, or upon any article injurious in itself, or which mark has been used with the design of deceiving the public in the purchase of merchandise, or has been abandoned, or upon any certificate or registra-

tion fraudulently obtained."

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I have concluded that the ends of justice require that I should do as indicated in the opening parts of this opinion. Leave will therefore be given the defendants, if so advised, to answer on or before the April rules any part or parts of the bill which may be supposed not to be reached by the plea. If on or before the April rules an answer is filed as indicated, and if promptly there is filed a general replication, the testimony can easily be completed before the next November Term, when the whole case can be heard and determined. The consideration of questions involved in the submission to which we have referred will be postponed to await further action.

Answer. Filed April 1st, 1912.

These defendants, respectively, now and at all times hereafter, saving to themselves all and all manner of benefit of advantages or exception or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in said bill contained, for answer thereto, or to so much thereof as these respondents are advised it is material and necessary for them to make answer to, jointly and severally answering, say, in addition to, and in aid of the matters and things heretofore pleaded by them in bar herein:

I.

That as to whether or not complainant now is, or at any time heretofore, has been the sole or the exclusive owner of, or the owner of any interest in, a distillery situate in Woodford County, Kentucky, or anywhere else, and as to whether such distillery, if any, that may have been owned by complainant or not, has been named or known as the "Old Crow Distillery," these defendants have not sufficient information upon which to form a belief, and therefore, deny the same and require strict proof thereof.

And these defendants deny that this distillery, if any, owned, or claimed to be, or to have — owned, by complainant is, or ever was, the only distillery in the State of Kentucky that ever has been

designated by the name of "Crow" or "Old Crow."

These defendants deny that the product, if any, of said distillery, if any, owned by complainant, is made by complainant or controlled by complainant, or at all or any of the times mentioned in said bill

has been made by complainant or controlled by complainant; and deny that at all times, or at any time, mentioned in said bill, the product, if any, of said distillery of complainant, if any, has consisted of straight rye whiskey and straight bourbon whiskey, or straight rye or straight bourbon whiskey, and deny that to the said product, if any of said distillery of complainant, if any, there have been applied to words "Old Crow," or that said words used or applied as in complainant's said bill alleged in connection with the

said product, if any, of the said distillery, if any, of complainant, did or could constitute a trademark; deny that said words "Old Crow" were at all or any of the times mentioned in said bill applied at all to straight rye whiskey or straight bourbon whiskey or any whiskey produced at said distillery, if any, or complainant, or that said words were imprinted or branded upon wooden packages or any packages containing whiskey produced at said distillery, if any, of complainant, or that said words were imprinted upon labels or anything else, or that labels or anything else with the said words imprinted on them, were affixed to bottles or anything else containing whiskey produced at said distillery, if any, of complainant.

And deny that said words applied or used as alleged by complainant, do or ever did, constitute a trademark, or that the same now are or have been used by complainant or by complainant's predecessors, if any, or any of them, in commerce among the several states of the

United States of America, or in any commerce whatsover.

Defendants admit that on the 26th day of February, 1909, complainant did file in the Patent Office of the United States, application for registration of the words "Old Crow," as a trademark, under the Act of February 20th, 1905, and that on the 20th day of July, 1909, a document or certificate purporting to be a certificate of registration, based on said application, was issued to said complainant, from the Patent Office of the United States. But as to whether or not complainant duly prosecuted its said application for trademark and complied with the provisions of said Statutes and the regulation issued thereunder, all and singular, defendants are not informed and they therefore deny the same and require strict proof thereof.

Defendants deny that on the 26th day of February, 1909, or at any time prior thereto, or since, the complainant had the sole or exclusive ownership of said words "Old Crow," as a trade-mark for whiskey, by virtue of priority of application, or use, or otherwise, or

ownership at all.

Defendants deny that the complainant on the 26th day of February, 1909, or at any time prior thereto, or on the 20th day of July, 1909, or at any time prior thereto, was entitled to registration of said words "Old Crow" as a trademark for whiskey.

And defendants state that complainant on the 26th day of February, 1909, and at all times prior thereto, well knew that it was not the owner of the words "Old Crow," as a trademark for whiskey, or entitled to register same as a trademark for whiskey, Defendants further state that on the 10th day of July, 1908, there was entered in the Circuit Court of the United States for the Eastern Division of

the Eastern Judicial District of Missouri, an order and decree in the case of W. A. Gaines and Company, the complainant herein, against Max Kahn, Administrator of the Estate of A. M. Hellman, deceased, and Moritz Hellman, defendants, dismissing the amended bill in equity theretofore filed therein by said complainant in said cause, for want of equity; that said suit directly involved the right to use, and the ownership of, the words "Old Crow," as a trademark for whiskey, and said suit was, upon apt pleadings and proof, contested vigorously by all the parties thereto, to-wit, between the complainant and defendants therein, with whom these defendants are in privity of contract, and that said order of July 10, 1908, was entered pursuant to the mandate of the United States Circuit Court of Appeals for the Eighth Circuit, duly rendered in said cause on appeal to said court of Appeals from said Circuit Court; and that said Circuit Court of Appeals, in passing upon said cause on appeal, considered and determined said suit upon its merits, and found said complainant was not entitled to any relief by way of restraint of infringement of trademark rights against the defendants in said cause, for the reason that the evidence showed that the predecessors in business of the original defendants in that suit, had adopted the words "Old Crow," as a trademark for whiskey, prior in time to the predecessors in business of complainant, which said opinion is reported at length in the Federal Reporter, volume 161 at pages 495 and 502, inclusive, 195

and the U. S. C. C. A., Reports, volume 88 at pages 437 to 444, inclusive, to which reference is hereby made; and the matters and things therein decided were and are the same cause of

action attempted to be litigated herein.

That said order and decree was the final order and decree in said case, and in any by said Order and decree, th-right of the defendants in said cause to use the words "Old Crow," as a trade mark for whiskey, as against complainant, was determined in favor of said defendants and against complainant, was determined in favor of said defendants and against complainant, and the ownership of said words "Old Crow," as a trademark for whiskey, and the exclusive right to use them upon whiskey, asserted by complainant in its amended bill in said suit and denied by defendants in said suit, was determined adversely to complainant and in favor of defendants, in said suit, with whom defendants in this suit are, and as herein mentioned, have been, in privity of contract.

Defendants aver that thereafter, on the 5th day of October, 1908, complainant applied to the United States Supreme Court for a writ of certiorari directed to the said court of Appeals in said cause, and that on the 19th day of October, 1908, said application was denied, and thereupon the decision of the Circuit Court of Appeals became, was and is final, and the said order and decree of the Circuit Court entered on the 10th day of July, 1908, as aforesaid, became, was and

is final.

Defendants state that all of said matters and things were well known to complainant at the time they occurred, and at all times thereafter hitherto, including the 26th day of February, 1909, that

Complainant in filing its said application for trademark in the United States Patent Office on February 26th, 1909, as aforesaid. was represented by James L. Hopkins, Esquire, as attorney of record; that the said James L. Hopkins was also counsel for complainant throughout the said suit in the Eastern District of Missouri, both in the Circuit Court and in the Court of Appeals, and was also its counsel in the United States Supreme Court; that said James L. Hopkins is, and at all times has been, complainant's

counsel in this suit, and for many years last past has been complainant's counsel continuously; that all of said matters and things were well known to said James L. Hopkins and to com-

plainant.

Defendants further show to the court that complainant is support of its said application or statement of registration filed in the United States Patent Office on February 26th, 1909, an affidavit duly made by Edson Bradley, Vice President of complainant, and filed therewith, said statement and affidavit being in words and figures as follows:

## Statement.

To all whom it may concern:

Be it known that W. A. Gaines and Company, a corporation duly organized, existing, and doing business under and by virtue of the laws of the State of Kentucky, and having its principal office and place of business in the city of Frankfort, in the County of Franklin. in said State of Kentucky, has adopted and used the trademark which consists of the words "Old Crow."

Said trademark has been continuously used in the business of ourselves and our predecessors since, to-wit, January 1st, A. D., 1835.

The class of merchandise to which the trademark is appropriated is Class 49, Distilled Alcoholic liquors, and the particular description of goods comprised in said class upon which the said trademark is used, in straight bourbon and rye whiskey.

The trademark is displayed on the packages, containing said whiskey by being imprinted upon labels, or stamped, printed, or branded

upon wooden containers.

W. A. GAINES & COMPANY, By EDSON BRADLEY, Vice-President.

Declaration.

CITY OF WASHINGTON. District of Columbia, ss:

Edson Bradley, of lawful age, being duly sworn, deposes and says that he is vice president of the corporation (W. A. Gaines & Company), the applicant named in the foregoing statement: that he believes the foregoing statement is true; that he believes said corporation is the owner of the trad ark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said

trademark, either in the identical form, or in any such near resemblance thereto as might be calculated to deceive; that said trademark is used by said corporation in commerce among the several States of the United States, and between the United States and foreign nations, and particularly between the States of Kentucky and New York, and between the United States and Great Britain; and that the description, drawing and specimens presented truly represent the trademark sought to be registered.

EDSON BRADLEY.

Subscribed and sworn to before me this 15th day of February, A. D. 1909.

> A. M. PARKINS, Notary Public for the District of Columbia.

Defendants further state that at the time said affidavit was executed, and at the time said application was filed, complainant was not the owner of said trademark; that another persons, firm or corporation had the right to use the words "Old Crow," as a trademark in the identical form in which complainant therein sought to have them registered, and in other forms so nearly resembling same as to cause confusion, or be calculated to mislead or deceive, towit, the Hellman Distilling Company, a party defendant in the said Missouri, suit; that complainant and its predecessors in business had not used the words "Old Crow," in their business continuously since 1835, but, at the most, from 1870 or 1867, and that the predecessors in business of the Hellman Distilling Company had used said words as a trademark for whiskey continuously from 1862 on; that all of said matters and things were well known to complainant and to said Bradley, its vice president, on said days, and long prior thereto, had been known to them and to each of them, and to complainant and all of its officers, agents and managers.

Defendants further aver that said affidavit was made, by 198 said Bradley, acting for and on behalf of complainant, and said application for registration was filed by complainant with full knowledge of all and singular the said rights of the Hellman Distilling Company to use the words "Old Crow," as a trademark for whiskey, and of all other facts and things heretofore stated, and that said application was not filed or prosecuted in good faith, and that complainant has not come into this court of equity with clean hands, and that complainant is entitled to relief based upon said registration, and that said registration, and that said registration is null and void as against these defendants, who are in privity of contract with said Hellman Distilling Company, and said registration was fraudulently obtained by complainant, and complainant is entitled to no relief based thereon under said statute, but - the terms and provisions of said statute, and the 21st section thereof, complainant is precluded from maintaining any suit or action based upon said registration obtained as aforesaid, and they plead and rely upon said statute in such cases made and provided.

case.

And for another and further defense, these defendants aver that said registration was produced by complainant contrary to the provisions of Section 5, paragraph b of said Act of February 20, 1905, in that said mark as sought to be registered by complainant, so nearly resembles a known trademark, owned and in use by another, to-wit, the Hellman Distilling Company and its predecessors in business and those in privity with it, and appropriated by said Hellman Distilling Company, its predecessors in business and those in privity with it, to the same class of merchandise, to-wit, whiskey, as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers; and that all and singular said facts were well known to complainant when it filed its said application and prosecuted same and obtained said registration, and said registration is contrary to the said provisions of said Acts and is null and void.

And for another and further defense, these defendants show to the

court that said complainant and its predecessors in business have heretofore registered in the United States Patent Office at Washington, the words "Old Crow," or variations thereof, of which the words "Old Crow" were a substantial and distinguishing feature, as a trademark for whiskey, four times, namely; on December 13, 1870, No. 102, on April 11, 1882 (No. 9,278), on June 28, 1904, (No. 42,419), and on July 20, 1909, registration averred in bill of complaint, (No. 74,537); that the registration of June 28, 1904, was obtained upon an application filed June 8, 1904, by the complainant through said James L. Hopkins, as its attorney; that a controversy had arisen prior to said date of said application between this complainant and the firm of A. M. Hellman & Company, as to the right of said A. M. Hellman & Company to the use of the words "Old Crow" as a trademark for whiskey: that during said contraversy, and while said controversy was pending, all of which complainant well knew, said registration of June, 1904, was applied for and obtained; that after said litigation in the Missouri case had terminated, as aforesaid, complainant filed its said application for new registration on February 26, 1909; that in, to-wit, the month of February, 1909, defendant Rosenfeld entered into contract with the Hellman Distilling Company for bottling in bond under the trademark "Old Crow" of the Hellman Distilling Company, of whiskey of said Hellman Distilling Company, owned and made by it, or by its predecessors in business, and located in warehouse of the defendant Rock Spring Distilling Company, leased to the defendant Rosenfeld, at Owensboro, Kentucky: that at the time of entering into said contract, defendants did not know that complainant had filed an application for registration of the words "Old Crow" as a trademark for whiskey, or that complainant contemplated doing so, and did not know that complainant had done so until they were served with subpænas in this

Defendants further aver that after entering into said contract with the said Hellman Distilling Company, defendants did bottle in bond said whiskey of said Hellman Distilling Company under the Hellman Distilling Company's said trademark "Old 200 Crow," and shipped same to the Hellman Distilling Company at St. Louis; that thereafter, on the 24th day of May, 1909, still being ignorant of said application filed by complainant as aforesaid, defendants heard that complainant had raised some objection to the bottling in bond of said whiskey by the defendants; that thereupon, out of an abundance of caution, and in order that no injustice might be done, defendants wrote and mailed a letter to complainant, in words and figures as follows:

Messrs. W. A. Gaines & Co., Frankfort, Ky.

Gentlemen: A rumor through a reliable source has reached us that you are contemplating an action against us for infringement, etc., because of the use of the "Old Crow" label on whiskey belonging to A. M. Hellman and Co., and Hellman Distilling Company, withdrawn from bond, tax paid for them, to be bottled in bond at our bottling warehouse.

We have no intention, wish or purpose to infringe upon your rights or any one's, or do aught that would be unfair to any one in

the conduct of our business.

For each of the several years past (spring 1904 to spring 1909) Messrs. A. M. Hellman and Company and their successors, the Hellman Distilling Co., St. Louis, Mo., have had made a crop of whiskey at our distillery under their name as distillers, and when withdrawn from bonded warehouse, to have their trade brand put on the commercial head, and also to have same bottled in bond under their trademark or label.

They directed that some of their whiskey be withdrawn taxpaid, for bottling in bond, put in their "Old Crow" cases, with their "Old Crow" labels on the bottles, stating that the controversy with you in regard to their right to use their "Old Crow" brand and labels had been determined in their favor by the United States Court of Appeals, with a copy of the court's opinion for our in-

formation.

After due and careful consideration of the decision and all facts in the case, we are advised by a special and general counsel that Hellman and his successors have the right to use the "Old Crow"

label such as they ask to have placed on the bottles of whiskey

201 bottled in bond at our distillery.

That we may perform our duty as per the terms of our contract with A. M. Hellman and Company and the Hellman Distilling Company, and without infringing on your rights or doing anything unfair to you, we ask what objection you have to the label, etc., being used in the manner mentioned.

Very truly yours,

## ROCK SPRING DISTILLING CO., Per SILAS ROSENFELD, Treasurer.

Defendants further aver that complainant received said letter and wholly neglected and filed to answer it; that thereupon, defendants under date of June 7th, 1909, wrote and mailed a letter to complainant, in words and figures as follows:

June 7, 1909.

Messrs. W. A. Gaines & Co., Frankfort, Ky.

Gentlemen: On the 24 ult, we addressed you (a copy of the let enclosed), and being without any acknowledgment of the receby you of the letter, inquire if it came to your hands.

Very truly yours,

ROCK SPRING DISTILLING CO., Per J. D. S.

Defendants further aver that there was contained in the enveloped in which said letter was mailed, a copy of said letter of May 1909; that complainant received said letter of June 7, 1909, a said copy, and wholly failed, neglected and omitted to answer san and did not communicate with the defendants or either of the in any way, until this suit was filed, on to-wit, the 28th day September, 1909.

Defendants further aver that complainant omitted and failed respond to, or answer, said letters and each of them for the reas that its said application for registration was then pending, and of

tificate of registration had not at that time been issued 202 complainant; that complainant did not secure said regist tion in good faith, and did not file this suit in good faith, a complainant has not come into this court with clean hands and

not entitled to any relief at the hands of this court.

Defendants further show to the court that the said bill of co plaint herein was sworn to by complainant's secretary and treasur George F. Berry, on, to-wit, the 13th day of September, 190 that said George F. Berry then was, and now is, and for more th twenty-five years last past, has been secretary of complainant, a then was, and now is, and for more than seven years last past l been a stockholder in and secretary and treasurer of complainar that complainant and said Berry on the said 13th day of Septemb 1909, and at all other times herein mentioned prior thereto, we familiar with, and knew the nature of the decision rendered by t United States Circuit Court of Appeals, as aforesaid, and the ore and decree entered in the said United States Circuit Court, as afo said, in the said suit by complainant in Missouri, and with the sa litigation in Missouri, and the other orders, decisions, and decr of the said courts hereinbefore set out, and of the said determinati of the claims of complainant to the exclusive use of the words "C Crow," as a trademark for whiskey, as against A. M. Hellman a Company and the Hellman Distilling Company, adversely to co plainant and in favor of said A. M. Hellman & Company and t Hellman Distilling Company, and on the said 13th day of Septe ber, 1909, and long prior thereto, as well as thereafter, compla ant and said Berry knew that the words "Old Crow" had been la fully applied to whiskey other than that produced by complains and its predecessors, and distilled by them at their distillery in t county of Woodford, in the State of Kentucky, to-wit, the firm A. M. Hellman & Company, or the Hellman Distilling Compar and defendant Rosenfeld; and at all the said times well knew that complainant was not the owner or the exclusive owner, or the sole owner, of the words "Old Crow," as a trademark for whiskey.

Wherefore defendants show to the court that complainant had not come into this court of equity with clean hands, and is not entitled to any relief at the hands of this Court.

Defendants further show the court that said proceedings before the Commissioner of Patents, undertaken and prosecuted by the complainant, as aforesaid, were purely ex parte; that these defendants, and neither of them, were parties to said proceedings, and did not participate in any way in said proceedings, and had no knowledge of said proceedings until long after they were completed, and until after this suit was filed; and said Hellman Distilling Company was not a party and did not participate therein.

Wherefore, the premises considered, defendants show the court that said proceedings were null and void, as to these defendants, and

to each of them.

Defendants further show to the court that the said registration obtained by complainant, as aforesaid, in said proceedings to which defendants were not parties and in which they did not participate, and to which the said Hellman Distilling Company was not a party and in which it did not participate, did not and could not affect the right established in favor of said Hellman Distilling Company, and those holding, or who might hold, under said Hellman Distilling Company, by the said mandate of the said United States Circuit Court of Appeals, and the said final decree and order entered in the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, as aforesaid, and that said Act of Congress and the said registration thereunder, if construed as complainant in and by its said bill herein seeks to construe them, would deprive defendants of their property without due process of law, and would be, and is, unconstitutional and void.

And these defendants deny that the said words were duly registered as a trademark to complainant or its successors or assigns and deny that said alleged trademark, as registered (if said alleged trademark was, in point of fact, registered, which defendants deny) is being, or for many years past, or for any period, has been used by complainant in commerce among the several states as a trade-

204 mark for straight rye whiskey or straight bourbon whiskey, or for whiskey at all.

#### III.

Defendants admit that the Rock Springs Distilling Company is, and for many years last past, has been a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Kentucky, and that its principal office and place of business is in the City of Owensboro, county of Daviess, in said state of Kentucky, and is the owner of a distillery for whiskey situate in the said county of Daviess, and known as Distillery No. 18 in the Second Internal Revenue District in the State of Kentucky; that defendant

Silas Rosenfeld is, and for, to-wit, seven years last past has been, engaged in the operation of the said distillery owned by the defendant Rock Spring Distilling Company, as aforesaid, but defendants deny that defendant Rosenfeld has operated said distillery under a license granted to him for the purpose of operating said distillery by said Rock Spring Distilling Company, or under any license, but charge the facts in this behalf to be that heretofore, to-wit, on the day of —, 1903, defendant Rock Spring Distilling Company leased to defendant Rosenfeld its said Distillery for the purpose of distilling whiskey from grain in the same way and by the said process as the Rock Spring Distilling Company had theretofore been distilling it. all in a strict compliance with the United States Internal Revenue laws and the Regulation issued thereunder; and defendant Rosenfeld thereafter continued, and up to and including the present time has continued, to operate said distillery under said laws, and in compliance with the provisions of the United States Internal Revenue laws and regulations, distilling whiskey from grain in the way and by the process theretofore used by defendant Rock Spring Distilling Company, which company prior thereto had operated said distillery.

### IV.

Defendants deny that at all times, or any times, since the first production, if any, of the said whiskey, if any, by complainant's predecessors, if any, or any of them, the alleged or so-called "Old Crow" whiskey, if any, of complainant's predecessors, if any, or any of them, has been a regularly distilled whiskey, or whiskey of any kind, known as straight whiskey, or as being the genuine product of distillation.

Defendants admit that in the year 1897 the Congress of the United States enacted an act of March 3rd, 1897, "An Act to allow the Bottling of Distilled Spirits in Bond," but as to whether or not in the year 1897, or any time, complainant availed itself of the provisions of said act, or in the year 1897, or any other time, began the bottling of said alleged or so-called "Old Crow" whiskey, or any whiskey in bond, or as to whether or not since the beginning said bottling in bond, as aforesaid (if, in point of fact, complainant did begin bottling in bond said whiskey, or any whiskey), complainant has maintained same, defendants have not sufficient information upon which to form a belief, and therefore, deny same and require strict proof thereof.

Defendants deny that the said alleged or so-called "Old Crow" whiskey, if any, bottled in bond by complainant, if any, at any time was, or has remained, or now is, the only "Old Crow" whiskey bottled in bond in the State of Kentucky or elsewhere; and defendants deny that the said alleged or so-called "Old Crow" whiskey, if any, bottled in bond by complainant, if any, has had or still has, an extensive sale throughout the United States of America or any portion thereof, or with foreign nations or any of them; defendants deny that complainant's said alleged or so-called "Old Crow" whiskey, if any, when bottled in bond, if any, is known or called for as "Old Crow"

Bottled in Bond"; or that said alleged or so-called "Old Crow" whiskey, if any, of complainant bottled in bond, if any, now commands, or has ever commanded, a higher market price, or a high market price, or that it is, or has ever been, a whiskey of the highest type or class, or of a high type or class, or made from the choicest ingredients, or from choice ingredients, or is or ever has been of the highest grade or quality or a high grade or quality of whiskey made in the state of Kentucky or elsewhere; defendants deny that complainant has caused to be affixed its said

alleged registered trademark consisting of the words "Old Crow" or any trademark consisting of the words "Old Crow" or any other words, to each package, or any package, of the said so-called or alleged "Old Crow" whiskey, if any bottled in bond by complainant, if any, produced or sold by complainant, if any, or that complainant has produced or sold any whiskey contained in packages marked as aforesaid; defendants deny that any Bourbon whiskey or other whiskey, if any, produced or bottled or sold by complainant, has contained the said words "Old Crow" imprinted or affixed to any package containing same in script, type, or otherwise, or that any print, or representation of the words "Old Crow," whether identical with, or similar to, the said words as contained in the alleged certificate of registration, if any, or otherwise, were affixed to, or printed upon, any bottle or package or other holder containing any whiskey, if any, produced by complainant.

## V.

Defendants deny that they, or either of them, knew or had full knowledge or any knowledge on the 21st day of July, 1909, or any time before or since, of the alleged rights, or any right, of complainant in and to the words "Old Crow" in connection with whiskey, as complainant has recited same in its bill herein, but, on the contrary, these defendants charge the fact to be that neither on the 21st day of July, 1909, or at any time theretofore, did complainant have any exclusive right in or to the words "Old Crow" in relation to whiskey, or any right to the words "Old Crow" in relation to whiskev: and particularly as against the Hellman Company, defendant Rosenfeld's privy herein, complainant had no exclusive right to the words "Old Crow" in connection with whiskey, or any right whatsoever, all of which was well known to these defendants on the said 21st day of July, 1909, and had been known to defendants, and each of them, long prior thereto, and was well known to complainant on the said 21st day of July, 1909, and for many years prior thereto.

These defendants aver and allege the truth in relation to said matters to be that, continuously, from the year 1862 down to and including the year 1909, and to the present date, the said Hellman Distilling Company, and its predecessors in business have used the words "Old Crow" and variations thereof of which the word "Crow" and the words "Old Crow" have formed a substantial

and significant feature, and the figure of the bird crow, continuously as a trademark for whiskey owned and sold by them, respectively. and that said use of the said words and said figure as a trademark for whiskey, was long prior to the attempted use of any similar or identical word, words or symbol by complainant or its predecessors in business; and that said facts and things, all and singular, and the right of the said Hellman Distilling Company to use the said word, words, and symbol as a trademark for whiskey, free of any charge or claim of infringement on the part of complainant, was fully contested, litigated, determined and adjudicated in the said suit in the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, as more particularly described and averred in the joint plea of these defendants heretofore filed in this cause on the 7th day of March, 1910, to which reference is hereby made; and these defendants aver that they are in privity of contract with the defendants in that suit, as set out in said plea, and that said determination and judgment in said suit avails these defendants against complainant, and by reason thereof complainant's suit herein against these defendants, and each of them, should be dismissed for want of equity.

## VI.

Defendants deny that the words "Old Crow" have never been lawfully applied to any whiskey but that produced by complainant, if any, or complainant's predecessors, if any, or any of them, or to whiskey, if any, distilled by complainant or complainant's predecessors, if any, or any of them, at their distillery, if any, in Woodford County, Kentucky, or elsewhere.

208 VII.

Defendants deny that any whiskey bottled, labeled and cased by them, or either of them, marked and branded with the words "Old Crow" was so marked or branded for the purpose, or with the intent to mislead or deceive the public or consumers of whiskey or any one, to purchase said whiskey, or any of it, in the belief that it was whiskey distilled by complainant, or bottled in bond by complainant, or that the public or consumers of whiskey have, or that any one has, by the said act of defendants, or either of them, or by any act, been led into purchasing the said whiskey, or any of it, under the false belief, or any belief, that it was the whiskey of complainant, or that by means of any fraud or imposition upon the public by means of, or through any, instrumentality, defendants, or either of them, have sold large quantities of whiskey, or any whiskey, marked or branded with the words "Old Crow," or otherwise.

Defendants further deny that they, or either of them, have infringed or appropriated complainant's said alleged registered trademark, or that they have been guilty of, or have committed any wrongful acts against complainant, or that they have falsely marked or branded any whiskey, or that any act or acts of defendants, or either of them, has resulted in injury, to complainant's business or the good will thereof, or that any act of defendants' or either of them, was done wantonly or maliciously or willfully against complainant, or that complainant has been damaged by defendants or either of

them in the sum of \$20,000 or in any sum.

Defendants deny that any act or acts of defendants, or either of them, will jeopardize complainant's right, if any, in and to its said alleged registered trademark "Old Crow" or will ultimately destroy same or render same of no value; and defendants deny that complainant has any rights in or to the words "Old Crow," or that any rights claimed by complainant in or to the words "Old Crow" are of any value whatsoever.

209 VIII.

Defendants deny that they, or either of them, have sold or caused to be sold any whiskey bottled in bond or otherwise marked or designated with any words infringing complainant's said alleged trademark, or that they, or either of them, have made or caused to be made, or have on hand within this district, any whiskey bottled in bond or otherwise, which infringes or violates any rights of complainant whatsoever; and defendants deny that they, or either of them, have a large quantity of labels, or any labels, bearing any mark which infringes or violates any rights of complainant, or that they, or either of them, have made large profits or advantages from any of the aforesaid acts; or that any act of defendants or either of them has had, or unless restrained by this court will have, the effect to encourage or induce others to venture to infringe said alleged registered trademark, or to disregard complainant's alleged rights to same, or to cause complainant additional expense, or any expense, in connection with its alleged rights,

But defendants aver the truth in this behalf to be that defendant Rosenfeld, under his contract with the said Hellman Distilling Company, has received a reasonable compensation for his trouble and expense in bottling, labeling, and casing, under and in accordance with the United States Internal Revenue Laws and Regulations relating to bottling in bond, the whiskey of the Hellman Distilling Company, selected and contracted for, as aforesaid, — that he has violated no

right of complainants whatsoever.

## IX.

Defendants aver that the said words "Old Crow," alleged to have been registered by complainant in the United States Patent Office, as a trademark for whiskey, as complainant's predecessors have sought and attempted to adopt and use same in connection with whiskey, cannot constitute a trademark; that complainant and complainant's predecessors sought to adopt said words in connection with whiskey as a personal name of one James Crow, and as indicating some

210 alleged method or process or personal skill of the said James Crow. But defendants further aver that said words "Old Crow" do not, in point of fact, indicate any process of James Crow or any one else, or any particular method of making whiskey.

Defendants deny that complainant is without adequate remedy save in this court, or that any act of defendants, or either of them, will be a damage to complainant or will produce irreparable damage

to complainant.

Wherefore, these defendants, having fully answered, confessing, traversing, avoiding and denying all the matters of the said bill of complaint material to be answered, according to their best knowledge and belief and having pleaded in bar herein, as hereinbefore noted, humbly pray this honorable court to enter its decree that these defendants, respectively, be hence dismissed with their reasonable costs and charges in this behalf sustained, and for such further and other relief in the premises as to this Honorable Court may seem meet and in accordance with equity.

LUTHER ELY SMITH, SWEENEY, ELLIS & SWEENEY, Solicitors and of Counsel for Defendants,

Replication. Filed May 21st, 1912.

This replicant, saving and reserving unto himself all and all manner or advantage and benefit of exception which may be had and taken to the errors, uncertainties, and insufficiencies of the answer of the defendants herein, for replication thereunto says that it will maintain and prove its said Bill of complaint herein to be true, certain and sufficient in law to be answered unto by the said defendants and that the answer of said defendants is untrue and insufficient in law; and it renews its prayer for relief as in its Bill of Complaint herein contained.

D. W. LINDSEY, E. F. TRABUE, JAMES L. HOPKINS, Solicitors and of Counsel for Complainant.

Solicitors and of Counsel for Complainant.

211 Order Entered by Judge Walter Evans September 30th, 1912.

This day came the parties by their respective counsel and filed their written stipulation herein, which is as follows:

"It is hereby stipulated between the complainant and defendants in the above entitled cause, that upon the issues raised by complainant's bill, defendants' answer, and complainant's replication to said answer, the following proof shall be considered as in evidence, subject to objection by either side:

1. All affidavits and exhibits offered by either side upon the original motion for preliminary injunction by complainant in this

case.

Depositions taken upon the issues raised by the joint plea of defendants to complainant's bill and complainant's replication to

said joint answer.

3. The printed record as used in the United States Supreme Court in the case of W. A. Gaines vs. Kahn, et al. in support of petition for writ of certiorari, filed in the United States Supreme Court in October —, 190—.

4. The original exhibits offered in evidence by either party in the case of W. A. Gaines & Company vs. Kahn, et al., No. 5096 in the United States Circuit Court for the Eastern Division of the East-

ern Judicial District of Missouri.

5. It is understood that any evidence or exhibits covered by stipulation in the foregoing items, are also included in this stipulation.

EDMUND F. TRABUÈ, DAVID W. LINDSEY, JAMES L. HOPKINS, Solicitors for Complainant. W. T. ELLIS, LUTHER ELY SMITH, Solicitors for Defendants."

212. Order of Submission on Final Hearing. Entered on January 17th, A. D. 1913.

This cause coming on for final hearing the complainant read upon its behalf the following:

The Bill;

Exhibits accompanying the bill;

The demurrer;

Joint plea of the defendant; Deposition of George F. Berry; Deposition of Thomas J. Jones;

Record in the case of Kahn, et al., vs. W. A. Gaines & Co., filed in the United States Circuit Court of Appeals for the eighth Circuit, No. 2700;

The motion for temporary injunction with affidavits and exhibits in support of same;

Also the same matters named in the list furnished by these respondents,

The defendant read in its behalf the following:

Complainant's bill;

Joint Plea of defendants and replication to same; Joint answer of defendant and replication to same;

Stipulation with reference to proof filed July 24, 1912;

Affidavit of George F. Berry in chief, in behalf of complainant, upon motion of a preliminary injunction;

Affidavit of George F. Berry, in rebuttal, in behalf of complain-

ant, upon motion for a preliminary injunction;

Affidavit of Edson Bradley, upon motion for preliminary injunction;

Record in the case of Kahn, et al., vs. W. A. Gaines & Co., in the United States Circuit Court of Appeals for the eighth Circuit, No. 2700;

The following exhibits offered by defendants in opposition to

motion for preliminary injunction:

Brief in the United States Court. ("Pearcy's Exhibit A.")

Brief in the United States Circuit Court of Appeals ("Pearcy's Exhibit B.")

Brief and motion to stay issuance of mandate in the United States Circuit Court of Appeals. ("Pearcy's Exhibit C.")

Brief in the United States Supreme Court. ("Pearcy's Exhibit D.")

Also petition for writ of certiorari in the United States Supreme Court. ("Pearcy's Exhibit E.")

Also.

- 1. One bottle Old Crow distilled by W. A. Gaines & Company, bottled by Steinwender Sellner Mercantile Company, St. Louis, Missouri, at Lindell Buffett, 712 Washington Avenue, St. Louis, Missouri, marked Pearcy's Exhibit "F," bearing the words "A Blend" on the label.
- 2. One bottle Old Crow distilled by W. A. Gaines & Company bottled by H. L. Griedsedick Distilling Company, St. Louis, Missouri, at Saloon of Carl E. Eberth on the north side of Chestnut street between Broadway and Fourth Streets, St. Louis, Missouri and marked Pearcy's Exhibit "G," bearing the words "A Blend" on the label.
- 3. One bottle Old Crow distilled by W. A. Gaines and Company bottled by J. Simon and Sons, St. Louis, Missouri, at Wolff-Wilson Drug Co., 6th and Washington Avenue, St. Louis, Missouri, marked Pearcy's Exhibit "H," and bearing the words "A Blend," on the label.
- 4. One bottle Old Crow distilled by W. A. Gaines & Company bottled by G. M. Riesmeyer Distilling Company, St. Louis, Missouri, at Brinkman's Cottage Bar, Broadway and Lucas, St. Louis, Missouri, and marked Pearcy's Exhibit "I" and bearing the words "A Blend" on the label.
- 5. One bottle Old Crow distilled by W. A. Gaines and Company bottled by Davied Nicholson Grocery Company, St. Louis, Missouri, at Lindell Buffett, 712 Washington Avenue, St. Louis, Missouri, and marked Pearcy's Exhibit "J" and bearing the words "A Blend," on the label.

The following deposition, taken by defendants in support of joint plea of res adjudicata and duly filed in this cause, together with exhibits offered in connection with each deposition, namely, the deposition- of:

J. D. Shortell;

Fred A. Hugho; Moritz Hellman;

Silas Rosenfeld;

A. Hirsch;

Also the depositions taken by complainant in opposition to defendants' plea, as follows:

George F. Berry.

The opinions of the court rendered herein on the following dates:

February 2, 1910; May 2, 1910;

February 24, 1912;

Defendants' Exhibit Glass Sign.

"Hellman's Exhibit A" in opposition to motion for preliminary injunction, being opinion rendered by the U. S. Circuit Court of Appeals dismissing the case of W. A. Gaines & Co. vs. Kahn, et al., ease No. 2700 in the Eighth Circuit.

"Hellman's Exhibit B" in opposition to motion for preliminary injunction, being order of United States Circuit Court of Appeals denying motion of W. A. Gaines & Company to stay issuance of

Mandate in said cause.

"Hellman's Exhibit- C & D" in opposition to motion for preliminary injunction, being certified copies of record entr-es, showing application for and denial of writ of certiorari in the United States

Supreme Court in said cause.

"Hellman's Exhibit E," in opposition to motion for preliminary injunction, being supplemental bill of W. A. Gaines & Company vs. Hellman Distilling Company, together with motions, orders, injunctions and record entries of same in connection therewith in Missouri case.

"Defendants' Exhibit" being a mandate entered in the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri on July 10, 1908. (See printed copy respond-

ents' statement of facts proven under plea, pages 42-44.)

The case was argued by counsel for the respective parties and the court not being sufficiently advised thereof takes time.

Final Decree. Entered by Judge Walter Evans February 7th, 1913.

This cause having heretofore, to-wit, on January 17th, 1913, been heard upon the bill of compiaint and the plea of the defendants thereto and the issues made thereon, and upon the answer of the said defendants and the issues made by the replication thereto and upon the testimony adduced by the respective parties, was argued by counsel, and upon consideration of the same, and the court being sufficiently advised, delivered its opinion in writing, which is filed and made part of the record. In accordance with said opinion it is ordered, adjudged and decreed by the court as follows, namely, first, that the judgment rendered by the Circuit Court of the United States for the Eastern District of Missouri at St. Louis, Missouri, on the 10th day of July, 1908, in the cause theretofore commenced in said court by the said W. A. Gaines & Company as complainant against Abraham M. Hellman and Moritz Hellman,

partners doing business as A. M. Hellman & Company, and as there-

after amended by including as a defendant Max Kahn, as the administrator of Abraham M. Hellman, who died pending said cause and which judgment is set forth and pleaded by the defendants Rock Spring Distilling Company and Silas Rosenfeld in estoppel of the complainant's right to the relief sought herein and in bar of this action, does estop and bar the complainant from any relief it has sought by its bill of complaint herein on account of any alleged in fringement or use by the said defendants or either of them of the trade mark Old Crow in connection with whiskey of any grade of character, the court being of opinion and now adjudging that by the judgment so pleaded it had in substance and effect been adjudge and determined that the said W. A. Gaines & Company was not the owner of or entitled to use the said trade mark to the exclusion of the said A. M. Hellman & Company, this court being also of opinion and now adjudging that the Hellman Distilling Company in du course so far became and now is the owner of the right to use said trade mark in connection with whiskey as to entitle the said Rock Spring Distillery Company and Silas Rosenfeld, who are its agent and who as such have used the said trade mark on whiskey, to th protection of the estoppel and bar of the former judgment, and accordingly and for that reason the bill of complaint so far as i seeks any relief for any infringement of said trade mark Old Crow in connection with its use on whiskey, should be and is dis

missed; and, second, that the registration of the trade mar Old Crow obtained by the complainant in the office of the Commissioner of Patents on July 20th, 1909, in the way and manne shown by the testimony could not and did not invalidate or nullif the judgment aforesaid rendered long previously by the Circuit Court of the United States for the Eastern District of Missouri, no did said registration, so obtained, give or confer upon the complain ant any right or title to said trade mark against the said defendant in this action or their principal, under whose rights and by whose authority the said defendants have used said trade mark; third, the as to all causes of action set forth in the bill of complaint, other than the infringement of the trade mark Old Crow registered a aforesaid in the office of the Commissioner of Patents, the bill shoul be and it is dismissed for want of equity; and, fourth, that the de fendants Rock Spring Distilling Company and Silas Rosenfeld d have and recover of the complainant, W. A. Gaines & Company the costs herein expended as the same may be properly taxed by the Clerk, and they may have execution therefor in due course.

Opinion on Final Hearing. Delivered by Judge Walter Evan February 7th, 1913.

From time to time as questions arose during the progress of the case we expressed our views upon them in opinions then file Those opinions, if it be necessary or desirable, can be referred to it connection with what we may now say without repeating them.

The complainant, a corporation, by its bill, alleges an infring

ment by the defendants of a certain trade mark, which on the 20th day of July, 1909, had been admitted to registration in the office of the Commissioner of Patents under the provisions of the Act of February 20th, 1905. The trade mark is familiarly known as Old Crow, and is described in the certificate of registration as being used upon "Straight Bourbon and Rye Whiskey."

Upon the allegations of the bill an injunction was prayed for to-

gether with other relief.

On May 2nd, 1910, the Hellman Distilling Company came 217 and tendered and asked leave to file a petition, in which it alleged that it was the transferree and successor of A. M. Hellman & Co., who long previously to the transfer to the petitioner had owned the trade mark referred to in the bill of complaint; that the defendants, Rock Spring Distilling Co., and Silas Rosenfeld were petitioners' agents in Kentucky, and as such were using the trade mark; that it had undertaken to defend them in such use, and thereupon prayed that it might be admitted as a defendant in the suit for the purpose of making such defense. The court expressed then its opinion, (179 Fed. 545), that the petitioner could not, in the face of complainant's opposition, be made a defendant, but that any estoppel by the former judgment referred to in the petition and presently to be described, would, under the facts therein stated, be available for the defendants.

Thereafter the defendants interposed a plea to the effect that long before the registration of the trade mark by the complainant, the latter, on November 11th, 1904, had filed its bill of complaint in the Circuit Court of the United States for the Eastern District of Missouri, at St. Louis, against A. M. Hellman & Co., a firm composed of Abraham Hellman and Moritz Hellman, in which it alleged itself to be the owner and proprietor of the trade mark, Old Crow when used in connection with whiskey; and, charging that the defendants were infringing it, had sought an injunction against them to prevent such use; that both sides in that suit claimed ownership of the trade mark Old Crow; that after the death of Abraham Hellman, his administrator, Max Kahn, was made a defendant, and the issues of fact were made up in that case in due course of pleading, and that it was finally brought to trial in that court, whose judgment was rendered therein against said defendants who were enjoined from using said trade mark; that the defendants in said cause thereupon prosecuted an appeal from said judgment to the Circuit Court of Appeals for the Eighth Circuit, which court, after full consideration and argument, reversed, on February 27th, 1908, the decree of the Cir-

cuit Court and remanded the case with directions to the latter 218 court to dismiss the action for want of equity, and that the latter court had, by its decree, entered on July 10th, 1908, done as directed by the Circuit Court of Appeals. The defendants pleaded the final judgment in that cause in bar of the present action. When the plea was set down for argument and heard, the court in an opinion and judgment thereon, on May 2nd, 1910, held that the plea was sufficient in law. Instead of dismissing the bill the court

gave leave to the complainant to take issue on the plea, which was done. The Court also, in its opinion filed February 27th, 1912, stated its reasons for giving the defendants leave to answer such part of the complainant's bill as were not covered by the plea. This was done upon authorities cited in the opinion last referred to. The defendants, in the answer thus allowed to be filed, assailed the registration of the trade mark upon various grounds. At the final hearing the issues thus raised, alike upon the plea and upon the answer were heard and argued. As already stated, it will serve little or no purpose to restate the grounds of our former rulings, as the several opinions heretofore filed in the case, do that with a clearness quite summary of the essential facts as we find them may not be amiss in disposing of the plea.

Many years ago, probably in 1835, one James Crow, in Woodford County, Kentucky, began the use of the trade mark Crow or Old Crow in connection with bourbon whiskey of his own make. He continued the use of his trade mark until his death in 1855, at which time its use was discontinued. In 1867 one Mitchell, a former employe of Crow's, in the same or in a continguous locality in Kentucky, began the use of the same trade mark on whiskey. He did this on his own initiative and without having in any way inherited or purchased the right to use the trade mark from Crow or his heirs or representatives. It is, therefore, only from Mitchell's use of the trade mark, begun in 1867, that complainant's claim can come. But four years previously to the beginning of its use by Mitchell, namely, in 1863, the use of a similar trade mark was begun in reference to whiskey in St. Louis, Mo., by persons who have

219 transmitted their rights to the defendants. It was out of this general state of fact that the controversy arose which was adjudicated finally in the Circuit Court of the United States for the Eastern District of Missouri. Whatever may have been the merits of the controversy which that court determined in that case we are not to inquire, nor are we to inquire into the merits of the whiskey made or sold by either party thereto. The question we are to determine on this phase of the case is whether, in its essential elements, the title adjudicated in that case was the same as the one again attempted to be litigated in this action. When we attentively examine the record, the pleadings and the final decree in the former cause we cannot doubt that the essential question in dispute there was the same as that involved here. This being so, and the defendants and the Hellman Distilling Company having in due course succeeded to the rights of A. M. Hellman & Co., we hold that the plea has been established, and that it is a bar to the relief now sought as to the infringement of the alleged trade mark.

But the defendants in that cause were denied an injunction upon their cross-bill asking that relief, and it is insisted that that shows that neither themselves nor their successors have any rights in the trade mark inasmuch as the record shows that they dismissed their cross-appeal from that part of the judgment in that case. We have not been able to see how that effects the question here involved, because, whatever effect may be given the denial to defendants of the relief they sought in that action, it is certain that in the most impressive way it was adjudged that the complainant had no equity to the relief it there prayed. At most it might be said that the result of that litigation was to leave both parties to it, each of whom had used the trade mark for about forty years, free to use the trade mark as each pleased in connection with whiskey. Indeed it might probably be that the proper conclusion is that the effect would be to open up the use of the trade mark in connection with whiskey to the public generally, because no one party had acquired a right to its exclusive use since Crow's death in 1855. Which of the views thus indicated be right is immaterial. They are only suggested as illustra-

tions.

Again it is insisted by the complainant that it uses the 220 trade mark in connection with "straight" whiskey, while the defendants have heretofore used it in connection with "blends." The bill of complaint, as we shall see, charges a broader use. general doctrine, we apprehend, is that a trade mark used in connection with any class of things must apply to all the various species of grades of that class. It would be an endless task to differentiate the various grades or qualities of whiskey or any other article of merchandise and say to which one or more of them a trade mark was appropriated or applicable. Especially, we apprehend, would this be so in reference to whiskey, which has as great a variety of grades (extending from the very best to the very worst) as probably any article in commerce. Some of the authorities illustrating this view are Layton Pure Food Co. vs. Church & Dwight Co., 182 Fed. 35, 38, and authorities therein cited, and Collins Co. vs. Oliver Ames & Sons Corporation, 18 Fed. 561, 570.

Another question of vital importance is to be considered. whether the registration obtained by the complainant is effective and available to overthrow a judgment finally, and under the direction of the Circuit Court of Appeals, rendered by the Circuit Court previous to the registration of the trade mark. In an opinion delivered on February 27th, 1912, we endeavored to clearly indicate our views on this phase of the case and our reasons for supposing that it was never in the contemplation of Congress that such a registration, especially if obtained ex parte, should invalidate the solemn judgment of a court having jurisdiction. The controlling facts in this connection are that on February 27th, 1908, the opinion of the Circuit Court of Appeals was rendered in the former suit then styled Kahn, administrator, and others vs. W. A. Gaines & Co., 179 Fed. 496. After an application for a stay of the mandate was refused on July 18th, 1908, the Supreme Court, on October 19th, 1908, denied a petition for a writ of certiorari. On February 13th, 1909, Edson Bradley, describing himself as vice president of W. A. Gaines & Co., was sworn to a statement intended to be filed as the basis of an ap-

221 plication for the registration of the trade mark Old Crow on straight bourbon and rye whiskey. This statement and the accompanying petition were filed in the Patent Office on February 26th, 1909, about one year after the decision by the Circuit Court of Appeals. This latter circumstance may be most significant in connection with the fact that in the papers just referred to, and as amended later, the vice president stated under oath that W. A. Gaines & Company in the County of Franklin and State of Kentucky, "has adopted for its use a trade mark which consists of the words Old Crow, and that said trade mark has been used in the business of ourselves and our predecessors since, to-wit, January 1, 1835. The class of merchandise to which the trade mark is appropriated is class 49, distilled alcoholic liquors and the particular description of goods in said class upon which the said trade mark is used is straight bourbon and rye whiskey." The vice president also swore "that no other person, firm, corporation or association, to the best of his knowledge and belief, has the right to use said trade mark. either in the identical form or in any such near resemblance thereto as might be calculated to deceive." As we have seen, it is altogether incorrect to say that the complainant and its predecessors had used that trade mark since January 1, 1835, because the complainant and its predecessors did not begin its use until 1867, nor then, in any legal sense as the successors of James Crow. Besides, from the testimony and developments in the suit in St. Louis the complainant certainly knew that its opponents in that suit had been adjudged the right to use and that they in fact had used the trade mark Old Crow ever since 1863 through probably not as energetically or as extensively as complainant. Yet upon these statements the registration was obtained.

The application for the registration was dealt with in the Patent Office in an entirely ex parte way, and though there was a formal publication on May 18th, 1909, in the Official Gazette of the Patent Office of the notice required by Section 6 of the Act of Feb'y 20th, 1905, the record in no way indicates that W. A. Gaines & Company caused notice of the application to be actually given to any of those who had been defendants in the previous suit, nor that

222 they otherwise had such notice. There is no indication in the record that those defendants ever knew of the application until long after the registration had been made on July 20th, 1909. While under the Act of 1905 the registration, even when thus made, affords a prima presumption of ownership of the trade mark in complainant, is not that presumption entirely overcome by the judgment which had been rendered against the complainant in the suit in St. Louis, long before the application was made, and of which litigation and judgment no information was given by the complainant to the Patent Office? To ask the question is to answer it in the negative unless such ex parte registration, obtained under such circumstances, and in the way indicated, is to override the previous judgment directed by the Circuit Court of Appeals in a litigation between the opposing claimants of that trade mark and in which all were fully heard. That such a result is impossible is, in our view, too plain for argument. Nor can we conceive that Congress ever contemplated such a result when enacting the legislation of 1905. Notwithstanding all this it is insisted that there is a question of

unfair trade to be considered, and we find that in stating its causes

action the complainant, in its bill filed the next day succeeding at of the registration, while alleging an infringement of its trade ark, also says "that well knowing the premises and with full knowlge of this complainant's rights above recited, the respondents above med, without knowledge or consent, and against the will of the mplainant, did on the twenty-first day of July, A. D. 1909, and en continuously from day to day until the time of the filing of is bill of complaint, in violation of the complainant's rights in nd to said trade mark consisting of the words "Old Crow" and in vasion of the complainant's rights under its said registration and in fringement of your Orator's said registered trade mark, and in aud against this complainant and against the public, did make, cause to be made, and sell or cause to be sold, in Owensboro, in e County of Daviess, State of Kentucky, a certain spurious straight ourbon whisky not the product of this complainant's "Old Crow"

Distillery, or distilled by this complainant, or licensed to be distilled by this complainant, and that they, the said respondents, have marked or branded, the same with the words "Celerated Old Crow Whiskey Bottled in Bond," and have caused the me to be bottled in bond, and have applied to the labels thereon the ords 'Old Crow' in script type; and have caused the same be sold and transported in commerce among the several tates of America; that a specimen of the packages so made and sold y respondents is exhibited with this bill and is filed herewith as

Exhibit B' accompanying the bill."

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The bill also stated "that the whiskey so dealt in by the respondnts and marked and branded with the words 'Old Crow' was so narked and branded for the purpose and with the intent to mislead nd deceive the public and consumers of whiskey distilled by the omplainant and bottled in bond by the complainant, and the public nd consumers of whisky have, by the said acts of the respondents een led into purchasing the respondent's whisky under the false elief that it was the whisky of the complainant, and that by means f the said fraud and imposition upon the public by means of and brough the instrumentality of their said unlawful appropriation nd infringement of your orator's said registered trade mark, the repondents have sold very large quantities of their whisky so falsely narked and branded, all of which wrongful acts have resulted in njury to the complainant's business and the good will thereof, and ere wantonly, wilfully, deliberately, and maliciously done by the espondents to complainant's damage in the sum of Twenty Thouand Dollars (\$20,000,00).'

If in addition to an action for the infringement of a registered rade mark the bill shows a claim for damages for unfair trade in blended whiskies, it is probably multifarious. However, the defendints have not insisted upon that objection, and the court will not at his stage, treat the bill as open to it, but will dispose of the question of unfair trade upon the entire record before it. Treating it thus, we think the record clearly shows, that the defendants, in using the rade mark Old Crow, whether in connection with a picture of a raven, as was usual, or not, used what they had a clear right to use. This being so, there could be no deception in doing that thing. This, however, is what is claimed to constitute unfair competition with complainant, and the testimony clearly shows that in other respects the defendants' labels, brands and other marks are altogether different from complainant's and of themselves show that complainant did not make the whiskey sold under defendants' brands.

So that at last this phase of the case seems to resolve itself into a complaint that the defendants use the words Old Crow on their labels. brands and other marks and probably in their advertising matter. After much consideration we have concluded that the defendants have acted within their rights, and have attempted to sell their own whiskey as being of their own make, and not as complainant's, each using the words Old Crow, as they had the right to do, and as the predecessors of each had done for over 45 years. Besides, while at the argument it was much asserted that complainant's whiskey was "straight" and defendant's a "blend," the testimony indubitably shows that much of complainant's Old Crow whiskies are "blends" and so labeled under the pure food laws. As "blends" they are not within the registered trade mark, which on its face refers only to "straight" rve and bourbon whisky. The testimony also demonstrates that much of the defendant's whiskey is bottled in bond, and is, therefore, necessarily "straight," inasmuch as under the statute nothing but "straight" whisky is permitted to be so bottled. So that as to "straight" whiskey the complainant must be regarded as suing only on its trade mark, while, as to "blends" as well as "straight, it is suing for unfair competition in trade. And in this connection it may be stated as matter almost of common knowledge, first that the purchaser of drinks over the counter of a bar-room seldom knows or is told what he is getting, or if he is told it soon becomes a matter of indifference to him, and, second, that the wholesale or retail dealer whoy buys from a manufacturer generally knows exactly from whom he purchases and the character of spirits he gets. The danger to the manufacturer is, therefore, not great. The same may be said of a whoiesale dealer who sells to a retail dealer.

225 It results that the decree now must be, 1st, that the plea of the former adjudication is sustained; 2nd, that the registration of the trade mark under which relief is claimed in this action was insufficient to invalidate the judgment in the prior suit; 3rd, that the charge of unfair trade has not been established, and, 4th, that the action be dismissed with costs to the defendants.

A decree accordingly will be entered.

Order Allowing Appeal and Approving Bond. Entered June 12th, 1913, by Judge Walter Evans.

This day appeared the complainant, W. A. Gaines & Company, by James Love Hopkins and Edwin F. Trabue, its counsel, and tendered to the court its petition for appeal and assignment of errors, and upon consideration whereof, it is ordered that said petition for appeal and assignment of errors be filed and an appeal be and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Sixth Circuit the judgment and proceedings heretofore entered herein upon giving bond according to law in the sum of Two hundred dollars, which bond shall not operate as a supersedeas bond, and thereupon the said W. A. Gaines & Company presented for acceptance and approval such bond in the sum of Two hundred Dollars with the National Surety Company as surety, which bond is hereby accepted and approved by the Court and now ordered filed.

Assignment of Errors. Filed June 12th, 1913.

And now on this 12th day of June, 1913, comes the said complainant, and says that the Order and Decree in said cause made and entered on the 7th day of February, 1913, dismissing Complainant's bill of complaint herein is erroneous and against the just rights of the said Complainant for the following reasons:

First. That the Court erred in dismissing Complainant's bill of

complaint.

Second. That the Court erred in not granting to the Complainant the relief prayed for in and by its bill of complaint. 226 Third. That the Court erred in finding the joint plea of

the defendants herein to be good and sufficient in law.

Fourth. That the Court erred in finding the joint plea of the defendants to be sustained by the evidence.

Fifth. That the Court erred in refusing to consider as prima facie evidence of ownership the registration of Complainant's trademark under the Act of Congress of February 20, 1905, 33 Statutes at Large 728.

Sixth. That the Court erred in sustaining the Defendant's plea of res adjudicate based upon the case of Kahn vs. W. A. Gaines & Company in the United States Circuit Court of Appeals for the Eighth

Circuit.

Wherefore, the Complainant prays that the said order and decree may be reversed, and that the said Court may be directed to enter an order and decree for an injunction and an accounting and for other relief as prayed for in said bill of complaint, as well as for the costs herein.

> JAMES LOVE HOPKINS, EDMUND F. TRABUE, JOHN C. DOOLAN, ATTILLA COX, Jr., Solicitors and of Counsel for Complainant.

Bond. Filed June 12th, 1913.

Know all men by these presents,

That we, W. A. Gaines and Company and The National Surety Company are held and firmly bound unto Rock Spring Distilling Company and Silas Rosenfeld, in the sum of Two Hundred Dollars, to be paid to the said Rock Spring Distilling Company and Silas Rosenfeld, executors or administrators. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our beirs, executors, and administrators firmly by these presents. Sealed with our seals and dated this 12th day of June, A. D. 1913. Whereas, the above named W. A. Gaines and Company hath prosecuted an appeal to the United States Circuit Court of Appeals for the Sixth Circuit to reverse the decree rendered in the above entitled suit, by the District Court of the United States for the Western District of Kentucky, at Owensboro.

Now, therefore, the conditions of this obligation is such, that if the above named W. A. Gaines and Company shall prosecute their said appeal to effect, and answer all costs, if they shall fail to make good their plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

W. A. GAINES & COMPANY, By EDMUND F. TRABUE, Attorney, NATIONAL SURETY COMPANY, By J. MORTON MORRIS,

Attorney in Fact.

Sealed and delivered in presence of

Approved,

WALTER EVANS, Judge.

Pracipe by Appellant. Filed June 12th, 1913.

The Clerk is requested to embody in the transcript the following items, without duplication:

1. All of the pleadings, omitting captions.

2. The stipulations as to Proof on the merits, which is as follows: "It is hereby stipulated between complainant and defendants in the above entitled cause, that upon the issues raised by complainant's bill, defendants' answer and complainant's replication to said answer, the following proof shall be considered as in evidence, subject to objection by either side:

1. All affidavits and exhibits offered by either side upon the original motion for preliminary injunction by complainant in this case.

2. Depositions taken upon the issues raised by the joint plea of defendants to complainant's bill and complainant's replication to said joint answer.

3. The printed record as used in the United States Supreme Court in the case of W. A. Gaines vs. Kahn, et al., in support of petition for writ of certiorari, filed in the United States Supreme Court on October —, 1908.

The original exhibits offered in evidence by either party in the case of W. A. Gaines & Company vs. Kahn, et al., No. 5096 in the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri.

5. It is understood that any evidence or exhibits covered by stipulation in the foregoing items are also included in this stipulation.

EDMUND F. TRABUE, DANIEL W. LINDSEY, JAMES L. HOPKINS, Solicitors for Complainant. W. T. ELLIS AND LUTHER ELY SMITH, Solicitors for Defendants."

All of the items called for in said stipulation, not, however, embodying any of the printed exhibits, except the trade mark certificates which are to be embodied in full, other than the complete transcript of record in case No. 2700, in the United States Circuit Court of Appeals of the Eighth Circuit, except as follows:

Berry Affidavit, Exhibit No. 1: The items relating to Old Crow on page 15, giving all of the ages, both in the left hand horizontal

line and in the vertical column at the right hand.

Berry Affidavit, Exhibit No. 2: All of the items relating to Old

Crow on page 14.

Berry Affidavit, Exhibit No. 3: All Crow items on page 16, five lines.

Berry Affidavit, Exhibit No. 4: Caption and line referring to Old Crow on page 26.

Berry Affidavit, Exhibit No. 5: All Old Crow items on page 22. Berry Affidavit, Exhibit No. 6: Old Crow items on page 1, column 3.

Berry Affidavit, Exhibit No. 7: The ten lines on page 2, column 1, beginning "Old Crow Bourbon."

Berry Affidavit, Exhibit No. 9: Two lines beginning "Old Crow" in column 40. Berry Affidavit, Exhibit No. 10: Two lines beginning "Old Crow"

on page 5.

Berry Affidavit, Exhibit No. 11: Item beginning "V. O. Old Crow," column 1.

229 Berry Affidavit, Exhibit No. 12: Entry as to Old Crow, column 1, page 1.

Berry Affidavit, Exhibit No. 13: The item marked in column 1, page 18, including the distillery brand, giving caption at top of

Merrall, Exhibit A: Item "Old Crow Bourbon," page 4, column 3. Merrall, Exhibit B: Items "Kirk's Old Crow Rye," column 3, page 55.

O'Brien, Exhibit A: The two lines, each beginning "Old Crow"

in the first column, page 3.

O'Brien, Exhibit B: Two lines beginning "Old Crow," column 1. page 93.

Ritter, Exhibit A: The line beginning "Old Crow," column 2, page 79.

Ritter, Exhibit B: Old Crow items, two lines, top of page 14. McMillan, Exhibit A: Item "Old Crow" on page 12.

Rosenbloom, Exhibit No. 1: Item "Old Crow Rye," column 2, page 2.

Moore, Exhibit A: Six lines indicated in blue pencil.

Moore, Exhibit B: All items on pages 6 and 7, except bottom six lines on page 6, and last two lines on page 7 marked "Omit."

Moore, Exhibit C: All items on page "C" down to the words "Her-

mitage Bourbon."

Durner, Affidavit Exhibit: Old Crow items on page 22, column 2. Respectfully.

> EDMUND F. TRABUE, D. W. LINDSEY, JAMES L. HOPKINS, Attorneys for Plaintiff.

Received a copy of the foregoing præcipe this 26th day of April, 1913.

W. T. ELLIS, Attorney for Defendants.

Pracipe by Appellee. Filed June 12th, 1913.

The clerk is requested to embody in the transcript the following items, without duplication:

230 1. From printed exhibits, such as briefs and other printed documents offered as exhibits by defendants upon the motion for preliminary injunction, the following:

Brief of W. A. Gaines & Company in U. S. Circuit Court in Mis-

souri (Pearcy's Exhibit "A," page 24:

"The whole brief for the defendants resolves itself into the single question, whether a stealthy, concealed and surreptitious use of the mark, done so stealthily as not to be known to competitors in the same line of trade residing in the same town, established any title to a trade mark which can be recognized by the law."

Again (at page 45, Pearcy's Exhibit "A"):

"The right of the complainant to the word 'Crow' as a technical trade mark for whisky appears to us clear and unequivocal. For forty years it has been in open and notorious use by the complainant; the distilling trade and dealers in whisky have universally acquiesced in it; it has been the subject of repeated litigation and has been registered in the Patent Office no less than three times; and the word 'Crow' means to every one in the trade the complainant's whisky. All these things are of the essence of exclusive title to a technical trade mark."

In its brief in the United States Circuit Court of Appeals, com-

plainant insisted (Pearcy's Exhibit "B," page 87):

"The record is replete with evidence from the leading trade journal publishers of the whisky trade and from the leading members of the trade in Chicago, New York and St. Louis, that there has been universal acquiescence by the trade in the right of W. A. Gaines & Company to the words 'Old Crow' as a trade mark for whisky."

In the brief in the United States Supreme Court, complainant

stated:

"The petitioner, a Kentucky corporation, commenced this suit in equity in the Circuit Court for the Eastern District of Missouri, Eastern Division, against the respondents, citizens of the State of Missouri, having a place of business in the City of St. Louis, to re-

strain them from the use of the trade mark which the petitioner prayed it had acquired in the words 'Old Crow' as applied to whisky. The petitioner being the owner of the Old Crow Distillery in Woodford County, Kentucky." (Pearcy's Exhibit

"D," pp. 4-5:)

"The effect of the decision whose review is hereby sought being to destroy the plaintiff's trade mark property, established repeatedly in thousands of cases throughout the United States, and to license the defendants to continue their frauds against the plaintiff and the public. The vital question that is presented in this case, therefore, is, whether, under the circumstances disclosed in the record, the petitioner is to be robbed of the good will resulting from forty years of labor and the expenditure of hundreds of thousands of dollars in advertising, by reason of small and trifling sales of imitation whisky under the fictitious names 'P. Crow' and 'J. W. Crow,' to the use of which names the defendants have not now, and never have had, any color or shadow of right; and whose use by the defendants and their predecessors is, and always was, fraudulent." (Pearcy's Exhibit "D," p. 2.)

In complainant's petition to the United States Supreme Court for

certiorari, complainant stated:

"The judgment of the Circuit Court was reversed on the sole ground that the respondents had used the words 'Crow' and 'Old Crow' before the petitioner had adopted the words 'Old Crow' as a

trade mark." (Pearcy's Exhibit "D," p. 15.)

"Petitioner represents that the protection of trade marks which truthfully indicate the origin of goods sold in the markets and thus afford a guarantee that they are really what they are represented to be, is of great importance to the public at large. On the other hand, the suppression of the fraudulent use of brands, stamps and labels which are calculated to deceive and impose upon the purchaser is of equal, if not greater, importance to the public. The petition states that for thirty-seven years before the institution of this action, it and its predecessors had in good faith used the words 'Old Crow' as a

trade mark on the packages containing the whisky made by them, according to the 'Crow' formula, and that whenever the said words were used on a label or brand the purchasing public understood that the article was their product." (Pearcy's Ex-

hibit "D," pp. 16, 17.)

No other portions of said briefs and other foregoing printed exhibits shall be copied in the transcript.

2. The following documentary exhibits offered by defendants

under their joint plea, will be copied into the transcript in full

(omitting captions and endings):

Opinion U. S. Circuit Court of Appeals in same case, on appeal (Hellman's Exhibit "A" in support of affidavit in opposition to preliminary injunction.

Motion in U. S. Circuit Court of Appeals to stay issuance of mandate (Pearcy's Exhibit "C" in support of affidavit in opposition to

preliminary injunction.

Order of U. S. Circuit Court of Appeals denying motion to stay issuance of mandate (Hellman's Exhibit "B" in support of affidavit

in opposition to preliminary injunction.

Petition of W. A. Gaines & Co. to U. S. Supreme Court for writ of certiorari to U. S. Circuit Court of Appeals, 8th Circuit, in said cause (Pearcy's Exhibit "E" in support of affidavit in opposition to preliminary injunction, and orders of U. S. Supreme Court denying same (Hellman's Exhibits "C" and "D" in support of affidavit in opposition to preliminary injunction).

Supplemental bill and proceedings thereunder, making Hellman Distilling Company a co-defendant in suit by W. A. Gaines & Company v. Hellman, et al. (Hellman's Exhibit "E" in support of af-

fidavit in opposition to preliminary injunction.

Final decree in U. S. Circuit Court dismissing amended bill of W. A. Gaines & Co. entered July 10, 1908, certified copy filed in this cause as Exhibit — on — (see pp. 42-43, Respondent's Statement of Facts proven under Plea—gray cover).

3. The following physical exhibits will be made a part of the

record and sent up on appeal:

(a) One bottle of Old Crow distilled by W. A. Gaines & Co., bottled by Steinwender-Sellner Mercantile Company, St. Louis,
 233 Mo., at Lindell Buffet, 712 Washington Avenue, St. Louis,
 Mo., and marked Pearcy's Exhibit "F," bearing the words

"A Blend" on the label.

(b) One bottle Old Crow distilled by W. A. Gaines & Company, bottled by H. L. Griesedieck Distilling Company, St. Louis, Mo., at saloon of Carl E. Eberth, on the north side of Chestnut St., St. Louis, Mo., and marked "Pearcy's Exhibit G," bearing the words "A Blend" on the label.

(c) One bottle Old Crow distilled by W. A. Gaines & Company, bottled by J. Simon & Son, St. Louis, Mo., at Wolf."-Wilson Drug Co., Sixth and Washington Avenue, St. Louis, Mo., and marked Pearcy's Exhibit "H" and bearing the words "A Blend" on the label.

(d) One bottle Old Crow distilled by W. A. Gaines & Company, St. Louis, Mo., purchased at Brinkman's Cottage Bar, Broadway and Lucas Avenue, St. Louis, Mo., marked Pearcy's Exhibit "I" and

bearing the words "A Blend" on the label.

(e) One bottle Old Crow distilled by W. A. Gaines & Co., bottled by David Nicholson Grocery Company, St. Louis, Mo., purchased at the Lindell Buffet, 712 Washington Avenue, St. Louis, Mo., and marked Pearcy's Exhibit "J" and bearing the words "A Blend" on the label.

Also the following:

Hellman's Exhibit "F" (case used in bottled in bond goods).

Hellman's Exhibit "G" (a bottle). Hellman's Exhibit "H" (labels).

Hellman's Exhibit "I."

Glass sign, with figure of Crow.

4. Also, transcript of testimony furnished by appellant with the

following changes:

Page I. Silas Rosenfeld: In line 8 of the statement of Silas Rosenfeld, after the word "distillery" insert "and in the name of"; and after the words "A. M. Hellman & Co." insert "under a sub-lease in accordance with the Internal Revenue Regulations"

Page 2. At the end of the direct examination of Silas Rosenfeld, last line but one, "incorporated in full" should read: 234 ("which exhibits will be incorporated in full in the tran-

script.")

Page 5. Line 2, after the word "made" insert, "For A. M. Hell-

man & Company.

Page 6. Line 22, after the word "Rosenfeld" insert ("respondents' plea, exhibits 1 and 2.")

Page 17. Line 3 from the bottom of page, the word "authority" is

a mistake; it should be "offered."

Page 20. At end of Hugo's cross-examination, insert ("which will be reproduced in the transcript.")

Page 21. End of Hugo's cross-examination upon being recalled, insert ("which will be reproduced in the record.")

Page 22. Line 16, after "Exhibit No. 1" insert, ("which will be

reproduced in the record").

Page 24. First complete sentence at the top of page, namely, "When witness made the purchase from the A. M. Hellman estate, the formula for making Old Crow whiskey was communicated to him verbally by A. Freiberg," should be stricken out, and X. Q. 14 and 15, together with answer and objection, incorporated instead, as follows:

"X Q. 14. When you made this purchase which includes 'the formula for making Old Crow whiskey made, purchase- and sold by the firm of A. M. Hellman & Company,' how was that formula delivered to you, verbally or in writing?"

"A. Not in writing, it was verbal."

"X Q. 15. Who communicated it to you?"

Counsel for respondents objects as being immaterial and irrelevant to any issue under the plea.

"A. Julius Freiberg. I knew all about it, nobody had to tell me.

I was a partner of A. M. Hellman."

Page 31. Beginning redirect examination, the first two sentences should be stricken out, as follows:

"Witness says Julius Freiberg did not tell him the formula. He does not think Freiberg knew anything about the formula."

And redirect Question No. 1, with answer, should be given in lieu thereof, as follows:

"Q. Mr. Hellman, in your cross-examination, in answer to a question of Mr. Hopkins as to who told you the formula of Old

235 Crow, or from whom you learned it, you stated that Julius Freiberg told you; I am not certain that you understood Mr. Hopkins' questions."

"A. No, Julius Freiberg did not tell me the formula; if I said that I did not understand him. I do not think Mr. Freiberg knew any.

thing about the formula.

Also, on page 10 of transcript as furnished by appellant, add to

cross-examination of Berry:

"The words 'Old Crow' were registered in the U. S. Patent Office in 1904 by complainant. The same words were registered in 1909 by advice of counsel (by 'counsel' witness refers to 'James L. Hopkins' throughout). Witness and all the officers of complainant company were familiar with the case of W. A. Gaines & Company v. Hellman, as it was tried in the U. S. Circuit Court in St. Louis, U. S. Circuit Court of Appeals for the Eighth Circuit, and the application for writ of certiorari in U. S. Supreme Court and the opinion rendered in the Court of Appeals. Edson Bradley was Vice President of complainant company. Witness discussed with Mr. Bradley the litigation in the St. Louis case and the opinion rendered by Judge Phillips in the U. S. Circuit Court of Appeals in that case, which opinion, Mr. Bradley, witness thinks, had read at the time witness discussed it with him. This was sometime after the opinion was handed down, late in 1908, a few months thereafter, witness thinks. probably prior to the first of January, 1909.

Witness states that in his affidavit made September 12, 1909, in support of application for preliminary injunction, he stated that the labels attached to his affidavit were authentic labels used upon plaintiff's Old Crow whiskey, and that those marked 'Reg. U. S. Pat. Off.,' were official labels used by complainant after its July, 1909, registration of the words 'Old Crow.' Witness identifies the label marked 'Old Crow, Reg. U. S. Pat. Office. Kentucky Bourbon Whiskey Distilled by W. A. Gaines & Co.' as one of the labels so incorporated in his affidavit. The words 'blended whiskey,' witness states, were added in order to conform to the U. S. Pure

Food Law, which complainant at that time thought required such a statement upon a mixture of different ages of the same brand of whiskey. But afterwards complainant's counsel gave an opinion that such a mixture did not require the words 'a

blend.'

Witness further states that many bottlings of complainant's Old Crow are sold in St. Louis and elsewhere—six or seven, or even more, being sold in St. Louis, different customers calling for different bottlings.

Many factors, such as cost of production, amounts spent in advertising, limitation of output, etc., enter into the matter of price."

Respectfully submitted by

W. T. ELLIS AND LUTHER ELY SMITH, Attorneys for Appellees.

Copy received June 7, 1913.

JAMES L. HOPKINS,

Att'y for Plaintiff-Appellant.

Ondensed Statement of the Evidence. Lodged June 12, 1913; Approved and Filed Nov. 5, A. D. 1913.

The Plaintiff submits the following condensed statement of the evidence under and in pursuance of Equity Rule 75(b).

The following is a condensed statement of the evidence.

In support of their plea the following evidence was adduced by the defendants:

SILAS ROSENFELD, one of the defendants became manager of the distillery of the Rock Spring Distilling Company in 1895 and continued in that position until the Fall of 1905, when he became Treasurer of said corporation, which position he has ever since occupied. He became lessee of the distillery in May, 1903, and has so continued ever since, subleasing the distillery to others from time to time. In 1904, as such lessee, he made whiskey at that distillery for and in

the name of A. M. Hellman & Co., under a sub-lease in accordance with the Internal Revenue Regulations and made other runs of whiskey for that firm or its successor Hellman Distilling Company in 1905, 1906, 1907, 1909, and 1910; the whiskey being sour mash whiskey and the best grade made at the Rock Spring Distillery. All of the whiskey so made was the same grade as that produced in 1904 for A. M. Hellman & Company and all of it was put in the bonded warehouse subject to the order of A. M. Hellman & Company or Hellman Distilling Company. Moritz Hellman selected the whiskey ordered by the Hellman Distilling Company. Witnesses began to bottle the whiskey in bond for the Hellman Distilling Company in the Spring of 1909, using the whiskey as above described, and no other, the whiskey being at least four years old, as required by the bottling in Bond Act and being bottled under the brand "Hellman's Celebrated Old Crow," the bottles, cases, caps and labels were all furnished by Hellman Distilling Company and the bottling was done as the Hellman Distilling Company expressly ordered it, from 1909 up to the present time. The bond bottled whiskey was all loaded on the train and shipped to the Hellman Distilling Company at St. Louis, neither of the defendants selling it or offering it for sale to any one else. Neither of the defendants ever claimed any interest in the brand "Old Crow." The bond bottling was negotiated by Arthur Rosenfeld with the Hellman Distilling Company, and before the bottling commenced the defendants read and studied carefully the transcript of record in case of Kahn et al., vs. W. A. Gaines & Co., No. 2700, in the United States Circuit Court of Appeals for the Eighth Circuit upon which they secured the opinion, verbally rendered, of Captain W. T. Ellis. Witness identifies the letters "Respondents' Plea Exhibits Nos. 1 and 2," and introduces respondents' Plea Exhibit No. 3, as stamped envelope bearing the words "After 5 days return to Rock Spring Distilling Co." (which exhibits will be incorporated in full in the transcript), Owensboro, Ky. No reply was received to either of said letters.

# Cross-examination:

The whiskey produced in 1904 for A. M. Hellman & Co. was barrelled in barrels whose commercial heads were blank and 238 bore no name, and those heads were left blank until the whiskey was bottled in bond 1909. All of the whiskey above referred to made for the Hellman Distilling Co., was placed in barrels having blank commercial heads. The first bottling in bond, above referred to, was done April 1st, 1909, and the bottling was done at the direction of Arthur Rosenfeld the representative of the Rock Springs Distilling Co., in St. Louis. Witness produces exhibits which will be reproduced in the transcript, being the following: Rosenfeld's Cross-Examination Exhibits, Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34.

The winesses has seen the advertisement of W. A. Gaines & Company's "Old Crow" in the trade publication known as Mida's Criterion, which is received regularly at the office of the Rock Spring Distilling Co. It was his knowledge of the use of the "Old Crow" brand by W. A. Gaines & Co., that lead the witness to make the investigation referred to above; he says "We did not know that Hellman had a right to use it also." About the 25th or 28th day of May, 1909, the witness and his brother consulted A. Julius Frejberg, Administrator of the estate of Abraham M. Hellman in Cincinnati: "We wanted to investigate as to the rights of the Hellman Distilling Co., to use Old Crow—the only reason we went there was to see that the Rock Spring was safe in every step it took." Freiberg told them that when A. M. Hellman & Company's assets were turned over to Hellman Distilling Company, the right to use the brand "Old Crow" was turned over, as to "the West and Southwest. West of the Mississippi," Freiberg offered to sell them the interest of the estate of A. M. Hellman in the Old Crow brand for Fifteen Thousand (\$15,000,00) Dollars, which was to include only a three-fourths interest in the brand.

#### Also for the defendants.

ABRAHAM HIRSCH, president of Rock Spring Distilling Company for the past seven or eight years testifies his company has run whiskey at its distillery for A. M. Hellman & Company, 239 and Hellman Distilling Company, but does not remember the exact years. Thinks it was somewhere early in the year 1909 they began to bottle whiskey in bond for the Hellman Distilling Company under the brand "Hellman's Celebrated Old Crow" under labels furnished by the Hellman Company. Rock Spring Distilling Company does not claim any interest in the words "Old Crow" or "Celebrated Old Crow" in connection with whiskey. The Hellman Distilling Company paid "so much" per case to the Rock Spring Distilling Company or Silas Rosenfeld as lessee, for its services in bottling and casing the whiskey so bottled in bond. The Rock Spring Distillery has been leased to Silas Rosenfeld as lessee.

# Cross-examination:

He has been engaged in the whiskey industry in Kentucky since March, 1881, prior to that time was a merchant dealing in clothing and furnishing goods. He has been personally acquainted with the Old Crow Whiskey of W. A. Gaines & Company "for a great many years, heard of it before I was in business."

Also for the defendants.

James D. Shortell, 66 years of age, confidential adviser and manager of the Rock Spring Distilling Company during about 9 years last past. Prior to that time he was in the Internal Revenue Service for 13 or 14 years, Chief Deputy Collector of the Fourth Kentucky District for nearly 10 years, connnected with the service in the Second Kentucky District two or three years, and has been for nearly 30 years in the distillery business. Is not a stockholder or related in any way to the officers or directors of defendant corporation. In 1904 the Rock Spring Distillery made for A. M. Hellman & Company a run of whiskey, the best defendant corporation could make, it was put in the government bonded warehouse as required by law until such time as A. M. Hellman & Company ordered it withdrawn according to law. The Hellman Distilling Company had whiskey produced of the same kind and quality in 1905, 1906, 1907, 1909 and 1910. The warehouse cer-

tificates of A. M. Hellman & Company passed by endorsement to their successors. "In February (1909-if I am correct about the date—in the early part of it, Mr. Arthur Rosenfeld stated that the Hellman Distilling Company desired to have some of their whiskey then in bonded warehouse bottled in bond and their "Old Crow" labels put upon the bottles. They had the privilege of bottling in bond under their label if they wanted to, that is implied in the contract in the warehouse receipts really. After a consideration of the matter, the officers of the Rock Spring Distilling Company, said, as to the use of the "Old Crow" label, have they the right to do that, they wanted to be sure as it was in controversy, and the records of the proceedings between Gaines and Hellman were sent over to the office for the information of the Rock Spring Distilling Company. They went over it as well as they could and seemed to be satisfied that the decision of the court of Appeals in Missouri gave them the right to use the label. addition to that they placed the record in the hands of their attorney Captain Ellis, for his advice and opinion. He said the case gave them the right to use this label. The Hellman Distilling Company supplied, as always required in case of private brands, all supplies, such as cases, corks, caps, labels and everything necessary for the bottling in bond, the Rock Spring Distilling Company was only doing the labor and furnishing the government stamp for the party holding the whiskey and having the bottling done. Accordingly, sometime in March, perhaps the middle or latter part of March, the supplies from the Hellman Distilling Company for the "Old Crow" cases and labels were received and the Rock Spring Distilling Company proceeded at the request of the Hellman Distilling Company, to bottle the whiskey they had sent receipts for, and that was eligible to be bottled, and bottled the first lot I believe about the first of April, 1909, shipped it to the Hellman Distilling Company, at St. Louis, and continued to bottle for them as they requested and furnished the supplies, and I believe are now bottling for them under the same conditions." As to the appeal Record in the case of Kahn et al., vs. W. A. Gaines & Company, in the Court of Appeals of the Eighth Circuit, the witness says: "I looked over the record as well as I could, not being a lawyer by training, I did not read it all. I only took sections of it and looked at the labeis, affidavits and then read the opinion of the

training, I did not read it all. I only took sections of it and looked at the labeis, affidavits and then read the opinion of the court deciding the case in favor of the Hellmans—A. M. Hellman by his administrator I think it was." Witness testifies that in the latter part of April or early in May, 1909, defendant Corporation learned that Plaintiff intended to bring an action for infringement against it for bottling in bond and using the "Old Crow" label, and that the letters testified to by Silas Rosenfeld (respondents' plea, exhibits 1 and 2), were sent by defendant corporation to the plaintiff and that no answer was received to them. That the scale of prices charged for the bottling for the Hellman Distilling Company was the same as charged to all the customers of the defendant corporation for bottling in bond; that as bottled said whiskey was shipped direct from the bonded warehouse to Hellman Distilling Company at St. Louis; that neither of the defendants or any one connected with them claims any interest in the words "Old Crow" connected with whiskey.

# Cross-examination:

The witness has been familiar with the Plaintiff's Old Crow brand for many years. Prior to the time the Rock Spring Distillery began to bottle its whiskey in bond for the Hellman Distilling Company the witnesses had never known or heard of any "Old Crow" bottled in bond except that of W. A. Gaines & Company.

# Re-examination:

The witness testifies concerning the leasing of the Defendant Corporation's distillery to Silas Rosenfeld as follows: "I believe in the Spring of 1903 it leased the distillery to Silas Rosenfeld, in order to enable them to comply with the requirements of the United States laws, in operating the distillery so they could make whiskey in the name of any of their customers who desired to pose as distillers. As a corporation they could not make whiskey in any other name but its own, and they had several customers who desired to have their names appear on the heads of the barrels of whiskey,

that was the purpose for which the lease was made." That this could be done by Silas Rosenfeld, but not by the Rock Spring Distilling Company.

# Defendants' Testimony.

George F. Berry, of Frankfort, Kentucky, age 54, Secretary and Treasurer and Director of W. A. Gaines & Company, has been connected with the whiskey industry in Kentucky continuously since Referring to the cross bill of the respondents in the case of W. A. Gaines & Co. against Hellman in the Eighth Circuit, in the paragraph numbered four, which refers to whiskey "rectified blended, made and produced according," to the formula of the then defendants and their predecessors, and which they branded as "Crow," the witness testifies that that compound so made by A. M. Hellman & Company and their predecessors in the City of St. Louis was in no sense a competitive whiskey with the Old Crow Whiskey of W. A. Gaines & Company. He says, "It being a rectified whiskey or compound, it could in no sense, be a competitor of the whiskey made by W. A. Gaines & Company "Old Crow" and which was and is a straight Kentucky whiskey." Also as to the whiskey made by the Rock Spring Distilling Co. for A. M. Hellman and Hellman Distilling Co., it is not a competitive whiskey with the "Old Crow" whiskey of W. A. Gaines & Co.; "It is a much cheaper grade and quality of whiskey than that of W. A. Gaines & Company's Old Crow." After being bottled in bond that whiskey probably would not be considered by the wholesale jobbing trade as a competitive whiskey with the Plaintiff's "Old Crow," but would be so considered by the consumer, in the opinion of the witness. As to the range of quality of straight whiskey made in Kentucky, the witness testifies: "The range of quality of the different brands of Kentucky whiskies, may properly be determined by the price that the brand when first made or afterwards commands, in the markets of the United States. The prices vary from as low as 20c. per gallon, to as high as 75c, a gallon new. These classes might be divided into four distinct classes. The first class being at prices ranging from 60 to 75 cents per gallon in bond, new. second grade varying from 45c. per gallon up to 60 cents. 243 The third ranging from 30 cents to 45 cents per gallon, and the fourth grade from say 20 cents to thirty cents per gallon. am familiar with the quotations of the Rock Spring Whiskey as published in the various pricelists of the different brokers, and I find that their whiskies would occupy the third grade, being between thirty and forty-five cents per gallon. The Old Crow Whiskey of W. A. Gaines & Company is in the first grade, which price ranges from sixty cents to seventy-five cents per gallon in bond, new. The price of either grade would advance according to age, and according to the demand, but in time they would bear relatively the same difference as when new. I take it that the quality of the different whiskies is determined largely on the price that they bring on the market."

W. A. Gaines & Company commenced the bottling of its Old Crow Whiskey in bond "at the beginning of the bottling in bond Act in 1897." The bottling for the Fall season of 1897 and Spring Season of 1898 was between 10,000 and 15,000 cases; that bottling increased

from year to year until it reached 100,000 cases per year; "A case containing twelve bottles of quarts or twelve bottles of fives to the gallon, or twenty-four bottles of pints, or forty-eight bottles of half-pints."

Before the defendants began their bottling the plaintiff's whiskey had been sold to practically all parts of the United States and Canada, and it had become known as "Old Crow whiskey bottled in bond."

# Cross-examination:

The plaintiff did not answer the letters of the defendant corporation, referred to in the testimony of Silas Rosenfeld, and written in May and June, 1909, because of the advice of counsel. The registration, certificate Number 74,537, of July 20, 1909, is put in evidence and will be inserted in the transcript, also certificate number 42,919, of June 28, 1904, marked "Berry's Cross Examination Exhibit 2," which will be inserted in the transcript; also certificate number 9,278, issued April 11, 1882, and marked "Berry's Cross Examination Exhibit 3," which also will be inserted in the transcript.

244 The trademark "Old Crow" has been applied by W. A. Gaines & Company to barrels containing whiskey, to the

personal knowledge of the witness, since 1872.

"The words 'Old Crow' were registered in the U. S. Patent Office in 1904 by complainant. The same words were registered in 1909 by advice of counsel (by 'counsel' witness refers to James L. Hopkins, throughout). Witness and all the officers of complainant company were familiar with the case of W. A. Gaines & Company v. Hellman, as it was tried in the United States Circuit Court in St. Louis, United States Circuit Court of Appeals for the Eighth Circuit and the application for writ of certiorari in the United States Supreme Court, and the opinion rendered in the Court of Appeals. Edson Bradley was vice president of complainant company. Witness discussed with Mr. Bradley the litigation in the St. Louis case and the opinion rendered by Judge Phillips in the United States Circuit Court of Appeals in that case, which opinion, Mr. Bradley, witness thinks, had read at the time witness discussed it with him. This was some time after the opinion was handed down, late in 1908, a few months thereafter, witness thinks, probably prior to the first of January, 1909.

Witness states that in his affidavit made September 12, 1909, in support of application for preliminary injunction, he stated that the labels attached to his affidavit were authentic labels used upon plaintiff's Old Crow whiskey and that those marked "Reg.\* U. S. Pat. Off.," were official labels used by complainant after its July, 1909, registration of the words 'Old Crow.' Witness, identifies the label marked 'Old Crow, Reg. U. S. Pat. Office, Kentucky Bourbon Whiskey Distilled by W. A. Gaines & Co.' as one of the labels so incorporated in his affidavit. The words 'blended whiskey' witness states, were added in order to conform to the U. S. Pure Food Law, which complainant at that time thought required such a statement upon a mixture of different ages of the same brand of whiskey.

But afterwards, complainant's counsel gave an opinion that such a mixture did not require the words 'a blend.'

Witness further states that many bottlings of complainant's Old Crow are sold in St. Louis and elsewhere—six or seven or even more being sold in St. Louis, different customers calling for different bottlings.

Many factors, such as cost of production, amounts spent in advertising, limitation of output, etc., enter into the matter of price."

There also testified for the plaintiff,

THOMAS S. JONES, 53 years of age, a resident of Louisville, Kentucky, who has been in the whiskey business for more than thirty years, and is now in the whiskey brokerage business. He has served as a clerk in a distillery, a traveling representative of several distilleries, has been part owner in three distilleries, his interest in which he sold in 1899. As to his knowledge of the Old Crow Whiskey of W. A. Gaines & Company he testifies as follows: "I have known of the 'Old Crow' brand all my life. I have visited the plant. I have traveled for a great many years with the representatives of W. A. Gaines & Company, who are the owners and distillers of the "Old Crow" brand. I know the 'Old Crow' brand which is distilled by W. A. Gaines & Company to be one of the most celebrated brands made in Kentucky." It has maintained that reputation as long as the witness can recall. "The distillers of the 'Old Crow' that is, W. A. Gaines and Company, have been very aggressive in the advertising of the 'Old Crow' brand, and these distillers have been the means of making the brand a very celebrated one. In fact, I am safe in saving that the distillers of the 'Old Crow' have done as much if not more to make Kentucky whiskey famous than any other firm engaged in the distilling business that I can recall. I have a bottle of whiskey in my possession which is said to be 'Old Crow' whiskey. The contents of the bottle are said to have been distilled in the fifties and presented by Gov. Magoffin to Col. R. T. Durrett who gave the package to me. It is generally regarded that the product, 'Old Crow,' which is distilled by the W. A. Gaines & Company, represents the very highest type of fine Kentucky whiskey. If this brand has ever been placed upon any other whiskey than that produced in the 'Old Crow' Distillery of W. A. Gaines & Company, I 246

know nothing about it, nor have I ever heard of them doing so. It is the highest type of whiskey produced in Kentucky—sour mash whiskey. It is a straight Kentucky whiskey." It is distributed from the Atlantic to the Pacific and from the Northern to the Southern boundary of the United States. It is made near Frankfort, Kentucky, in the Blue Grass region embracing ten or twelve counties of which the witness names Henry, Woodford, Franklin, Harrison and Bourbon counties, the Old Crow Distillery being in Woodford County. The whiskey distilled in the Blue Grass section brings a higher price than the whiskey of any other section, brands like the Old Crow and the Old Taylor bringing about twice as much

as brands made in the Owensboro section. Witness has been familiar with the product of the Rock Spring Distillery for eleven or twelve years. He classifies Kentucky whiskies thus: "The product in Kentucky might be placed in four classes. First, of all is the class which we will put down at sixty cents in price or better, when new. The second class will run fifty cents or better. The third will run from thirty to forty cents, and the fourth class will be at thirty cents or under." These prices are upon a normal corn crop and not upon the erop available at this time. The plaintiff's Old Crow stands at the very top of the first class, the Rock Spring Distilling Company's whiskey comes in the third class. Witness first knew of the defendants' bond bottling a year or two ago. Plaintiff's Old Crow has been advertised to his knowledge since 1884 and very extensively advertised since the passage of the Act permitting bottling in bond, which Act was drafted by Thomas S. Sherley, Edson Bradley, John B. Thomson, R. F. Balke, The Commissioner of Internal Revenue. and the Witness. The use of the Old Crow brand upon the product of the Rock Spring Distilling Company is bound, sooner or later, to impair the earnings of the plaintiff, and in time will seriously affect the reputation of the plaintiff's Old Crow Whiskey. "Their business is bound to suffer seriously if the Hellman Distilling Com-

pany is permitted to come in competition with them by placing of their labels upon the products of the Rock Spring Distilling Company. It will affect the earnings of the Company by reason of the fact that it will create an uncertainty as to who is the rightful distiller of the 'Old Crow' whiskey. It is confusing to have one brand of whiskey put up by more than one firm. Those who have been using the 'Old Crow' whiskey made by W. A. Gaines & Company might accident-ly obtain a case of Hellman 'Old Crow' put up by the Rock Spring Distilling Company and this might prevent the purchaser from buying from either in the future. In 1910 witness was selling

Spring of 1905,	Old Crow	\$1.50
Spring of 1904,	Old Crow	\$1 . 60
	Old Crow	
Spring of 1908,	Old Crow	\$ at 78 to 87 1/2 cents.

The highest price at which witness has known a sale of Rock Spring Distilling Co. whiskey to be made was 48½ cents.

# Cross-examination:

Blended whiskies are under suspicion by the drinking public in general. The demand for blended whiskey fell off after the bottling in bond law and the Pure Food law went into effect. The witness never knew of Plaintiff's Old Crow whiskey as a blend, and never saw it labeled as a blend. There are cheap whiskies produced in the Blue Grass Region. The witness estimates the cost of producing whiskey under normal conditions at about 30 cents per gallon. Bottling in bond is under the supervision of the Government the whiskey is bottled as it comes from the charred barrel, being reduced

to proof with water. "If you don't put the right quantity in the bottle the government will seize it, if it is below proof, the government will seize it."

# Redirect examination:

The witness continues, "I believe after the Bottled in Bond law became operative under the rulings of the Commissioner of Internal Revenue, it took some time for the Commissioner and the officials under him to promulgate certain rulings which acted as a

guide to distillers in putting up of this bottled in bond whis-248 key. At that time blended whiskey had reached probably its full force and with the enactment of the bottled in Bond law there was great antagonism on the part of the wholesale liquor dealers against the introduction of that whiskey in that form. Just as soon as ever the goods were ready for sale I was employed by the Melwood Distillery Company to take charge of their advertising department and superintend the sale of the bottled in bond whiskey. The antagonism was so great they could make very few sales. We had to send the whiskey on consignment and that took time to win over the wholesale liquor dealer and also took the distillers time to receive the effects of their advertising. Finally the Melwood Distilling Company commenced expending quite a lot of money followed by W. A. Gaines & Company and the Kentucky Distilleries and Warehouse Company came in and offered the bottled in bond whiskey very cheap and just as soon as the people got hold of it and realized that the government supervised the bottling of it they preferred that to blended whiskey. That is one reason why the bottled in bond whiskey did not have much of a growth at the start." There is a very peculiar quality of water in the Blue Grass differing from the waters of any other section of the State. Some of the finest springs in the world are in and around the Old Crow Distillery.

#### Recross-examination:

It was a long time after bottling in bond Act took effect before the distillers could get started bottling in bond. In Canada it is permitted to blend whiskey in bond under the supervision of Excise officers.

Also for the defendant, Arthur Rosenfeld, resident of St. Louis, Vice President and traveling salesman for the Rock Spring Distilling Company; Vice President since 1905 or 1906, and traveling salesman since 1897 for the defendant corporation. Has maintained his head-quarters in St. Louis for seven or eight years; knew the late A. M. Hellman, and in 1904 sold him some May and June, 1904, whiskey,

to be made under the name of A. M. Hellman & Company at the defendant corporation's distillery, Owensboro, Ky. The whiskey was the best grade of whiskey made by the defendant corporation, a sour mash bourbon whiskey. The contract was fulfilled.

Witness is acquainted with the Hellman Distilling Company of St. Louis, and has been since its organization, is acquainted with Moritz Hellman; had business dealings with the Hellman Distilling Company in the spring of 1905, selling them the same kind of whiskey as he sold A. M. Hellman & Company, to be made at the distillery of the defendant corporation; and subsequently had dealings of the same kind, relating to the same quality of whiskey, with the Hellman Distilling Company in 1906, 1907, 1909 and 1910. The amounts sold sometimes varies, but the quality of whiskey was the same. The witness knows that all of these contracts were fulfilled, except that of 1910, which he thinks has been fulfilled but is not positive.

He verbally agreed to bottle the Hellman Distilling Company's whiskey in bond, meaning the whiskey Hellman & Company had purchased from defendant corporation, and which was in Warehouse

No. 18 of the defendant corporation.

The Hellman Distilling Company have always furnished the labels and have paid the defendant corporation for the bottling of the goods, which was bottled under the brand "Hellman's Celebrated Old Crow." The labels were furnished by the Hellman Distilling Company. Defendant corporation had no interest in the Old Crow Brand; and its only connection with that brand was to sell the goods in bulk and bottle them in bond, as it did with other brands for various customers. The Rock Spring Distilling Company is run under the name of Silas Rosenfeld, Lessee, and the only connection of said Silas Rosenfeld with the brand was through the bottling of the goods as "The Rock Spring Distilling Company."

## Cross-examination:

Witness is a brother of Silas Rosenfeld and wrote the letter "Rosenfeld's Cross-Examination Exhibit No. 20." Prior to the writing of that letter, some bottling under the brand "Hellman's Cele-250 brated Old Crow" had been done by Silas Rosenfeld, Lessee, the age of the first whiskey so bottled being Spring of 1904. The witness thinks that it was some 1904 whiskey he had sold to A. M. Hellman in 1904. As to the letter "Rosenfeld's Cross-examination Exhibit No. 21." witness thinks that shortly before the date of that letter, he sold Hellman Distilling Company fifteen barrels referred to in that letter; he does not know whether it was used in the bond bottling, as requested in the letter. After the request for bond bottling was made by Hellman Distilling Company, witness consulted with Mr. Smith, the firm at Owensboro and his brother, Silas Rosenfeld. The request for bond bottling was made verbally to the witness by the Hellman Distilling Company. "There was present two or three of the members of the firm. I do not recall which one it was, I think it was Moritz Hellman." The conversation being at the office of the Hellman Distilling Company in St. Louis, the brand referred to being "Hellman's Celebrated Old Crow," and the conversation occurring in 1909. The members of the firm of Hellman & Company informed him that they had branded whiskey and shipped it out as "Hellman's Celebrated Old Crow," witness understood that this had been done in St. Louis. So far as the witness was personally concerned, and so far as the Rock Spring Distilling Company was concerned, they had never associated the words "Old Crow" in any way with the whiskey which they had made during the years 1904, 1905, 1906, and 1907. At the time of the conversation referred to, Mr. Moritz Hellman informed the witness that the Kentucky Distilleries & Warehouse Company, known as "The Whiskey Trust" with which Mr. Bradley, the witness is informed, is connected, had offered to bottle these goods for them, or asked for the business or solicited the business. Mr. Hellman stated to the witness that there were other distilleries—he did not mention the names—that offered to sell him goods on the same terms as the defendant corporation did. Witness heard that the Turner-Looker Company of Cincinnati, was figuring on bottling some of the goods. "Mr. Moritz Hellman told me that Mr. Freiberg was figuring on giving the Turner-Looker

Company certain territory and to have the goods distilled 251 wherever they pleased, but not at the plant of the Rock Spring Distilling Company or Silas Rosenfeld." The agreement to do the bottling in bond was never reduced to writing.

As to the letter of January 27th, 1910, "Rosenfeld's Cross-Examination Exhibit No. 8," witness does not recollect the letter having been written with his knowledge or authorization, but says "Told my brother if he purchased the brand, I would go in and take an interest." He may have written something to the defendant corporation with reference to bottling in bond for the Hellman Distilling Company but does not recall, thinks he told them in person about it at Owensboro. He does not always retain copies of his correspondence with the defendant corporation at his St. Louis office. Undertakes to make a search for copies of correspondence. After adjournment testifies he found no copy of anything relating to the bottling in bond transaction, except the letter shown to him by cross-examining counsel before adjournment.

#### Redirect:

The fifteen barrels of whiskey mentioned in S. Rosenfeld's Cross-Examination Exhibit No. 21, was the same grade defendant corporation had been making for the Hellman Distilling Company, and the same theretofore made by them for A. M. Hellman & Company. The witness, before beginning the bottling in bond for Hellman Distilling Company was informed by them that they had theretofore branded whiskey at their place with the brand "Old Crow."

Also for the defendant-, FREDERICK A. HUGO, Secretary of Hellman Distilling Company since its organization in February, 1905, prior to which time, and from April, 1893, he had been in the employ of A. M. Hellman & Company. A. M. Hellman & Company had whiskey produced by Silas Rosenfeld, Lessee, in the Spring of 1904, the best quality of whiskey made by the Rock Spring Distillery, and similar orders were placed with the defendant corporation by Hellman Distilling Company in 1905, 1906, 1907, 1909 and 1910. He is not sure whether the arrangement for bottling in bond made by the Hellman Company with the defendant corporation was

verbally or in writing. The Hellman Company furnished the bottles, cases, corks and labels (bearing the words "Hellman's Old Crow") which were used for the bottling in bond of whisky then in the warehouse of defendant corporation, made in the name of A. M. Hellman & Company or Hellman Distilling Company. When the Hellman Company wanted the whiskey bottled in bond, they sent the warehouse receipts over to the defendant corporation with instructions to unbond and bottle in bond. The Hellman Distilling Company succeeded to the business of A. M. Hellman & Company, and continued selling and labeling whiskey "Old Crow" until they were enjoined by the court (at St. Louis).

## Cross-examination:

Witness produces the two instruments of February 25, 1905, deed from Max Kahn, Adm'r, to Moritz Hellman, Hugo's Cross-examination Exhibit No. 1, and an assignment from Moritz Hellman to the Hellman Distilling Company, Hugo's Cross-examination Exhibit No. 2, (which will be reproduced in the transcript).

Hugo recalled for defendant-.

Testifies that the Hellman Distilling Company never conveyed to any one any of the property or rights which it received under the instrument "Hugo's Cross-examination Exhibit No. 2"; legal title has remained in Heliman Distilling Company at all times; the expense of the former litigation in St. Louis was paid by the heirs of A. M. Hellman and Moritz Hellman; the Hellman Distilling Company did not pay any of the expenses; and the Hellman Distilling Company, after it acquired the business as set out in the instrument, Hugo's Cross-examination Exhibit No. 2, kept on selling whiskey under the trade mark "Old Crow" until it was enjoined. The Hellman Distilling Company acquired from the Hellman heirs the "Old Crow" business by buying it. After the former litigation was over, the Hellman heirs were paid a royalty with reference to the Old Crow business; they claimed a beneficial interest, which has since been acquired by Hellman Distilling Company.

## 253 Cross-examination:

The interest was acquired from A. M. Hellman heirs by written instrument which is produced on request of complainant's counsel. Two instruments being produced by witness, Hugo's cross-examination Exhibits 3 and 4, (which will be reproduced in the record).

MORITZ HELLMAN, also called for rspondents.

Is President of Hellman Distilling Company, and was a defendant in the case of W. A. Gaines & Company vs. Hellman et al., in the Eighth Circuit, and until the death of Abraham M. Hellman, was a partner with him in the firm of A. M. Hellman Company. They were engaged in putting up whiskey under the trade mark "Old Crow," and were succeeded by the Hellman Distilling Company who acquired the business theretofore conducted by A. M. Hellman & Company, and acquired title through the conveyances, Hugo's cross-

examination Exhibits Nos. 1 and 2. The Hellman Distilling Company continued to sell whiskey under the trade mark Old Crow. ever since we got a decision that we had the right to use it." After the Hellman Distilling Company was organized in 1905, they continued to sell whiskey under the mark "Old Crow" until an injunction was issued, when they stopped. Witness ordered from Arthur Rosenfeld, of the Rock Spring Distilling Company, certain amounts of whiskey from 1905 up to 1907, then in 1909 and 1910. None was ordered in 1908. The Hellman Company had no written contract for the bottling in bond, simply ordered the goods and furnished the labels, cases, corks, etc., and paid the defendant corporation or Silas Rosenfeld, Lessee, for their services in putting up the whiskey; the whiskey being bottled, being that which had been ordered to be made theretofore, and which whiskey belonged to the Hellman Distilling Company, and was located at the defendant corporation's distillery warehouse in Owensboro. Prior to the commencement of the bottling in bond, the Hellman Distilling Company had sold whiskey at different time- under the brand "Old Crow." The petition of Max Kahn, Admr., for the order of sale referred to in Hugo Cross-Examination Exhibit No. 1, is offered as Hellman's direct examina-254 tion Exhibit No. 1, (which will be reproduced in the record). Neither Rock Spring Distilling Company nor Silas Rosen-

Neither Rock Spring Distilling Company nor Silas Rosenfeld, Lessee, nor any one connected with him, had or claimed any interest in the trade mark "Hellman's Celebrated Old Crow." They merely bottled the Hellman Distilling Company's whiskey in bond according to the instructions of that Company.

## Cross-examination:

The witness knows that A. Julius Freiberg, after the execution of the bill of sale "Hugo Cross-examination Exhibit No. 1," offered a three-fourths interest in the claim of the A. M. Hellman estate for the trade mark "Old Crow" to one party. A. M. Hellman's interest in A. M. Hellman & Company was a three-fourths interest, and he retained that interest until the suit was de-In offering the three-fourths interest for sale, A. J. Freiberg represented the  $\Lambda$ . M. Hellman Estate. The witness bought the entire interest of the estate of  $\Lambda$ . M. Hellman in the assets of the business, including the claim to the mark "Old Crow" and the formulas for making Old Crow in February, 1905, and conveyed the interest so purchased to the corporation, Hellman Distilling Com-Witness does not remember whether Freiberg has been offering the three-fourths interest for sale during the past year, but knows that he did so much later than the time when witness conveved the interest which witness purchased from the Hellman Estate to the Hellman Distilling Company. Asked whether he has any instrument in writing by which the estate of A. M. Hellman owned three-fourths interest in the Old Crow Brand after the conveyance to the Hellman Distilling Company, he says: "We kept the A. M. Hellman estate responsible for the law suit on hand to see if there would be a gain or loss and in order to win and to get the costs back, I paid them a royalty, and at that time they got the money back, I

paid the interest, and the Hellman Distilling Company own three-fourths interest today, but A. M. Hellman used to own it." Witness owns the other one-fourth interest. Freiberg is not representing him and has not represented the Hellman Distilling Company so far as

he knows.

255 "X Q. 14. When you made this purchase which includes 'the formula for making Old Crow whiskey made, purchased, and sold by the firm of A. M. Hellman & Company' how was that formula delivered to you, verbally or in writing?"

"A. Not in writing, it was verbal."

"X Q. 15. Who communicated it to you?"

Counsel for respondents objected as being immaterial and irrelevant to any issue under the plea.

"A. Julius Freiberg. I knew all about it; nobody had to tell me.

I was a partner of A. M. Hellman.'

Witness adds: "I knew all about it, nobody had to tell me. I was a partner of A. M. Hellman." Asked what the formula was, witness says: "I do not think it is necessary for me to explain that. It is a private matter." Asked whether it was the same formula about which he testified in the Missouri Case, the witness says: "I do not know that I testified to any formula." To refresh his memory, witness is read from page 473 of the transcript in the case of Gaines vs. Kahn, 8th Circuit Court of Appeals, Case No. 2700, the question and answer: "You were asked by your counsel: 'The words Crow or Old Crow or the figure of a Crow, that you used, were put solely on packages containing whiskey that you yourself had blended?" To which your answer was, 'yes, sir.'" To which he now answers "I don't remember." He admits his former testimony at pages 478 and 479 of the transcript in said case No. 2700, in which testimony he first stated: "We never knew any other way but that brand was ours. which we have used," referring to the brand Crow or Old Crow,' and subsequently "We always used Old Crow whiskey, but this brand that was used here was ours, but others have used it also, we never interfered with anybody else. When asked whether the whiskey that he was testifying about in the former case was made by the same formula that he purchased under date of February 25, 1905, witness answers, "I do not remember." He does not remember whether the formula was ever changed. He does not remember when he first learned what the formula was. When asked whether he just learned of the formula before A. M. Hellman died, he

says "I do not remember that, because I was traveling a good deal in those days." He does not know who communicated the formula to Freiberg. Witness did not communicate it to Freiberg so far as he remembers. When asked "You may have done so?" His answer is "No, I do not think so." Asked "You can't be sure about that." he answers "I do not remember."

The remainder of his cross-examination can best be preserved and presented in question and answer form:

"X Q. 29. Did you communicate that formula to the Rock Spring or any of its officers? Counsel (Mr. Smith) for Respondents objects on same grounds.

A. Not in writing.

X Q. 30. Did you do so verbally?

A. A. M. Hellman did.

X Q. 31. When?

A. I do not remember.

X Q. 32. How do you know he did?

A. Because we have goods made there which A. M. Hellman him-

self ordered.

X Q. 33. Do I understand you as saying that *them* goods which were made by the Rock Spring Distilling Company were made according to the formula which you purchased from the A. M. Hellman estate?

Counsel for Respondents object on same grounds, and for the further reason that it is immaterial whether made by the same formula or not.

A. Yes, sir.

X Q. 34. Did the Rock Spring Distilling Company ever make a blend for you?

A. No. sir.

X Q. 35. Was the Old Crow Whiskey ever a straight whiskey to your knowledge before you began bottling it in bond?

A. Yes, sir.

X Q. 36. How far back?

A. I do not know.

X Q. 37. Do you know as a matter of fact that it was a blend?

A. We sold it both ways, straight and blend. X Q. 38. When did you first sell it straight?

A. I do not remember. It was years ago. Our books show it, and you have seen our books.

X Q. 39. I will ask you to produce those books, and show me where

you find such an entry?

A. I know that we sold it both ways, straight and blend.

Q. 40. I will ask you to produce those books and such entry?

Counsel for respondents objects as to what kind of whiskey the Hellman Distilling Company sold under the brand Old Crow for the reason that if they had the right to apply it to any make they had then right to apply it to all whiskies.

A. We furnished a list of goods that we sold, and that list showed that we sold it in straight whiskey. We used the brand on two stamped goods as well as one, and that brand was shown to the Court at that time. Remember we had it on paper.

X Q. 41. By whom were those two stamped goods made?

A. Rock Spring Distilling Company.

X Q. 42. They were the first ones to make them, were they?

A. I don't remember that because A. M. Hellman was living then

and he attended to that part.

X Q. 43. I will renew my request to produce any papers showing that at any time before this bottling in bond began the Hellman

Distilling Company, or A. M. Hellman and Company, or the firm of I. & L. M. Hellman have ever sold a straight whiskey under the name Old Crow?

Mr. Smith, counsel for Respondents objects to this because it is immaterial and irrelevant on what kind of whiskey they used the words old crow if they had the right to use it upon any kind.

Adjournment until Monday 2 o'clock, July 11th, 1910.

Monday, July 11th, 1910,

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Counsel present as before—Cross-examination Mr. Moritz Hellman resumed.

258 X Q. 44. Have you produced the books and accounts of the Hellman Distilling Company which I requested you to, produce upon our former hearing?

A. I produce paper entitled "List of sales of Hellman's Old Crow in Double Stamp packages and in Bond" beginning March 25, 1905, with page number, number of barrels, name of consignees and place of business.

X Q. 45. Was this made at your direction?

A. This list was made by Mr. Hugo at my request.

X Q. 46. I notice that the first of these sales was dated March 25, 1905, that is the earliest date at which any sale of whiskey under the name of Old Crow was made by the A. M. Hellman and Company or the Hellman Distilling Company so far as you know?

A. Yes, double stamp whiskey.

X Q. 47. Aside from the sales indicated in this list all the whiskey was made according to the formula which you purchased from A. M. Hellman estate?

Counsel for respondents objects on the ground that it makes no difference whether the whiskey sold under the trademark Old Crow was made according to any particular formula or not, if it was their whiskey.

A. So far as I know.

X Q. 48. Did you make any sales indicated on this list?

d. Yes.

X Q. 49. In what territory?

A. Louisiana, I suppose in Mississippi—maybe in Alabama.

X Q. 50. Did you personally make any sales in Mexico?

A. Yes sir.

X Q. 51. Were any sales ever made there?

A. I do not know.

X Q. 52. Do you know of any being made in Canada?

A. No.

X Q. 53. But they may have — made in both Canada and Mexico?

A. I do not know.

X Q. 54. Now these sales that you have referred to in this list, they were the whiskey of the Rock Spring Distilling Company?

259 A. So far as I know.

X Q. 55. And if the name old crow was affixed to these nackages where was it affixed?

A. If it was shipped from here in St. Louis, it was put on here, but

if it was shipped from the warehouse it was put on over there.

X Q. 56. What is the difference between these items that you have marked on this list (in bond) and those which are not so marked?

A. Those that are marked were shipped from here and those not

marked were shipped from the warehouse in Owensboro.

X Q. 57. Do you know of your own knowledge that the words old Crow were placed on these packages?

A. They were. Yes.

X Q. 58. Did your company ever send a stenci! or burning brand to the Rock Spring Distilling Company so that that mark could be placed upon these barrels?

A. Yes sir.

X Q. 59. When?

A. I could not tell when. I don't remember.

The list produced is offered in evidence by complainant's counsel and marked Hellman's Exhibit No. 1.

X Q. 60. Did you personally make any of the sales in the State of Missouri, indicated on this list?

A. No sir.

X Q. 61. In the State of Arkansas?

A. No sir.

X Q. 62. Or in Nebraska?

A. No sir.

X Q. 63. Your company had other salesmen in that territory?

A. Yes sir.

X Q. 64. These sales that are indicated upon this list with the words (in bond) are sales that are made by the warehouse certificate, I presume are they not?

A. Yes sir.

X Q. 65. The other sales were whiskey that was delivered to you and were styled double stamp packages when they were delivered?

A. Yes sir.

260 X Q. 66. Your company did not sell any other whiskey than that produced by the Rock Spring Distilling Company under the name Old Crow?

A. No sir.

"Q. Mr. Hellman, in your cross-examination, in answer to a question of Mr. Hopkins as to who told you the formula of Old Crow or from whom you learned it, you stated that Julius Freiberg told you; I am not certain that you understood Mr. Hopkins' questions."

"A. No, Julius Freiberg did not tell me the formula; if I said that, I did not understand him. I do not think Mr. Freiberg knew anything about the formula." The list of sales produced by him, "Hellman Exhibit No. 1," concern sales all by the Hellman Distilling Company after the death of A. M. Hellmann had dissolved the

firm A. M. Hellman & Company. Hellman Distilling Company continued to produce and sell whiskey under the Old Crow brand down to the time when they were enjoined by Judge Dyer, and then produced none after the order denving the writ of certiorari was made by the Supreme Court. After that order by the Supreme Court, the Hellman Distilling Company began to sell whiskey under the brand Old Crow and have continued so to do down to the present time. Asked "State whether or not anyone else has produced or sold whiskey under this brand down to the present time-during or since the last five years?" he answers "No sir." He has not transferred or sold to anyone or tried to sell the right to anyone to produce or sell whiskey under this brand. After the organization of the Hellman Distilling Company, there was an agreement in writing (Hellman's Exhibit No. 2) between the Hellman Distilling Company and the heirs of A. M. Hellman. The expense of litigation, including the attorney's fees, so far as the defendants were concerned, in the former case, were paid by A. M. Hellman and Moritz Hellman-A. M. Hellman and Company. The Hellman Distilling Company paid no part of the expense. When asked whether the Hellman Distilling Company has secured the interests, if any which the Hellman heirs claimed in the Old Crow business, he says: "The Hellman Distilling Company secured the brand. They secured what 261 the Hellman heirs had—a beneficial interest in the brand.

the Hellman heirs had—a beneficial interest in the brand, but the Hellman Distilling Company owned the brand. That is wiped out—The Hellman Distilling (Company) bought it." The Hellman Distilling Company has at no time conveyed to anyone the rights which they received from witness under the instrument marked "Hugo Cross-examination Exhibit No. ?."

JAMES L. HOPKINS, EDMUND F. TRABUE, Counsel for Complainant,

Received a copy of foregoing abstract this 23rd day of April, 1913.

LUTHER ELY SMITH,

Per R. H. LUKE,

Attorney for Defendants.

O. K.

W. T. ELLIS & LUTHER ELY SMITH, Counsel for Defendant-.

November 3, 1913.

The foregoing has been agreed to by the respective counsel, it is for that reason approved by me.

WALTER EVANS, Judge.

Nov. 5, 1913.

Part Taken from Brief of W. A. Gaines & Co. in U. S. Circuit Court in Missouri, Pearcy's Exhibit "A," Page 24.

"The whole brief for the defendants resolves itself into the single question, whether a stealthy, conceaied and surreptitious use of the mark, done so stealthily as not to be known to competitions in the same line of trade residing in the same town, establishes any title to a trademark which can be recognized by law."

Again at page 45, Pearcy's Exhibit "A."

"The right of complainant to the word 'Crow' as a technical trademark for whiskey appears to us clear and unequivocal. For forty years it has been in open and notorious use by the complainant; the distilling trade and dealers in whisky have universally acquiesced in it; it has been the subject of repeated litigation and has been registered in the Patent Office no less than three times; and the word 'Crow' means to every one in the trade the complainant's

whisky. All these things are of the essence of exclusive title

to a technical trademark."

262

Part Taken from Brief of W. A. Gaines & Company in the United States Circuit Court of Appeals, Pearcy's Exhibit "B," Page 87.

"The record is replete with evidence from the leading trade journal publishers of the whisky trade and from the leading members of the trade in Chicago, New York, and St. Louis, that there has been universal acquiescence by the trade in the right of W. A. Gaines & Company to the words 'Old Crow' as a trademark for whiskey."

Part Taken from Brief of W. A. Gaines & Company in the United States Supreme Court.

"The petitioner, a Kentucky corporation, commenced this suit in equity in the Circuit Court for the Eastern District of Missouri, Eastern Division, against the respondents, citizens of the State of Missouri, having a place of business in the City of St. Louis, to restrain them from the use of the trademark which the petitioner prayed it had acquired in the words 'Old Crow' as applied to whiskey. The petitioner being the owner of the Old Crow Distillery in Woodford County, Kentucky." (Pearcy's Exhibit "D" pp. 4-5.)

"The effect of the decision whose review is hereby sought being to destroy the plaintiff's trademark property, established repeatedly in thousands of cases throughout the United States, and to license the defendants to continue their frauds against the plaintiff and the public.

The vital question that is presented in this case, therefore, is whether under the circumstances disclosed in the record, the petitioner is to be robbed of the good will resulting from forty years of labor and the expenditure of hundreds of thousands of dollars in advertising, by reason of small and trifling sales of imitation whisky

under the fictitious names of "P. Crow" and "J. W. Crow" to the use of which names the defendants have not now, and never have had, any color or shadow of right; and whose use by the defendants and their predecessors is and always was fraudulent." (Pearcy's Exhibit "D" p. 2.)

263 Part Taken from W. A. Gaines & Company's Petition to the United States Supreme Court for Certiorari.

"The judgment of the Circuit Court was reversed on the sole ground that the respondents had used the words 'Crow' and 'Old Crow' before the petitioner had adopted the words 'Old Crow' as a

trademark --." (Pearcy's Exhibit "D" p. 15.)

Petitioner represents that the protection of trademarks which truthfully indicate the origin of goods sold in the markets and thus afford a guarantee that they are really what they are represented to be, is of great importance to the public at large. On the other hand, the suppression of the fraudulent use of brands, stamps and labels which are calculated to deceive and impose upon the purchaser is of equal, if not greater importance to the public. The petition states that for thirty-seven years before the institution of this action, it and its predecessors had in good faith used the words 'Old Crow' as a trademark on the packages containing the whisky made by them, according to the 'Crow' formula, and that whenever the said words were used on a label or brand the purchasing public understood that the article was their product." Pearcy's Exhibit "D" pp. 16, 17.)

Order Filing Stipulation as to Record. Entered June 24th, 1913, by Judge Walter Evans.

This day came the parties by their counsel, and tendered the following stipulation in writing as to what shall constitute the record on the appeal taken herein. Said stipulation is as follows:

"It is stipulated by the parties,

1. That the record be made up in accordance with the procipes of

the respective parties.

2. That in reproducing the record in Kahn v. W. A. Gaines & Company, as well as the present record, all cuts and labels whereof specimens are not furnished the printer by the parties shall be reproduced in black and white.

3. That all pamphlets, books, circulars, pricelists and physical exhibits in Kahn vs. Gaines and the present case shall be transmitted to the Clerk of the Circuit Court of Appeals of the Sixth Circuit, such exhibits in the case of Kahn v. W. A.

Gaines & Company shall be so transmitted and lodged by counsel for defendants ten days before the hearing.

Dated June 9th, 1913.

E. F. TRABUE,
D. W. LINDSEY AND
J. L. HOPKINS,

Counsel for Plaintiff.
W. T. ELLIS AND
LUTHER ELY SMITH,

Counsel for Defendants."

And it is now ordered that said stipulation be filed and spread on the record.

Order Extending Time to File Transcript. Entered July 15th, A. D. 1913.

On motion of the complainant, it is ordered that the time within which the record on appeal in this cause may be filed in the United States Circuit — of Appeals for the Sixth Circuit is extended to and including October 15th, 1913.

Order Extending Time to File Transcript. Entered October 6th, A. D. 1913.

By consent of parties, it is ordered that the time for filing the transcript of the record herein in the Circuit Court of Appeals be extended to and including the 1st day of December, 1913.

I, A. G. Ronald, Clerk of the United States District Court for the Western District of Kentucky, do hereby certify that the foregoing transcript consisting of Volume One, containing two hundred and sixty-five pages, exclusive of the index, citation, and petition for appeal; and Volume Two, containing nine hundred and seventy-nine pages, exclusive of the index, contains a full, true and complete copies of all the pleadings, record entries, and proceedings in a certain cause in said court in which W. A. Gaines & Company are the complainants and Rock Spring Distilling Company and Silas Rosenfeld, are the defendants, Number 237, Owensboro Division, made and copied in accordance with the præcipes filed by the appellant and appellees, copied herein and found on pages 227 to 236 of Volume One of this record, as full, true and complete as the originals of the same on file and of record in my office.

In Testimony Whereof, witness my hand and the seal of said

court this 28th day of November, 1913.

Clerk United States District Court for the Western District of Kentucky. 266

Certified Copy, Volume 2.

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals for the Sixth Circuit.

No. 2572.

W. A. Gaines & Company, Appellant,

ROCK SPRING DISTILLING COMPANY and SILAS ROSENFELD, Appellees.

Volume II.

EXHIBIT NUMBER 20 WITH AFFIDAVIT OF GEORGE F. BERRY.

Transcript of Record in Case No. 2700.

United States Circuit Court of Appeals, Eighth Circuit.

MAX KAHN, Administrator, etc., vs. W. A. GAINES & COMPANY.

Appeal from the District Court of the United States for the Western District of Kentucky.

Original Transcript. Filed December 1st, 1913.

Filed Dec. 2, 1913. Frank O. Loveland, Clerk.

2661/2

No. 455.

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Eighth Circuit.

No. 2700.

MAX KAHN, Administrator of the Estate of Abraham Hellman, and Moritz Hellman, Appellants, vs.

W. A. Gaines and Company (a Corporation), Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Filed September 20, 1907.

1 The United States of America to W. A. Gaines and Company (a Corporation), Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Eighth Circuit, at St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to an order allowing appeal, filed in the Clerk's office of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein Max Kahn, Administrator of the Estate of Abraham Hellman, and Moritz Hellman, are appellants, and you are appellees, to show cause, if any there be, why the interlocutory decree rendered against the said appellants as in said order allowing appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable David P. Dyer, Justice of the Circuit Court of the United States for the Eastern District of Missouri, this 20th day of July in the year of our Lord one thousand nine hundred and

seven.

DAVID P. DYER, United States District Judge for the Eastern District of Missouri.

Service of the foregoing Citation is hereby acknowledged this 5th day of Aug., A. D. 1907.

JAMES L. HOPKINS, Solicitor for W. A. Gaines & Co., Appellee.

No. —. United States Circuit Court, Eastern Division of the Eastern District of Missouri. W. A. Gaines & Co., vs. Max Kahn Adm. et al. Citation. Filed 20 day of July 1907. James R. Gray, Clerk.

United States of America, Eastern Division of the Eastern Judicial District of Missouri, ss:

In the United States Circuit Court in and for the Eastern Division of the Eastern Judicial District of Missouri.

Be It Remembered: That heretofore, to-wit: on the 11th day of November, A. D., 1904, there was filed in the office of the Clerk of said Court, a Bill in Equity, wherein W. A. Gaines & Co., is complainant, and Abraham M. Hellman and Moritz Hellman, are Defendants.

And thereupon a Subpœna in Chancery was issued, which Subpœna with the Marshal's return thereon is in the words and figures as follows, to-wit:

(Subpana in Chancery.)

United States of America, Eastern Division of the Eastern Judicial District of Missouri, set:

In the Circuit Court of the United States in and for the Eastern Division of said District.

The President of the United States of America to Abraham M. Hellman and Moritz Hellman, Greeting:

You are hereby commanded to be and appear at Rules, to be held at the office of the Clerk of the Circuit Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, on the first Monday of December next, at the City of St. Louis, then and there to answer the bill of complaint of W. A. Gaines and Company citizen of the State of Kentucky filed against you on the 11th day of November, 1904: hereof fail not.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 11th day of November,

1904.

Issued at Office, in the City of St. Louis, under the Seal of said Circuit Court, the day and year last aforesaid.

[SEAL.] JAMES R. GRAY, Clerk.

MEM.—The Defendants to enter their appearance in this suit in the Clerk's office, on or before the day at which the writ is returnable; otherwise the bill may be taken pro confesso.

JAMES R. GRAY, Clerk.

(Marshal's Return on Subpana in Chancery.)

UNITED STATES OF AMERICA.

Eastern Division of the Eastern Judicial District of Missouri, set:

I certify that I executed this writ at the City of St. Louis, in the above named District on the 15th day of Nov. 1904, by delivering a certified copy thereof and a copy of the petition in this cause as certified by the Clerk to the within named defendant Abraham M. Hellman.

I further certify that the within named defendant Moritz Hellman cannot be found in the Eastern District of Missouri.

WILLIAM L. MORSEY, U. S. Marshal, E. District of Missouri, By LOUIS WILD, Deputy.

And afterwards, to-wit: on December 29th, 1904, a Bill of Revivor was filed in said cause, which is in words and figures as follows, to-wit:

(Bill of Revivor.)

3 In the United States Circuit Court, Eastern Division of the Eastern District of Missouri.

W. A. GAINES, Complainant,

US

ABRAHAM M. HELLMAN and MORITZ HELLMAN, Defendants.

To the Honorable the Judges of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri:

W. A. Gaines & Company, a corporation organized under and pursuant to the laws of the State of Kentucky, and having its prin-

cipal office and place of business at the City of Frankfort, in said State, and being an inhabitant of the City of Frankfort, in said State, by leave of court first had and obtained, brings this its bill of revivor against Max Kahn, administrator of the estate of Abraham M. Hellman, deceased; the said Max Kahn being a citizen of the State of Missouri, and a resident of the City of St. Louis in said State; and thereupon your orator complains and says that on or about the 11th day of November, 1904, your orator filed a bill in equity in this court against Abraham M. Hellman and Moritz Hellman, alleging infringement by them of certain trade-mark and other trade rights of your orator.

That thereafter, the said Abraham M. Hellman and Moritz Hellman, having been duly served with the writ of subpœna, appeared by counsel on the Rule day in December, 1904, and that thereafter, by consent, certain depositions of certain witnesses for the defendants

were taken; but that no answer has been filed herein.

That the said Abraham M. Hellman, lately, and on or about the 14th day of December, 1904, departed this life, having made and published his last will and testament in writing; and that on or about the 28th day of December, 1904, the Probate Court of the City of St. Louis did grant to said Max Kahn, letters of administration with the will annexed, of the goods, chattels, rights and credits of the said Abraham M. Hellman, deceased; and that the said Probate Court of the City of St. Louis was the proper Court having jurisdiction to make and grant such letters.

That thereby the said Max Kahn became and he now is the legal

personal representative of the said Abraham M. Hellman.

And your orator further shows that the said suit and proceedings have become abated by the death of the said Abraham M. Hellman; and your orator having been granted leave, on the 29th day of December, 1904, by this Court to file this bill of revivor, and your orator being, as it is advised, entitled to have the said suit and proceedings revived against the said Max Kahn, in the place and stead

4 of the said Abraham M. Hellman, lately deceased, and to have said cause put in the same plight and condition as the same was in previously to the abatement thereof by the death of the

said Abraham M. Hellman.

To the end, therefore, that the said Max Kahn may answer the premises; and that the said suit and proceedings which so became abated as aforesaid may stand revived, and be in the same state and condition as the same were in at the time of the death of the said Abraham M. Hellman, or that the defendant may show good cause to the contrary. May it please your honors to grant unto the plaintiff a writ of subpæna to revive and answer, issuing out of and under the seal of this honorable court to be directed to the said Max Kahn, thereby commanding him at a certain day and under a certain penalty, to be therein limited, personally to be and appear before your honors, in this honorable Court, then and there to answer the premises and to show cause, if he can, why the said suit, and the proceedings therein had, should not stand and be revived against him, and be in the same plight and condition as the same were in at the

time of the abatement thereof; and further, to stand to, and to abide, such order and decree in the premises as to your honors shall seem meet. And the plaintiff shall ever pray.

JAMES L. HOPKINS,

Solicitor for Complainant, HIGDON & LONGAN & HOPKINS,

Of Counsel.

And afterwards, to-wit: on said December 29th, 1904, and during the September Term 1904 of said Court the following proceedings were had and appear of record in said cause, to-wit:

W. A. Gaines, Complainant,

18.

ABRAHAM M. HELLMAN and MORITZ HELLMAN, Defendants.

Now comes complainant, by its solicitor, and suggests to the court the death of Abraham M. Hellman, one of the defendants herein, and by leave of court a bill of revivor; thereupon Max Kahn, Administrator, with the will annexed, of the estate of said Abraham M. Hellman, comes by his solicitor and enters his appearance herein, and with his consent, it is ordered that this action now stand revived and proceed against said Kahn, as such administrator.

December 29, 1904.

(Signed)

ELMER B. ADAMS, Judge,

And afterwards, to-wit: on March 3rd, 1905, an Amended Bill was filed in said cause, which said Amended Bill is in words and figures as follows, to-wit:

(Amended Bill.)

5 In the Circuit Court of the United States, Eastern Division of the Eastern District of Missouri.

No. 5096. In Equity.

W. A. Gaines & Company, Complainant,

MORITZ HELLMAN and MAX KAHN, Administrator with the Will Annexed of Abraham M. Hellman, Deceased, Respondents.

To the Honorable Judges of the Circuit Court of the United States, Eastern Division of the Eastern District of Missouri:

W. A. Gaines & Company, a corporation organized, existing and doing business under and by virtue of the laws of the State
6 of Kentucky, and having its principal office and place of business at the City of Frankfort, in the County of Franklin, in the State of Kentucky, and being a citizen of the State of Kentucky, by leave of Court first had and obtained, brings this, its

amended bill of complaint, against Moritz Hellman and Max Kahn,

administrator with the will annexed of Abraham M. Hellman, deceased, each of whom is a citizen of the State of Missouri, and a resident of the City of St. Louis, in the Eastern Division of the Eastern Federal Judicial District of Missouri; and thereupon your Orator complains and says:

That your Orator is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and having its principal office and place of business in the City of Frankfort, in the County of Franklin, in the State of Kentucky, and that it is engaged in the distillation of whisky in the State of Kentucky.

That at the time of the filing of the bill of complaint herein, the respondents Moritz Hellman and Abraham M. Hellman were co-partners under the firm name and style of A. M. Hellman & Company; that said Abraham M. Hellman died thereafter, and on or about the 14th day of December, 1904. And that the respondent, Max Kahn, as the Administrator of said Abraham M. Hellman, has heretofore been made a party hereto by the Bill of Revivor herein.

That your Orator is the sole and exclusive owner of the trademark for whisky consisting of the words "Old Crow," which said words "Old Crow" are, and have during their use as a trade-mark by your Orator and its predecessors, been applied to packages containing whisky, by marking, printing, branding, stamping and labeling.

That your Orator is the successor in business of W. A. Gaines & Company, a co-partnership, and that said W. A. Gaines & Company, the co-partnership, was the successor in business of

Gaines, Berry & Company, a co-partnership; that Gaines, Berry & Company, in the year A. D. 1867, adopted and commercially applied the words "Old Crow" as a trade-mark for whisky distilled by them, and that said words "Old Crow" were then open to adoption as a trade-mark for whisky, and that said Gaines, Berry & Company continuously used the said trade-mark in application to whisky until the year A. D. 1870, when they were succeeded in business by W. A. Gaines & Company, a co-partnership; whereupon, said Gaines, Berry & Company transferred, assigned and conveyed unto the said W. A. Gaines & Company, the co-partnership, all and singular, their entire business, assets and good will, including the said trade-mark consisting of the words "Old Crow."

That the said W. A. Gaines & Company, the co-partnership, continued the distillation and vending of whisky to which the said trade-mark was applied, and continuously distilled and vended the same under the said trade-mark, until the year A. D. 1887, when they were succeeded in business by your Orator; whereupon, said W. A. Gaines & Company, the co-partnership, conveyed unto your Orator, all and singular, their assets, business and good will, including the trade-mark "Old Crow."

That thereupon your Orator continued the distillation and sale of the whisky to which the said trade-mark "Old Crow" had been applied by its said predecessors, and ever since has continuously distilled and sold said whisky under the trade-mark "Old Crow," and still continues to distill such whisky and to vend the same under the said trade-mark "Old Crow." That said trade-mark "Old Crow" has been used continuously in application to said whisky since its said adoption by Gaines, Berry & Company in 1867, and and has through long use become and now is an integral part of the

good will of your Orator, and of the value of Five Hundred Thousand (500,000) Dollars, and upwards; that the amount in controversy herein is in excess of the sum of Two Thou-

sand (2,000) Dollars, exclusive of interest and costs.

That the said whisky of your Orator so designated and distinguished as to origin and ownership by the trade-mark consisting of the words "Old Crow," has always been produced by your Orator and its said predecessors, since the year A. D. 1867, on Glenn's

Creek, in the County of Woodford, State of Kentucky.

That in the year A. D. 1835, one James Crow became domiciled upon the said Glenn's Creek and did there begin the manufacture of whisky of superior excellence and quality, which became designated about that time by the name "Crow" or "Old Crow." the said James Crow was continuously from 1835 until the time of his death, in the year A. D. 1855, engaged in the distillation of said whisky, which was known and designated as "Crow" or "Old Crow" whisky, and that during his lifetime the said whisky acquired a wide and extensive sale and reputation. That upon the death of the said James Crow there remained upon the market a considerable quantity of the said "Crow" or "Old Crow" whisky, and that the said "Old Crow" whisky continued to be known commercially, and was sold and dealt in continuously by various persons who had purchased the same during the lifetime of the said James Crow, until the year A. D. 1867, when your Orator's predecessor began the production of their whisky, using the same process and material that had theretofore been used by the said James Crow, and conducting the distillation of the said whisky upon the said Glenn's Creek, in the County of Woodford, and State of Kentucky. That from the time of the death of the said James Crow in 1855 until the year A. D. 1867, no whisky was produced upon the said Glenn's Creek, or elsewhere, to which the said words "Crow" or "Old Crow" were applied as a trade-mark. That the said

words "Crow" or "Old Crow" had been left open for adoption by the death of the said James Crow, and the cessation of the distillation of the whisky designated by the said words, so that the same were lawfully appropriated and used by your Orator's

said predecessors in the year A. D. 1867.

And in this behalf your Orator states that from and after the time when said process was first devised and put into use by said James Crow in A. D. 1835, as aforesaid, down to the present time, the words "Old Crow" have always been applied continuously to the whisky produced by the said process and to no other whisky whatsoever; and that the distillation and production of said whisky made by said process has always been made on Glenn's Creek, in

Woodford County, Kentucky, and at no other place in the United

States, or anywhere else in the world.

That the said words "Old Crow" have continuously since the year A. D. 1835 and down to the present time, indicated to the public, and particularly to consumers of and dealers in whisky throughout the world, the whisky made by the said process, devised and invented by the said James Crow, and no other whisky whatsoever.

That the said words "Old Crow" have continuously since the year A. D. 1835 and down to the present time, indicated to the public, and particularly to the consumers of and dealers in whisky throughout the world, that the whisky to which it was and is applied was and is distilled on Glenn's Creek, in Woodford County

Kentucky, and nowhere else in the world.

Your Orator further states that the whisky to which the words "Old Crow" is applied is sold at a higher price than any other whisky of equal age produced in the United States, by reason of its uniform excellence, and the skill and care devoted by your Orator to the selection of the materials used, and to the process of

its distillation, together with the natural advantages of the locality in which your Orator's distillery is situated. That your Orator and its predecessors have expended large sums of money in and about advertising the said whisky throughout the United States.

Your Orator further avers that its right to be subjected to none but fair and lawful competition is of the value of Five Hundred

Thousand (\$500,000) Dollars and upwards.

That the said mark "Old Crow" as applied to whisky is a lawful and valid and subsisting trade-mark, and that your Orator has been universally recognized as the sole and exclusive owner thereof; that save for the wrongful acts of the respondent hereinafter complained of, your Orator has had at all times quiet and undisturbed

possession and use of the said trade-mark.

That your Orator, by reason of the uniform excellence of the whisky distilled and sold by it under the trade-mark "Old Crow," has established a large and continuously increasing trade and demand for its said whisky, so distinguished by the said trade-mark, said trade and demand being established throughout the United States, and particularly in the City of St. Louis, in the State of Missouri.

That, well knowing your Orator's rights in the premises, and in unlawful disregard of the same, the respondents, Moritz Hellman and the late Abraham M. Hellman, deceased, have from the first day of January, A. D. 1903, and thence continuously from day to day unto to the time of the filing of the bill of complaint herein, made or caused to be made, and sold, or caused to be sold, in the City of St. Louis, in the State of Missouri, and elsewhere, a certain compound liquor, or liquid, to which they applied the trade-mark "Old Crow" against the will of your Orator, and without its consent, and in fraud and violation of your Orator's trade-mark rights.

That by their said fraudulent acts, said respondents Moritz Hell-

man and said Abraham M. Hellman, now deceased, have sold said spurious compounded liquor, as and for your Orator's whisky, and did divert to themselves trade to which your Orator was entitled, and which it would have otherwise received. Said liquor sold by the respondents, Moritz Hellman and said Abraham Hellman, deceased, has been purchased by the public, and consumers thereof, in the false belief that it was your Orator's whisky, and by reason of the inferior quality of the said liquor, the reputation of your Orator's whisky has been greatly damaged.

Your Orator is informed and believes, and therefore avers the fact to be, that by reason of the said unlawful invasion of its business and good will by the respondents, Moritz Hellman and said Abraham M. Hellman, deceased, it has been damaged in the sum of Five Thou-

sand (\$5,000) Dollars.

That the said wrongful acts have placed the value of your Orator's said trade-mark "Old Crow" in jeopardy; that said acts are now continuing, and unless restrained by your Honors will ultimately de-

strov your Orator's trade-mark.

That the said unlawful and wrongful acts constitute unfair competition in trade; that the said acts are now continuing, and are now imperiling and jeopardizing your Orator's established trade and good will, and unless restrained by your Honors will ultimately destroy

your Orator's business, trade and good will.

Forasmuch as your Orator is without adequate remedy, save in this Court, and to the end, therefore, that the Respondents may, if they can, show cause why your Orator should not have the relief hereby prayed, and that the Respondents may be compelled to make a full, perfect and complete disclosure and discovery of, all and singular, the matters aforesaid, as fully as if directly interrogated as to each, and that said Respondents may be decreed, according to the best and

utmost of their knowledge, remembrance, information and belief, full, true, direct and perfect answer hereunto make, but not under oath (an answer under oath being hereby ex-

pressly waived):

And that the Respondents may be decreed to account for the gains and profits by them in this behalf unlawfully made and received;

And that in addition to such gains and profits, your Orator may have and recover damages for the injury in this behalf by it sustained:

Your Orator prays that your Honors may grant a writ of injunction issuing out of and under the seal of this Honorable Court, perpetually enjoining the said Respondents and their privies from making, keeping, offering for sale or selling any liquor not produced by your Orator, and bearing your Orator's said trade-mark "Old Crow";

May it please your Honors to grant unto your Orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of Subpœna ad Respondendum of the United States of America, directed to the said Moritz Hellman and Max Kahn, Administrator with the will annexed of Abraham H. Hellman, deceased, commanding them on a day certain therein to be named to appear and answer unto this bill of complaint, and to abide and perform all and

singular such orders and decrees in the premises as to your Honors shall seem proper and conformable to the principles of equity and good conscience.

JAMES L. HOPKINS, Solicitor for Complainant. JAMES L. HOPKINS AND D. W. LINDSEY, Of Counsel for Complainant.

And afterwards, to-wit: on June 5th, 1905, an Answer was filed in said cause, which said Answer is in words and figures as follows, to-wit:

(Answer.)

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

No. 5056. In Equity.

W. A. Gaines & Company, Complainant,

Max Kahn, Administrator with the Will Annexed of the Estate of Abraham M. Hellman, Deceased, and Moritz Hellman, Respondents.

14 & 15 Answer of Moritz Hellman and Max Kahn, Administrator with the Will Annexed of the Estate of Abraham M. Hellman, Deceased.

The Joint and Several Answer of the Respondents to the Amended Bill of Complaint of W. A. Gaines & Company, Complainant.

These respondents respectively, now and at all times hereafter, saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in said amended bill contained, for answer thereto, or to so much thereof as these respondents are advised it is material and necessary for them to make answer to, jointly and severally answering say:

I.

That as to whether or not complainant is a corporation organized existing and doing business under and by virtue of the laws of the State of Kentucky, having its principal office and place of business at the City of Frankfort, in the County of Franklin, in the State of Kentucky, or is engaged in the distillation of whisky in the State of Kentucky, these respondents have not sufficient information upon which to form a belief and therefore deny the same and require strict proof thereof.

# II.

Respondents deny that Moritz Hellman is a citizen of the State of Missouri, but alleges the fact to be that he is a citizen of the State of Mississippi. Respondents admit that at the time of the filing of the bill of complaint herein, respondent Moritz Hellman and the late Abraham M. Hellman were co-partners, doing business under the firm name and style of A. M. Hellman & Co., and that said Abraham M. Hellman died thereafter and Max Kahn, as administrator with the will annexed of the estate of said Abraham M. Hellman, has heretofore appeared and by leave of court entered his appearance as party respondent to this suit.

#### III.

Respondents deny that complainant is the sole or exclusive owner of the trade-mark for whisky consisting of the words "Old Crow" and deny that the said words "Old Crow" are or have been applied by complainant to packages containing whisky by marking, printing, branding, stamping or labeling; and deny that the same have been continuously applied to whisky by complainant and its alleged predecessors in business since the year A. D. 1867 by branding, printing, stamping, labeling or marking same on packages or receptacles for whisky; and deny that the said words have been used as a trade-mark by complainant or any of its predecessors; and deny that any of complainant's predecessors have applied the said words to packages containing whisky by marking, printing, branding, stamping or labeling; and deny that complainant or any of its predecessors in business marked the words "Old Crow" as a trade-mark upon any package or packages containing whisky, or marked the said words "Old Crow" upon any package of whisky in any manner whatsoever so as to constitute a trade-mark.

### IV.

Respondents deny that complainant is the successor in business of W. A. Gaines & Co., an alleged co-partnership, and deny that the alleged co-partnership, W. A. Gaines & Co., was the successor in business of Gaines, Berry & Co., an alleged co-partnership.

# 17 V.

Respondents deny that Gaines, Berry & Co., in the year 1867 adopted or commercially applied the words "Old Crow" as a trade mark for whisky distilled by them or for any whisky, and deny that said words "Old Crow" were then open to adoption as a trade mark for whisky; and deny that said Gaines, Berry & Co., continuously used the words "Old Crow" as a trade mark in application to whisky until the year A. D. 1870 or any other year.

### VI.

Respondents deny that in the year 1870 or any other year, Gaines, Berry & Co., an alleged co-partnership, was succeeded in business by W. A. Gaines & Co., an alleged co-partnership, and deny that said Gaines, Berry & Co., transferred, assigned or conveyed to the said W. A. Gaines & Co., the alleged co-partnership, all or singular, their entire business, assets or good will or any part thereof, or the alleged trade-mark "Old Crow," or any trade-mark rights in the said words "Old Crow," or any other right or rights in or in connection with the said words.

## VII.

Respondents deny that W. A. Gaines & Co., the alleged co-partnership, continued the distillation or vending of whisky under the alleged trade mark "Old Crow," or continuously distilled or vended whisky under the alleged trade mark "Old Crow" until the year A. D. 1887, or any other year, and deny that the said alleged co-partnership was succeeded in business by complainant in the year 1887 and deny that the said alleged co-partnership thereupon or at any time conveyed to complainant, all or singular, its assets, business, or good will, or any portion thereof, or the alleged trade mark

18 "Old Crow" or any rights in the nature of trade mark rights in the said words "Old Crow"; or any other right or rights in or in connection with the said words.

### VIII.

Respondents deny that complainant continued the distillation or sale of whisky under the alieged trade mark "Old Crow" from the year A. D. 1887 and deny that it has continuously distilled or sold whisky ever since or still continues to distill or vend such whisky under the alleged trade mark "Old Crow."

#### IX.

Respondents deny that complainant from 1887 on used the words "Old Crow" as a trade mark in application to whisky, and deny that complainant's predecessors in business or either of them had theretofore used the said words "Old Crow" as a trade-mark in application to whisky; and deny that said words "Old Crow" have been used continuously as a trade mark in application to whisky by complainant or any predecessor in business of complainant from the year 1867; and deny that through long use, the alleged trade mark has become or now is or at any time has been an integral party or any part of the good will of complainant's business, or is of the value of \$500,000 to complainant or any portion thereof, or that the amount in controversy as aforesaid is in excess of \$2,000 exclusive of costs, or any other sum.

# X.

Respondents deny that whisky, if any, manufactured by complainant is distinguished or designated as to origin or ownership by the alleged trade mark "Old Crow" and deny that whisky designated by the words "Old Crow" has always or at any time since the 19 year 1867 been produced by complainant of any of its predecessors in business on Glenn's Creek, in Woodford County, Kentucky, or anywhere else.

#### XI.

As to whether or not in the year 1835 one James Crow became domiciled upon Glenn's Creek and as to whether or not he did there begin the manufacture of whisky of superior excellence or quality, or of any kind of whisky; and as to whether or not the whisky if any manufactured by him became designated about that time by the name "Crow" or "Old Crow," and as to whether or not the said James Crow continuously from the year 1835 to the year 1855 engaged in the distillation of whisky which was known or designated as "Crow" or "Old Crow" whisky, and as to whether or not during the lifetime of the said James Crow the said whisky if any acquired a wide or extensive sale or reputation, and as to whether or not upon the death of the said James Crow there remained upon the market a considerable quantity of whisky alleged to have been manufactured by the said James Crow or alleged to have been designated or known as "Crow" or "Old Crow" whisky and as to whether or not the alleged "Old Crow" whisky continued to be so known commercially or was sold or dealt in continuously by various persons who had purchased the same during the lifetime of the said James Crow, until the year 1867, respondents have not sufficient information upon which to form a belief and therefore deny the same and require strict proof of all such allegations.

### XII.

Respondents deny that any predecessor in business of complainant began the production of whisky in 1867, or in that year or thereafter used the same process or material that had theretofore been used by James Crow, and deny that any predecessor in business of complainant conducted the distillation of the alleged whisky upon Glenn's Creek in Woodford County, Kentucky.

### XIII.

Respondents deny that from the death of James Crow in 1855 until 1867 no whisky was produced upon Glenn's Creek or elsewhere to which the words "Crow" or "Old Crow" were applied as a trade-mark or as a trade name to designate the same; but on the contrary these respondents allege the truth in relation to said matters to be that whisky was made, sold and dealt in under the name "Crow"

and "Old Crow," and that barrels, boxes, bottles, kegs and packages containing whisky with the figure of a crow and the words "Crow" and "Old Crow" stamped or branded upon them, and barrels, bottles, boxes and kegs containing whisky with labels bearing the figure of a crow and the words "Crow" or "Old Crow" pasted upon and attached to them were sold and dealt in long prior to the year 1867, to-wit, as early as the year 1863 and long prior thereto by the predecessors in business of Moritz Hellman and the late Abraham M. Hellman, to-wit, the firm of I. & L. M. Hellman, in the City of St. Louis, State of Missouri, and at numerous other places and cities throughout the United States and have been continuously sold and dealt in from 1863 to the present time by the said I. & L. M. Hellman and their successors in business. And respondents aver that neither complainant nor any of its predecessors in business ever at any time acguired or had any exclusive or legal title to the use of the said word or words in designating or in connection with whisky made or produced by it or its predecessors in business, or either of them.

#### XIV.

Respondents deny that the words "Crow" or "Old Crow" were lawfully appropriated or used by complainant's predecessors in business in the year 1867 or any other year, as a trade mark or trade name to designate whisky.

# XV.

Respondents deny that James Crow devised or put into use any special process for the manufacture of whisky in the year 1835 or any other year and deny that the words "Old Crow" have always or continuously been applied to whisky produced by the said alleged process and deny that the said words have been applied to such whisky so made as alleged, and to no other whisky whatsoever, and deny that the said words have been applied by complainant or any of its predecessors to whisky produced by any particular process; and deny that the distillation or the production of whisky if any made by the alleged process has always been on Glenn's Creek, in Woodford County, Kentucky, and deny that the whisky if any produced according to such alleged process has been made only at said locality and has not been made at any other place in the United States or anywhere else in the world.

### XVI.

Respondents deny that the words "Old Crow" have continuously since the year 1835 or down to the present time, indicated to the public or particularly to consumers of or dealers in whisky throughout the world, or any of them, that the whisky, if any, to which such words were and are applied was or is distilled on Glenn's Creek in Woodford County, Kentucky, and nowhere else in the world.

## XVII.

Respondents deny that the words "Old Crow" have continuously since the year 1835 down to the present time, or at any time 99 since the year 1835, indicated to the public or to consumers of or dealers in whisky throughout the world or particularly to them or any of them, whisky made by the process alleged to have been invented or devised by the said James Crow, and deny that the words "Old Crow" have indicated such whisky so made as alleged and no other whisky whatsoever. But on the contrary these respondents aver and allege the truth in relation to said matters to be that in the year 1863 the firm of I. & L. M. Hellman, a co-partnrship composed of Isaac and Louis M. Hellman, who were the predecessors in business of Moritz Hellman and the late Abraham M. Hellman. did a general wholesale liquor business in the city of St. Louis, and made and produced according to their own formula a blended whisky which the said firm of I. & L. M. Hellman & Co. designated as "Crow" or "Old Crow" whisky, and branded and stamped upon barrels, kegs, boxes and bottles containing the said whisky the figure of a crow, and the words "Crow" and "Old Crow," and "Celebrated and "J. W. Crow's Bourbon," together with the firm Old Crow, name and the word "Hellman's," and continuously sold and dealt in whisky in packages so stamped, branded and labeled, and continuously designated the said whisky to the trade by the said names and each of them, until the year 1867, when Isaac Hellman, one of the members of the said firm of I. & L. M. Hellman, departed this life and shortly after the death of the said Isaac Hellman the said Louis M. Hellman acquired all the rights and property of the said Isaac Hellman in said firm of I. & L. M. Hellman, including the right to make and produce whisky according to the formula of said firm and sell the same, to use and apply to such whisky the said names of "Crow," "Old Crow" and "Celebrated Old Crow" and "J. W. Crow's Bourbon" together with the brands, labels, and marks and figures used in connection therewith. And these respondents further state that thereafter the said Louis M. Hellman by himself until 23 the year 1871 and thereafter in partnership with the late Abraham M. Hellman, until the year 1882 continued the said business under the same firm name of I. & L. M. Hellman, and during all said time continued to produce, manufacture, blend and sell the said whisky made according to the formula of said firm.

Abraham M. Hellman, until the year 1882 continued the said business under the same firm name of I. & L. M. Hellman, and during all said time continued to produce, manufacture, blend and sell the said whisky made according to the formula of said firm, and known and designated during all said time and previously as "Crow" and "Old Crow" and "Celebrated Crow Bourbon" and "J. W. Crow's Bourbon" whisky and continued during all said time to sell the same in the city of St. Louis and elsewhere under said names and continued during all of said time to apply said name and names to the bottles, cases, sacks, barrels and other receptacles containing the same by branding, labeling and stamping said names in connection with the figure of a crow thereon, as a trade mark in connection with the said firm name of "I. & L. M. Hellman," and in connection with the name "Hellman."

And these respondents further say that in the year 1882 the said

Abraham M. Hellman purchased and acquired all the rights and property of the said Louis M. Hellman in said firm of I. & L. M. Hellman, including the right to make and produce whisky according to said formula and sell the same to use and apply to such whisky said names of "Crow," "Old Crow" and "Celebrated Crow Bourbon" and "J. W. Crow's Bourbon," together with the brands, labels and marks and figures used in connection therewith, and thereafter, in the year — associated with himself the respondent Moritz Hellman and continued the business theretofore conducted in the name of I. & L. M. Hellman under the firm and copartnership name of A. M. Hellman & Co., down to the time of his death in the year 1904. And these respondents further say that during all of said time from the year 1882 down to the time of the death of the said Abraham M. Hellman, the said firm of Λ. M. Hellman & Co. did make and produce, according to the said formula, said

blended whisky, and branded and stamped upon barrels, kegs, boxes and bottles containing the said whisky the figure of a crow, and the words "Crow" and "Old Crow" and "Celebrated Old Crow" and "J. W. Crow's Bourbon," together with their firm name and the name of "Hellman's" and continuously sold and dealt in the said whisky in packages so stamped, branded and labeled, and continuously designated the said whisky to the trade by the said

names and each of them.

And these respondents further say that all of the acts of the said firm and copartnership of I. & L. M. Hellman, and of the said Louis M. Hellman under said firm name and of his successors in business under the same firm name, and of the said A. M. Hellman & Co. were open, unconcealed and known to the public and to the trade and were also known to the alleged firm and copartnership of Gaines, Berry & Co., the alleged copartnership of W. A. Gaines & Co., and to complainant respectively, during all said time, and the claim of the said Abraham M. Hellman and Moritz Hellman that they were rightfully entitled to the use of the said words "Crow," "Old Crow," "Celebrated Crow Bourbon" and "J. W. Crow's Bourbon," and the figure of a crow as a trade mark for and upon the whisky made and produced by them, was particularly well known to the complainant herein ever since the year 1896, and acquiesced in by said complainant since said time, and that the use of said words and symbols upon the packages, bottles, cases, casks and barrels containing the whisky made and produced by the said A. M. Hellman & Co. and their predecessors as aforesaid, was acquiesced in by the complainant and all other persons whether predecessors in business of complainant or otherwise, ever since the year 1863.

#### XVIII.

Respondents deny that whisky, if any, to which the words "Old Crow" are applied by complainant, is sold at a higher price 25 than any other whisky of equal age produced in the United States; and deny that the said whisky, if any, is possessed of uniform excellence or that complainant devotes any unusual skill or care to the selection of materials used, or to the process of distillation in the production of the said whisky; and deny that there are any natural advantages in the locality in which complainant's alleged distillery is situated; deny that the name "Old Crow" denotes whisky produced in said locality; and deny that complainant or any of its predecessors have expended large sums or any sums of money in or about advertising the said whisky throughout the United States or anywhere else. And respondents deny that complainant has a distillery on Glenn's Creek, in Woodford County, Kentucky. And these respondents aver the truth in relation to said matters to be that the whisky produced by complainant and sold by it under the firm name of "Crow" or "Old Crow" and represented by it to be whisky of superior excellence is in point of fact a whisky containing a large and dangerous percentage of fusel oil, a deadly poison, and a large percentage of other dangerous and deleterious impurities and that the same is unwholesome and impure, and that the same has not been subjected to any process of rectification, blending, or vatting for the purpose of removing such dangerous and deleterious impurities, and that in representing said whisky to be pure and of superior excellence the complainant is guilty of fraud upon the public and especially upon purchasers and consumers of whisky.

# XIX.

Respondents deny that complainant's right to be subjected to none but fair and lawful competition is of the value of \$500,000 or any portion of said sum, and deny that the amount in controversy herein exceeds the sum of \$2,000, or any other sum, exclusive of interest and costs.

26 XX.

Respondents deny that the words "Old Crow" as applied by complainant to whisky are a lawful, valid or subsisting trade mark, and deny that complainant has been universally recognized as the sole or exclusive owner of said alleged trade mark or of the right to use said words in or upon whisky, and deny that save for the acts of respondents complained of in the amended bill of complaint herein. complainant has had quiet or undisturbed possession or use of the said alleged trade mark. Respondents allege the truth in relation to said matters to be that neither complainant nor any of its predecessors in business has ever at any time had any right or title to the use of the words "Crow" or "Old Crow" as a trade mark or otherwise, nor at any time has been the only ones to use the said words to designate whisky, and that neither the complainant nor any of its predecessors, ever, prior to the year 1896, branded, labeled, marked or stamped upon any whisky made or produced by it the said words "Old Crow," but that at all times since the year 1863 and long prior thereto, the said words "Old Crow" have been used by Moritz Hellman and the late Abraham M. Hellman and their predecessors in business respectively to designate whisky made, dealt in and sold by them.

### XXI.

Respondents deny that complainant has established a large or continuously increasing trade or demand for whisky sold under the name "Old Crow" throughout the United States, or particularly in the city of St. Louis, Missouri, or that whisky if any distilled or sold by it possesses any uniform excellence, or any excellence at all.

### XXII.

Respondents deny that respondents Moritz Hellman and the late Abraham M. Hellman or either of them, have, since the 27 first day of January, A. D. 1903, continuously or at any time since said date violated any rights of complainants in the nature of trade mark rights or any other rights; and deny that they have sold or caused to be sold any whisky or any liquor or liquid whatever as or for complainant's whisky; and deny that they diverted to themselves any trade to which complainant was entitled or which complainant would otherwise have received; and deny that the public or any consumer or consumers of whisky purchased any whisky or any liquor or liquid sold or caused to be sold by respondent Moritz Hellman and the late Abraham M. Heilman, deceased, or either of them, in the belief that it was complainant's whisky; and deny that the whisky to which respondent Moritz Hellman and the late Abraham M. Hellman and their predecessors in business applied the words "Old Crow" was of inferior quality; and deny that complainant's whisky has been greatly damaged or damaged at all by any act of Moritz Hellman and the late Abraham M. Hellman, or either of them or any of their predecessors in business.

### XXIII.

Respondents deny that complainant's business or good will has been invaded by the alleged acts or any act of Moritz Hellman and the late Abraham M. Hellman, deceased, or by any act of either of them; and deny that complainant has been damaged in the sum of \$5,000 or in any sum whatever; deny that the alleged acts of Moritz Hellman and the late Abraham M. Hellman, deceased, or of either of them, are or have at any time been wrongful, and deny that the said alleged acts constitute unfair competition in trade; and deny that the said alleged acts are now imperiling or jeopardizing complainant's established trade or good will or at any time have imperiled or jeopardized said trade or good will; and deny that

unless restrained by the process of this court said alleged acts or any of them will ultimately destroy complainant's business, trade or good will, or will injure said business, trade or good

will, in any degree whatever.

### XXIV.

Respondents deny that complainant is without adequate remedy save in this court or that any act of respondents or of either of them

will be a damage to complainant or will produce irreparable damage to complainant.

Wherefore these respondents, having fully answered, confessing, traversing, avoiding and denying all the matters of the said amended bill of complaint material to be answered, according to their best knowledge and belief, humbly pray this honorable court to enter its decree that these respondents respectively be hence dismissed with their reasonable costs and charges in this behalf sustained, and for such further and other relief in the premises as to this honorable court may seen meet and in accordance with equity.

KLEIN & HOUGH, Solicitors and of Counsel for Respondents Herein.

29 And afterwards, to-wit: on June 13th, 1905, a Replication was filed in said cause, which said Replication is in words and figures as follows, to-wit:

# (Replication.)

In the Circuit Court of the United States, Eastern Division of the Eastern Judicial District of Missouri.

No. 5096. In Equity.

W. A. Gaines & Company, Complainant,

V8.

Max Kahn, Administrator with the Will Annexed of the Estate of Abraham M. Hellman, Deceased, and Moritz Hellman, Respondents.

Replication of Complainant, W. A. Gaines & Company, in Above Cause to the Answer of Max Kahn, Administrator with the Will Annexed of the Estate of Abraham M. Hellman, Deceased, and Moritz Hellman, Respondents.

This replicant, saving and reserving all advantage of exception to the manifold insufficiencies of said answer, for replication thereto saith that it will aver and prove its said bill to be true and sufficient, and that the said answer is untrue and insufficient; wherefore it prays relief as in said bill set forth.

JAMES L. HOPKINS, Solicitor and of Counsel for Complainant.

On June 5th, 1905, a Cross-bill and Exhibits thereto were filed in said cause, which Cross Bill and Exhibits are respectively in words and figures as follows, to-wit: In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

No. 5056. In Equity.

W. A. GAINES & COMPANY, Complainant,

Max Kahn, Administrator with the Will Annexed of the Estate of Abraham M. Hellman, Deceased and Moritz Hellman, Respondents.

The Cross-bill of Moritz Hellman and Max Kahn, Administrator with the Will Annexed of the Estate of the Late Abraham M. Hellman, Respondents, to the Bill and the Amendment Thereto of W. A. Gaines & Co., Complainant.

To the Honorable Judges of the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri:

Come now your orators, the above named respondents, Moritz Hellman, a citizen of the State of Mississippi, and Max Kahn, administrator with the will annexed of the estate of the late Abraham M. Hellman, a citizen of the State of Missouri, and by leave of court first had and obtained, file their cross-bill herein against W. A. Gaines & Co., complainant in said original and amended bills, a citizen of the State of Kentucky, and represent to the honorable court as follows:

T.

Your orators aver that Moritz Hellman, of Natchez, Mississippi, a citizen of the state of Mississippi, and Max Kahn, administrator with the will annexed of the estate of the late Abraham M. Hellman, deceased, of the city of St. Louis, Missouri, is a citizen of the State of Missouri, in the Eastern Division of the Eastern Judicial District thereof, and W. A. Gaines & Company is a corporation organized, existing and doing business under the laws of the State of Kentucky, and is a citizen of the said State of Kentucky.

II.

Your orators further aver that on the — day of November, 1904, W. A. Gaines & Co., party respondent to this cross 31 bill, filed its bill of complaint against Moritz Hellman and the late Abraham M. Hellman, and by the said bill of complaint, respondent W. A. Gaines & Co. sought to charge that it was the lawful and exclusive owner of an alleged trade mark for whisky consisting of the words "Old Crow," and of the alleged right to designate whisky by said words, and that Moritz Hellman and the late Abraham M. Hellman had been guilty of certain alleged acts which constituted an infringement of the alleged trade mark

and unfair competition in trade; and thereafter, on the fourteenth day of December, 1904, Abraham M. Hellman died and Max Kahn was duly appointed administrator with the will annexed of his estate and by leave of court entered his appearance as party respondent to said suit, and thereafter yours orators interposed a demurrer to said bill of complaint which was sustained by the court, and thereafter respondent filed its amended bill of complaint which sought to charge the same matters and things which were charged in the said original bill of complaint. And your orators further aver that James 1. Hopkins was and now is solicitor of record in the filing of said original and amended bills of complaint herein.

### III.

Your orators further aver that the said Moritz Hellman and Abraham M. Hellman were co-partners and engaged in business as general wholesale liquor dealers continuously under the firm name of A. M. Hellman & Co. for many years prior to the filing of the original bill of complaint herein by respondent against your orators. and until the said 14th day of December, 1904. Your orators further aver that Isaac Hellman and Louis M. Hellman in the year 1863 and prior thereto were co-partners doing business in the city of St. Louis, state and district aforesaid, under the firm name of I. & L. M. Hellman, and that said firm was a predecessor in business of the said firm of A. M. Hellman & Co., and continuously from the year 1863 made and produced according to their own formula a blended whisky which the said firm of I. & L. M. Hellman designated as "Crow" or "Old Crow" whisky, and branded and stamped upon barrels, kegs, boxes and bottles containing the said whisky the figure of a crow, and the words "Crow" and "Old Crow," and "Celebrated Old Crow," and "J. W. Crow's Bourbon," together with the firm name and the word "Hellman's" and continuously sold and dealt in whisky in packages so stamped, branded and labeled, and continuously design nated the said whisky to the trade by the said names and each of them, until the year 1867, when Isaac Hellman, one of the members of the said firm of I. & L. M. Hellman, departed this life and that shortly after the death of the said Isaac Hellman the said Louis M. Hellman acquired all the rights and property of the said Isaac Hellman in said firm of I. & L. M. Hellman, including the right to make and produce whisky according to the said formula and sell the same and use and apply to said whisky so made the said names of "Crow," "Old Crow," and "Celebrated Old Crow" and "J. W. Crow's Bourbon," together with the brands, labels and marks and figures used in connection therewith. And your orators further state that thereafter the said Louis M. Hellman by himself until the year 1871 and thereafter in partnership with the late Abraham M. Hellman, until the year 1882, continued the said business under the same firm name of I. & L. M. Hellman, and during all said time continued to produce, manufacture, blend and sell whisky

made according to the formula of said firm, and known and designated during all said time and previously as "Crow" and "Old Crow" and "Celebrated Crow Bourbon" and "J. W. Crow's Bourbon" whisky and continued during all said time to sell the same in the city of St. Louis and elsewhere under said names and continued during all of said time to apply said name and names

to the bottles, cases, casks, barrels and other receptacles containing the same by branding, labeling and stamping said names in connection with the figure of a crow thereon, as a trade mark, in connection with the said firm name of "I. & L. M. Hellman,"

and in connection with the name "Hellman."

And your orators further say that in the year 1882 the said Abraham M. Hellman purchased and acquired all the rights and property of the said Louis M. Hellm n in said firm of I. & L. M. Hellman, including the right to make and produce whisky according to the said formula and to sell the same and use and apply to such whisky said names of "Crow," "Old Crow" and "Celebrated Crow Bourbon," and "J. W. Crow's Bourbon," together with the brands, labels, and marks and figures used in connection therewith, and thereafter, in the year — associated with himself your orator, Moritz Hellman, and continued the business theretofore conducted in the name of I. & L. M. Hellman under the firm and co-partnership name of A. M. Hellman & Co., down to the time of his death in the year 1904. And these respondents further say that during all of said time from the year 1882 down to the time of the death of the said Abraham M. Hellman, the said firm of A. M. Hellman & Co. did make and produce, according to the said formula, said blended whisky, and branded and stamped upon barrels, kegs and boxes and bottles containing the said whisky the figure of a crow and the words "Crow" and "Old Crow" and "Celebrated Old Crow" and "J. W. Crow's Bourbon," together with their firm name and the name of "Hellman's" and continuously sold and dealt in the said whisky in packages so stamped, branded and labeled, and continuously designated the said whisky to the trade by the said names and each of them.

34 IV.

Your orators further aver that during all of the said years from 1863 and prior thereto down to and including the 14th day of December, 1904, Moritz Hellman and Abraham M. Hellman, co-partners, and their aforesaid predecessors in business, respectively, were engaged in the wholesale liquor business in the city of St. Louis continuously, and during all of that time bought, sold, dealt in, rectified, blended and compounded whiskies, liquors and distilled spirits, and did a general wholesale business; that during all of that time continuously the said Moritz Hellman and Abraham M. Hellman, copartners, doing business as aforesaid, and each of their predecessors in business, rectified, blended, made and produced a whisky according to their own formula, which whisky they at all times sold in packages upon which they stamped, branded and labeled the figure

of a crow, and the said whisky they at all times designated as "Crow" or "Old Crow" or "Crow Bourbon" and sold under the name of "Crow" or "Old Crow" or "Crow Bourbon" and which was known to the trade and to the public generally as "Hellman's Crow" or "Old Crow" or "Crow Bourbon" or "J. W. Crow's Old Bourbon" or "Hellman's Celebrated Crow Bourbon."

## V.

Your orators further aver that in the year 1863 and prior thereto the predecessors in business of Moritz Hellman and Abraham M. Hellman, to-wit, Isaac Hellman and Louis M. Hellman, doing business as aforesaid, in the city of St. Louis, stamped and branded upon barrels, and kegs, containing whisky, rectified, blended, made and produced by them as aforesaid, the figure of a crow and the words "Crow," "Old Crow" and "J. W. Crow's Old Bourbon" and "Hellman's Old Crow" and "Celebrated Crow Bourbon," and

stamped and branded the said figure of a crow and the said words upon boxes containing bottles of whisky rectified, blended, made and produced by them as aforesaid and sold to the trade, barrels, bottles, kegs and boxes containing whisky rectified, blended, made and produced by them, as aforesaid, stamped,

branded and labeled as aforesaid.

That in the year 1863 and long prior thereto the predecessors in business of your orator, Isaac and Louis M. Heilman, extensively advertised the said blend of whisky made and produced by them as aforesaid and in this connection manufactured and distributed to the retail trade and exhibited in public places, glass signs upon which were painted the figure of a crow perched upon a barrel and the words "Celebrated Crow Bourbon, I. & L. M. Hellman, St. Louis"; upon the head of the figure of the barrel appeared the words "Celebrated Crow Bourbon," the said sign being about 23½ inches by 29 inches in dimensions and neatly framed, a photographic reproduction of which sign is filed herewith and marked Respondent's exhibit A.

Your orators further aver that in the year 1863 and long prior thereto the said Isaac Hellman and Louis M. Hellman branded upon barrels, kegs and boxes containing the said blend of whisky made and produced by them as aforesaid the words "J. W. Crow's Old Bourbon," an impression of which brand is filed herewith and marked Respondent's exhibit "B." And the said Isaac Hellman and Louis M. Hellman long prior to the year 1863 and from 1863 on and their successors in business respectively continuously used the said brand in and upon barrels, boxes and packages containing the said blend of whisky made and produced by them as aforesaid.

Your orators further aver that Isaac Hellman and Louis M. Hellman and their successors in business respectively pasted upon and attached to barrels, kegs, boxes, bottles and packages containing the said blend of whisky, made and manufactured by them as

aforesaid, continuously, labels, bearing the figure of a crow and the words "Old Crow Hand Made Sour Mash Whisky" and also labels bearing the said figure of a crow and the words

"Old Crow Hand Made Whisky" and these said labels, and other similar labels were attached by them to packages containing the said blend of whisky as aforesaid, from the year 1863 and prior thereto, down to the filing of complainant's original bill herein. Said labels are filed herewith and marked exhibits C., D., E. and F. respectively.

### VI.

Your orators aver that the predecessors in business of Moritz Hellman and Abraham M. Hellman, to-wit, Issac and Louis M. Hellman, doing business under the firm name of I. & L. M. Hellman, were the first persons to brand, stamp and label barrels, kegs, boxes and bottles containing whisky with the figure of a crow and the words "Crow" and "Old Crow" and "Hellman's Old Crow" and "Hellman's Crow" and "J. W. Crow's Old Bourbon" and "Hellman's Celebrated Crow Bourbon" and similar marks and the said Isaac and Louis M. Hellman were the first persons to make, deal in or sell whisky in barrels, kegs, boxes and bottles, branded, stamped and labeled, as aforesaid, and the first persons to designate whisky by those words, phrases and symbols, and to sell whisky so designated by said words, phrases and symbols, all of which the said Isaac and Louis M. Hellman did long prior to the time when respondent wrongfully invaded their rights as hereinafter complained of.

#### VII.

Your orators further aver that the said predecessors in business of Moritz Hellman and Abraham M. Hellman, to-wit, Isaac and Louis M. Hellman, doing business as aforesaid continuously during the existence of the said co-partnership between them, and each of their successors in business respectively, including Moritz Hellman and the late Abraham M. Hellman, continuously rectified, blended, made and produced whisky as aforesaid and sold the same as aforesaid in barrels, bottles, kegs and boxes, branded, stamped and labeled as aforesaid, from the year 1863 and prior thereto, down to the present time, and continuously from the year 1863 and prior thereto to the present time, made dealt in and sold whisky rectified, blended, made and produced by them as aforesaid, to the trade, under the name and designation "Crow," "Old Crow," "J. W. Crow's Old Bourbon," "Hellman's Crow" and "Hellman's Old Crow" and "Hellman's Celebrated Crow Bourbon" and similar designations.

# VII-.

Your orators further aver that the figure of a crow and the words "Crow," "Old Crow" and "J. W. Crow's Old Bourbon" and "Hellman'- Crow" and "Hellman's Old Crow" and each of them, when used in connection with or stamped, branded or labeled upon packages containing whisky, indicated for many years and ever since the year 1863 and prior thereto continuously have indicated to the trade

and the public, a superior blended or compounded whisky, rectified, blended, made and produced by the said firms of I. & L. M. Hellman and A. M. Hellman & Co., successively. And the said whisky so rectified, blended, made and produced has been known to the public and to the trade generally from 1863 to the present time continuously as "Crow" or "Old Crow" whisky.

Your orators further aver that the figure of a crow and the words "Crow" and "Old Crow" and each of them, as stamped, branded, labeled and marked upon barrels, kegs, boxes, bottles and packages containing whisky, by the said firms, I. & L. M. Heliman and

38 A. M. Hellman & Co., either by themselves or in connection with the said figure of a crow or other figures or in connection with the words "Bourbon" or Hellman's" or "Celebrated" or the letters "J. W." constituted and at all times in the year 1863 and prior thereto and continuously from the said year 1863 down to the present time, have constituted a valid trade-mark belonging to said firms respectively and belonging to your orators, exclusively.

## IX.

Your orators allege that respondent is engaged through its agents in the city of St. Louis, in the State and District aforesaid, and through its agents elsewhere at numerous points throughout the United States and in foreign countries, in seiling a straight and unrectified whisky from which the impurities have not been removed by any process of rectification, blending or vatting, under the name "Crow" or "Old Crow"; that respondent has been so engaged in selling whisky since the year 1896 and prior thereto, against the will of Moritz Hellman and the late Abraham M. Hellman, deceased, without their consent and in fraud and violation of their rights in the premises.

And your orators aver the truth in relation to said matters to be that the whisky produced by respondent and sold by it under the name of "Crow" or "Old Crow" and represented by it to be whisky of superior excellence is in point of fact a whisky containing a large and dangerous percentage of fusel oil, a deadiy poison, and a large percentage of other dangerous and deleterious impurities and that the same is unwholesome and impure, and that the same has not been subjected to any process of rectification, blending or vatting for the purpose of removing such dangerous and deleterious impurities, and that in representing said whisky to be pure and of superior excellence, the respondent is guilty of fraud upon the public.

39 and especially upon purchasers and consumers of whisky.

Your orators further show that respondent by its said unlawful acts in the premises, and particularly by its use of the said words "Crow" or "Old Crow" in application to and in connection with its said whisky, as aforesaid, has damaged your orators' trade and business and has greatly diminished the sale of your orators' said blend of whisky and your orators further show that respondent has diverted to itself a large amount of trade to which your orators were entitled and which they would have received.

Your orators further show that the public and the trade in general and consumers of whisky have purchased the said whisky of respondent in the false belief that it was your orators' whisky; and by reason of the fact that the said whisky sold and dealt in by respondent, as aforesaid, is a straight whisky, and has been subjected to no process of rectification or purification to remove the impurities therefrom, and by reason of the fact that the said whisky so produced by respondent is in point of fact a whisky containing a large and dangerous percentage of fusil oil, a deadly poison, and a large percentage of other dangerous and deleterious impurities and that the same is unwholesome and impure, and that the same has not been subjected to any process of rectification, blending or vatting for the purpose of removing such dangerous and deleterious impurities. by reason of all these said facts the reputation of your orators' blend of whisky which is superior to the whisky so sold by respondent, has been greatly damaged.

Your orators allege the fact to be that the said wrongful acts of respondent constitute an infringement of your orators' said trade mark and an invasion of your orators' good will and business, and

constitute unfair competition in business.

And your orators further show that by reason of the said infringement of their said trade-mark and invasion of their business and good will, and unfair competition in trade by respondent as aforesaid, your orators have been damaged in the sum of \$100,000; that the value of your orators' said trade-mark and trade name is more than \$100,000; that your orator's good will is worth more than \$100,000, and that the amount herein involved exceeds \$2,000 in value, exclusive of interest and costs.

#### X.

Your orators aver that the said wrongful acts of respondent have placed the value of your orators' trade-mark and your orators' said right to use the words "Old Crow" and "Crow" and your orators' good will in jeopardy.

That said acts are now continuing and unless restrained will de-

stroy your orators' rights in the premises.

#### XI.

Your orators aver that they are without adequate remedy at law, and are unable to obtain any relief against the said wrongful acts of respondent, except in equity and in this honorable court.

#### XII.

To the end, therefore, that your orators may obtain relief in the premises in this honorable court where alone they can obtain relief, they humbly pray:

(1) That the said W. A. Gaines & Co. may be made respondent to this cross bill and compelled to answer each and every allegation therein contained, but not under oath, an answer under oath being expressly waived, and as fully and directly as if interrogated as to each allegation as to this, your orators' cross-complaint.

41 (2) That the said respondent may be compelled to render a full, true, perfect and complete account of the gains and profits by it in this behalf unlawfully made and received from the wrongful use of the words "Crow" or "Old Crow," as aforesaid, and may be decreed to pay unto your orators the full amount of such

profits.

(3) That the said respondent, its agents, servants and all persons claiming or holding through or under it, may be forever enjoined and restrained in any form or manner whatsoever from using the words "Crow" or "Old Crow" or any word or words similar thereto, or the figure of a crow in and upon whisky, and from making, dealing in, keeping for sale, offering for sale or selling, under the name, mark, brand, stamp or label "Crow" or "Old Crow" or indicating by such words or any word or words or design similar hereto or the figure of a crow or any figure similar thereto, whisky or other distilled spirits not made, produced, rectified or blended by your orators.

(4) That your orators may have such other and further relief in the premises as the nature of the circumstances of the case may require and to your honors shall seem meet. That your honors will grant a writ of subpœna ad respondendum of the United States of America, directed to the said W. A. Gaines & Co., commanding it on a day certain therein to be named to appear and answer unto this cross bill of complaint, and to abide and perform all and singular such orders and decrees in the premises as to your honors shall seem proper and conformable to the principles of equity and good con-

science.

(5) Inasmuch as this bill is a cross complaint to the amended bill heretofore filed herein by the respondent as complainant, and the said respondent herein is a non-resident of the State of Missouri, but is a citizen of the State of Kentucky, your orators prays that an order may be made and entered herein directing the marshal

of this court to serve the writ of subpœna when issued herein upon the said respondent, W. A. Gaines & Co., by substituted service thereof upon its solicitor of record in this court, namely, James L. Hopkins, and that the same when made may be deemed good service.

KLEIN & HOUGH, Attorneys for Respondents.

43 (Here follows Exhibit A to the cross bill which is omitted because a copy of same appears as Defendants' Exhibit at page 942 of this printed record.)

(Here follow Exhibits B, C, D, E, and F, marked pages 44 to 48, inclusive.)

44

Exhibit "B."
CROSS BILL.
Gaines,
No. 5096 v.
Hellman.

SOLD SON

Exhibit "C."
CROSS BILL.
Gaines,
No. 5096 v.
Hellman.

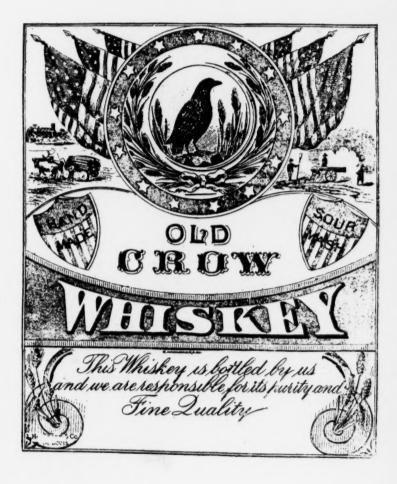


Exhibit "D."
CROSS BILL.
Gaines,
No. 5096 v.
Hellman.



Exhibit "E."
CROSS BILL.
Gaines,
V.
Hellman.



Exhibit "F."
CROSS BILL.
Gaines,
v.
Hellman.



Thereupon, on said June 5th, 1905, the following further proceedings were had and appear of record in said cause, to-wit:

5096.

## W. A. Gaines & Co., Complainant,

VS.

MAX KAHN, Administrator with the Will Annexed of the Estate of Abraham M. Hellman, Deceased, and Moritz Hellman, Respondents.

#### Order for Substituted Service.

Be it remembered that on the 5th day of June, 1905, in open court, at the City of St. Louis, State and District aforesaid, upon application of complainants in the cross bill, filed herein on the said day, in the above entitled cause: it is ordered, adjudged and decreed by the court that the writ of subporna do issue upon the said cross bill, directed to W. A. Gaines & Co., a corporation organized and doing business under the laws of the State of Kentucky and a citizen of the State of Kentucky, as respondent, and that the same be served upon the said respondent by the marshal of this district by substituted service upon James L. Hopkins, who is the solicitor of record in this court of the said W. A. Gaines & Co. in the suit in equity No. 5096, which shall be deemed good service; and that the marshal do make return accordingly. It is further ordered that the cierk of the court attach a certified copy of this order to the subpœna when issued, for the instruction of the marshal. Order, adjudged and decreed in open court in the City of St. Louis, State of Missouri, on June 5, 1905.

JOHN H. RODGERS, Judge.

Thereupon a subpæna in chancery was issued out of the clerk's office of said court on said cross bill which said subpæna with the marshal's return thereon is in words and figures as follows, to-wit:

United States of America,

Eastern Division of the Eastern

Judicial District of Missouri, set:

In the Circuit Court of the United States in and for the Eastern Division of said District.

The President of the United States of America to W. A. Gaines & Co., Greeting:

You are hereby commanded to be and appear at Rules, to be held at the office of the Clerk of the Circuit Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, on the first Monday of July next, at the City of St. Louis, then and there to answer the Cross Bill of

26 - 311

Complaint of Max Kahn, Administrator with the will annexed of the estate of Abraham M. Heilman, deceased, and Moritz Hellman, citizens of the State of Missouri filed against you on the 5th day of June, 1905; Hereof fail not.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 5th day of June, 1905.

Issued at office in the City of St. Louis, under the seal of said Circuit Court, the day and year last aforesaid.

[SEAL.] JAMES R. GRAY, Clerk.

MEM.—'The defendant to enter its appearance in this suit in the Clerk's office, on or before the day at which the writ is returnable; otherwise the Bill may be taken pro confesso.

JAMES R. GRAY, Clerk.

(Marshal's Return on Subpana.)

United States of America,

Eastern Division of the Eastern

Judicial District of Missouri, set:

I certify that I executed this writ at the City of St. Louis in the above named District on the 6th day of June, 1905, by delivering a true copy thereof together with a copy of the Bill of Complaint in this cause as furnished by the Clerk to James L. Hopkins, Solicitor of record for the within named Complainants W. A. Gaines & Company, in a suit in Equity pending in the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, in case Number 5096. Said service being made on said Hopkins as ordered by the Court, a copy of which order is hereto attached.

WM. L. MORSEY, U. S. Marshal, Eastern District of Missouri, By W. W. NALL, Deputy.

And afterwards, to-wit: on June 19th, 1905, an Answer to Cross Bill was filed in said cause, which said Answer is in words and figures as follows, to-wit:

In the Circuit Court of the United States, Eastern Division of the Eastern Judicial District of Missouri.

No. 5096. In Equity.

# W. A. Gaines & Company, Complainant,

VS.

MAX KAHN, Administrator with the Will Annexed of the Estate of Abraham M. Hellman, Deceased, and Moritz Hellman, Respondents.

51 The Answer of W. A. Gaines & Company, Complainant, to the Cross-bill of Moritz Hellman and Max Kahn, Administrator with the Will Annexed of the Estate of Abraham M. Hellman, Respondents.

This complainant now, and at all times hereafter, saving and reserving unto itself the benefit of all exceptions to the errors and imperfections in said cross bill contained, for answer to so much thereof as it is advised is necessary and material for it to answer unto, doth aver and say:

Complainant admits the averments of the paragraph numbered

I of the cross bill.

Complainant admits the filing of its bill of complaint herein against the respondents, Moritz Hellman and the late Abraham M. Hellman, the death of the said Abraham M. Hellman, and the filing of complainant's amended bill herein; and complainant further admits that James L. Hopkins was, and now is, its solicitor of record

in this cause.

Complainant admits that at the time of the filing of the bill of complaint herein, said Moritz Hellman, and Abraham M. Hellman were co-partners under the name and style of A. M. Hellman & Company; but as to how long said co-partnership had existed, and as to who the predecessors in business of said co-partnership were, and as to how long said predecessors were engaged in business, complainant is not advised, save by the said cross bill, and asks for proof thereof upon the part of said respondents.

Complainant denies that from the year A. D. 1863 until the year A. D. 1867, I. and L. M. Hellman made and produced according to their own formula, a blended whisky designated as "Crow," "Old Crow," "Celebrated Old Crow" or "J. W. Crow's Bourbon";

52 and avers that the said firm of I. and L. M. Hellman, if it dealt in any whisky so designated at said time, it was in truth and fact dealing in the genuine whisky produced by the late James Crow on Glenn's Creek, in Woodford County, Kentucky, prior to his death in 1855.

Complainant denies that Louis M. Hellman, from the year 1867 to the year 1871 produced any whisky which he designated by the said marks, or either of them, and denies from the year 1871 to the

year 1882, the said Louis M. Hellman, in partnership with the late Abraham M. Hellman produced said whisky under said designation.

Complainant avers the fact to be that if the said Louis M. Heliman and Abraham M. Hellman dealt in any whisky designated by the said marks, or either of them, during the said period, they were either vending the whisky produced by James Crow in his lifetime, on Glenn's Creek, in Woodford County, Kentucky, or by Gaines, Berry & Company, or W. A. Gaines & Company, on Glenn's Creek.

Woodford County, Kentucky.

Complainant denies that Abraham M. Hellman, in the year A. D. 1882, or any other time, purchased, or pretended to purchase, and acquired or pretended to acquire any property right of the said Louis M. Hellman in any alleged formula for the production of whisky designated by either of the aforesaid marks; and denies that in the year A. D. 1882, or at any other time, said Abraham M. Hellman purchased or acquired, or pretended to purchase or acquire, any right to the use of the name "Crow" either singly or in combination with other words, in application to whisky; and in this behalf complainant avers the fact to be that whatever use of the said word "Crow," either singly or in combination with other words, in application to whisky was made by the said Abraham M. Hellman, or the respondent, Moritz Hellman, was done in fraud of the complainant's established business, and complainant's

53 well known trade-mark consisting of the words "Old Crow," and that the said was done secretly and stealthily; and that the whisky so marked and designated by the respondents. Moritz Hellman and the late Abraham M. Heilman, was sold as and for

complainant's whisky.

Complainant specifically denies that either the respondent, Moritz Hellman, the late Abraham M. Hellman, or either of the alleged predecessors in business of said individuals, ever at any time prior to the institution of this suit, made any claim of ownership of any formula for the production of whisky designated as "Crow," "Old Crow," "Crow Bourbon," "Hellman's Crow," "J. W. Crow's Old

Bourbon" or "Hellman's C'elebrated Crow Bourbon."

Complainant specifically denies that the said Moritz Hellman. Abraham M. Hellman or either of the alleged predecessors ever advertised any whisky designated by the word "Crow" either singly or in combination with other words, as being their produce; but avers the fact to be that any whisky sold by said persons under the name of "Crow," either singly or in combination with other words, was either the genuine whisky produced by James Crow in his lifetime, or by complainant's predecessors in business, or was sold in fraudulent competition with the whisky of complainant or its predecessors. and was passed off upon the public as and for the whisky of complainant and its predecessors.

Complainant further avers that the glass sign referred to in the cross-bill, and of which a photographic reproduction is filed with the cross bill and marked "Exhibit A," was made long subsequent to the establishment of the business of complainant's predecessor, Gaines, Berry & Company, on Glenn's Creek, in Woodford County, Kentucky, as recited in the bill of complaint; and that the said sign, if used at all by the firm of I. & L. M. Hellman, was used either to advertise complainant's whisky, bought and distributed by

the said I. & L. M. Hellman, or was used as an instrumentality of fraud for the purpose of cheating and deceiving the public into false belief that the whisky dealt in by the said I. & L. M. Hellman was the whisky of complainant's predecessor which had become celebrated throughout the United States, and particularly throughout the State of Missouri, because of its superior excellence. Complainant specifically denies that in the year A. D. 1863, or

at any time, Isaac Hellman and Louis M. Hellman used a whisky brand, bearing the words "J. W. Crow's Bourbon," of which brand an alleged impression is filed with the cross-bill, and marked "Ex-

hibit B."

In this behalf, complainant avers that if the said alleged brand was ever used by the respondents or their predecessors in business, its use was purely fraudulent and solely devised to cheat and deceive the public into the belief that the whisky dealt in by said persons was the genuine whisky produced upon Glenn's Creek, in Woodford county, Kentucky, under the formula of the late James Crow; and complainant avers that neither the respondents nor any of the persons alleged in the cross-bill to be the predecessors of the respondents, had, at any time, any color of right, or made any claim of right to the use of the name "Crow," "James Crow," or "J. W. Crow" upon any whisky not produced on Glenn's Creek, in Woodford county, Kentucky, until the time of the filing of this suit.

Complainant avers that since the year A. D. 1867, the complainant and its predecessors have sold the genuine "Old Crow" whisky produced by themselves on Glenn's Creek, in Woodford county, Kentucky, both bottled and in bulk; that the whisky sold by them in bulk has been commonly bottled by its purchasers under labels, similar to those exhibited with the cross bill as Ex-

hibits C, D, E, and F.

Complainant avers that whenever said labels so exhibited have been used by the respondents, or their predecessors in business, they have been used either upon the genuine whisky of the complainant, or their use has been solely for the purpose of cheating and defrauding the public, and this complainant, or its predecessors.

Complainant denies that respondents' predecessors were the first persons to brand, stamp and label whisky packages with the figures of — crow, and the words "Crow," either singly or in combination

with other words.

Complainant denies that the figure of a crow, and the word "Crow," either singly or in combination with other words, have ever indicated to the public and the trade, the product of the firms of I. & L. M. Hellman, or A. M. Hellman & Company; and denies that either of said firm- have ever used said words upon whisky except for the purpose of cheating and defrauding the public, or the complainant and its predecessors, unless said firms applied the said

trade-mark to whisky actually produced by complainant or its prede-

cessors on Glenn's Creek, in Woodford county, Kentucky.

Complainant avers that it is a distiller of pure hand-made sour mash whisky, and that the whisky marketed by it and its predecessors under the trade-mark "Old Crow" has been of the highest standard of excellence and purity; that the alleged whisky sold by the respondents in fraud of the complainant's rights, and under the said trade-mark, has been a spirituous liquor concocted from spirits and other adulterants of whisky. That the alleged whisky sold by the respondents under the name "Crow" is not, and has not been whisky, and has not been correctly designated by the word "Bourbon."

Complainant denies that its whisky sold under the trade-mark "Old Crow" is unwholesome or impure, and denies that it contains any fusel oil above the percentage naturally contained in a pure distilled whisky, and which percentage necessarily varies with the

age of the whisky.

Complainant admits that the "Old Crow" whisky distilled and sold by it has not been subjected to any artificial process of rectification or blending; and admits that the whisky sold by it is the pure product of distillation, and free from the admixture of any adulteration.

Complainant denies that in this, or in any other respect, it is or has been guilty of any fraud upon the public, or purchasers and

consumers of whisky.

Complainant avers that the said traffic of the respondents sought to be justified by its cross bill, has been from its inception, and now is, wholly fraudulent; and that the said whisky sold by the respondents has never acquired any reputation in any market, but that the same has been sold wholly in fraud of the complainant's trademark.

Complainant denies that it has damaged any right of the respondents as alleged in said cross bill; denies that respondents have been damaged in the sum of One Hundred Thousand (\$100,000) Dollars, or any other sum, by the act of complainant; denies that the respondents have any color of title to any of the marks claimed as trade-marks in said cross bill, but admits that the value of the trade-mark "Old Crow" is in excess of Five Hundred Thousand (\$500,000) Dollars; and in this behalf complainant avers that it has no knowledge or information as to the value of the respondent's good will.

Complainant further denies each and every allegation in said cross bill contained not hereinbefore specifically admitted or denied; and having fully answered, complainant prays that the said cross bill be dismissed at respondents' cost.

JAMES L. HOPKINS, Solicitor and of Counsel for Complainant.

57 And afterwards, to-wit: On June 30th, 1905, a Replication to Answer to Cross Bill was filed in said cause, which said Replication is in words and figures as follows, to-wit:

In the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

No. 5096. In Equity.

W. A. GAINES & COMPANY, Respondent,

VS.

MORITZ HELLMAN and MAX KAHN, Administrator with the Bill Annexed of the Estate of Abraham M. Hellman, Deceased, Complainants.

Replication to Answer to Cross-bill.

These replicants, Moritz Hellman and Max Kahn, administrator with the will annexed of the estate of Abraham M. Hellman, deceased, saving and reserving to themselves all and all manner of advantages and exceptions which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant to the cross bill herein, W. A. Gaines & Co., for replication thereunto, say that they do and will ever maintain and prove their said cross bill to be true, certain and sufficient of the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in law to be replied unto by these replicants; without that, that in any other matter or thing in the said answer contained material or effectual in the law to be replied unto, confessed, or avoided, traversed or denied, is true: all of which matters and things these replicants are ready to aver, maintain and prove as this Honorable Court shall direct, and humbly pray as in and by their said cross bill they have already prayed.

KLEIN & HOUGH, Solicitors for Complainants in the said Cross-bill Herein.

And afterwards, on July 31st, 1905, the following deposition on behalf of complainant was filed in said cause, to-wit:

In the Circuit Court of the United States, Eastern Division of the Eastern Judicial District of Missouri.

No. 5096. In Equity.

W. A. Gaines & Company, Complainant,

58

MAX KAHN, Administrator with the Will Annexed of the Estate of Abraham M. Hellman, Deceased, and Moritz Hellman, Respondents.

Depositions of Witnesses on Behalf of the Complainant, Taken Before John A. Shields, as Special Examiner, at His Office, in the Post-office Building, City of New York, State of New York, June 21, 1905, by Consent of the Parties and Pursuant to Stipulation.

#### Appearances:

James L. Hopkins, Esq., for complainant. Warwick M. Hough, Esq., for respondents.

EDSON BRADLEY, called as a witness on behalf of complainant, being duly sworn, testified as follows:

### Direct examination by Mr. Hopkins:

Q. 1. Please state your name, age, residence and occupation?

A. Edson Bradley; 53 years of age; residence, Tuxedo Park, New York; occupation, merchant and distiller and president of corporations.

Q. 2. What relationship do you bear to the complainant corpora-

tion and how long has that relationship existed?

A. I am its vice president and have been since its incorporation in 1887. Prior to that time I was a member of the firm of W. A. Gaines & Company, to which the complainant corporation succeeded.

Q. 3. During how long a period were you a member of the co-

partnership of W. A. Gaines & Company?

- A. From 1880 to 1887; but since 1875 I have been engaged in the direction of the business of the plaintiff corporation.
- Q. 4. Since 1875, in what business has the plaintiff corporation been engaged?

A. In the distillation of Old Crow and Hermitage whiskies.

Q. 5. What distillery properties has the complainant corporation owned since 1875, and its predecessors?

A. The Old Crow Distillery of Woodford County, Kentucky, and

the Hermitage Distillery at Franklin County, Kentucky.

Q. 6. Since 1875, what has the product of the Old Crow Distillery been?

A. It has been high-grade sour mash, Bourbon and Rye whisky, every barrel of which has been branded Old Crow, Bourbon or Old Crow Rye, and distilled in the name of W. A. Gaines & Co.

Q. 7. What experience have you had, if any, which qualifies you to testify as an expert in matters involving the distillation and

59 characteristics of American whiskies?

A. I have been in the business a large part of my life, and am thoroughly acquainted with every detail of the manufacture of American whiskies, of all grades. I have also been at the head of one of the largest whiskey houses in the United States for over thirty years, and during that time have purchased for my firm of Paris, Allen & Co., of New York, hundreds of thousands of barrels of whiskies made by distillers all over the United States, and in that connection have examined and compared samples of almost all known whiskies, so that I am thoroughly familiar with them. I have also examined samples of whiskies purchased from infringers of the Old Crow and Hermitage trademarks of W. A. Gaines & Co.

Mr. Hough: I want to object to that part, because it is not responsive to the question. He states he has examined all classes of whiskies. It is not necessary to say whether they are infringers in his

opinion or not. If he has examined all classes of whiskey, that covers the whole field.

The Witness (continuing): These samples were the basis of several thousand suits brought by W. A. Gaines & Co. against these infringers of their trademarks.

Q. 8. Have you testified as an expert in such cases?

A. I have.

Q. 9. Are you acquainted with the comparative value and standing of the product of the complainant's Old Crow Distillery, among American whiskies; if so, please state what it is?

A. It stands at the head of all the Bourbon whiskies distilled in the State of Kentucky, and always has, both as to quality and price.

Q. 10. What is the extent of your acquaintance as to territory, with the liquor trade of the United States?

A. I am thoroughly acquainted with it in every part of the

country.

Q. 11. Can you state of your own knowledge what the signification of the word "Old Crow" as applied to whisky is, throughout the liquor trade of the United States?

Mr. Hough: That is objected to as incompetent, irrelevant and immaterial.

60 A. The words signify always the very highest grade of whiskey and the whiskey made by W. A. Gaines & Co., of Frankfort, Kentucky.

Q. 12. How is the Old Crow whiskey produced by the complainant at its Old Crow distillery, usually packed for distribution to the

trade?

A. In barrels containing about forty-six to forty-seven gallons, bearing the Internal Revenue warehouse and tax paid stamps upon the so-called Government head of the barrel, and bearing upon the other head, known as the commercial head, the distillery brand containing the words "Old Crow," and the name of W. A. Gaines & Co., which brand is burnt into the head of the barrel with a firebrand. It it also sold in cases put up under the Bottling Bond law on the distillery premises under the supervision of Internal Revenue officers, and these cases and the bottles therein also bear the Internal Revenue stamps provided by the Government. To a small extent it has also been bottled by W. A. Gaines & Co. out of bond for themselves and for a few special customers, and all of these bottlings bear distinctive labels and marks showing that it originated in their hands.

Q. 13. To what extent, if at all, is the Old Crow whiskey of the complainant bottled under the trademark "Old Crow" by purchasers

from the complainant?

A. It is bottled very extensively by houses all over the United States, who buy the whiskey in the original packages described in my previous answer, and who on their own premises put it into bottles and cases under descriptive labels and sell it as their individual bottling.

Q. 14. In these bottlings of the Old Crow whiskey made by the

trade, has any pictorial device been generally used in connection with the words "Old Crow," and if so, what?

Mr. Hough: I want to get in an objection before the answer, that this is incompetent, irrelevant and immaterial.

A. A very large percentage of the bottling of Old Crow whiskey by the purchasers in barrels has been to put another label bearing the symbol of a crow. In some cases the word "Crow" on

these labels has been omitted entirely, the bottler using the word "Old" and "Whiskey," inserting the symbol of a crow between those words, depending upon the familiarity of the consuming public with the name of this whiskey and the use of this symbol to convey the intended meaning, namely, that the bottle contained Old Crow Whiskey. This special device has almost invariably been employed by those who bottled a spurious article, they evidently believing by omitting the word "Crow" they evaded prosecution. The symbol of a crow had been used, however, on a very large percentage of genuine bottling of Old Crow Whiskey, so that it has become very fully identified with the brand.

Q. 15. In what manner and by whom are the labels used by the liquor trade in the bottling of complainant's whiskey printed and

distributed?

Mr. Hough: Objected to as incompetent, irrelevant and immaterial.

A. Practically every lithographer in the United States has in his stock of ready-made labels numerous styles of whiskey labels bearing the words "Old Crow." Nearly all of these are unobjectionable and properly describe the whiskey to be put in the bottle where the bottle is genuine Old Crow distilled by W. A. Gaines & Co. Where an improper label is adopted and the fact known to W. A. Gaines & Co., they have put an end to it. These lithographers sell their labels to wholesale dealers all over the country, who bottle Old Crow whiskey made by W. A. Gaines & Co.

Q. 16. Are you familiar with the various representations of a crow which are most generally used upon these stock labels in connection

with the word "Crow" or "Old Crow"?

Mr. Hough: Objected to as incompetent, irrelevant and immaterial.

A. Yes, I have seen nearly all of them.

Q. 17. I will hand you a label bearing the words "Hellman's Crow Hand-Made Whiskey" and a picture of a crow within a circle, this inner circle being surrounded by an eccentric circular band decorated with stars. I will ask you whether or not this cut of a crow and the surrounding decorative matter is familiar to you as being one of the pictures used commonly by lithographers in connection with the Old Crow representation used by the trade in the bottling of the complainant's whiskey?

Mr. Hough: Objected to as incompetent, irrelevant and immaterial.

A. It is. It is one of the very common devices employed by the lithographers on their stock labels for Old Crow whiskey.

Mr. Hopkins: Complainant offers the label referred to by the witness in evidence, and asks that the same be marked Complainant's Exhibit Hellman Label, June 22, 1905, J. A. S., Ex'r, which is accordingly done.

Mr. Hough: Objected to as not identified, and no foundation laid

for its introduction.

Q. 18. Since your first connection with the predecessors of the complainant corporation in 1875, I will ask you to state whether the production of Old Crow whiskey by the complainant and its predecessors has been continuous or otherwise?

A. It has been continuous.

Q. 19. During that period has said Old Crow whiskey been produced uniformly by the same process and of the same ingredients?

A. It has, excepting only some occasional very slight variations in the way of experiment, producing very limited quantities of whiskey. These variations, however, were very slight, and in no way affected the quality or changed the quality of the product

Q. 20. What business interests, if any, have you had in whiskey trademarks other than those of the complainant, which tends to give you expert knowledge of the values of American whiskey trade-

marks?

Mr. Hough: Objected to as incompetent, irrelevant and immaterial.

A. I am, and have been since its incorporation, president of the Kentucky Distilleries and Warehouse Company, which corporation owns or controls a very large percentage of all the fine whis-

63 key trademarks of the State of Kentucky, numbering in all over one hundred; included among them are the oldest and the most prominent brands of the State, exclusive of the Old Crow and Hermitage trademarks of W. A. Gaines & Co. I am also vice-president of the Distilleries Securities Corporation, the holding company which owns and controls the Kentucky Distilleries and Warehouse Company, the Standard Distilling & Distributing Company, and the Hannis Distilling Company, all of which corporations have very valuable and prominent trademarks.

Q. 21. In your connection with these various corporations, have you had to do with the buying or sale of properties including whis-

key trademarks, and if so, to what extent?

A. My company, the Kentucky Distilleries & Warehouse Company, purchased from the original owners of distilleries and trademarks in Kentucky all of the trademarks which it now controls. Of course, as president of that company, I had personal charge of all this business.

Q. 22. What, in your opinion, is the value of the complainant's trademark for whiskey, consisting of the words "Old Crow"?

A. Not less than \$500,000.

Q. 23. Is there an established market for complainant's whiskey

designated by the trademark "Old Crow" in the City of St. Louis, Missouri, and if so, how long has that market been established, to your personal knowledge?

A. It is a very large market for Old Crow, and has been, so far

as I have had connection with this business, since 1875.

Q. 24. Would it have been possible at any time, since 1875, for any person to have sold in the City of St. Louis under the mark "Crow" or "Old Crow" a whiskey not produced by the complainant or its predecessors, without diverting from the complainant or its predecessors trade which belonged to the complainant or such predecessor?

Mr. Hough: Objected to as leading; also objected to as incompetent, irrelevant and immaterial.

A. No.

Q. 25. To what extent, if at all, has the complainant or its predecessors since the year 1875, advertised its trademark, "Old Crow" throughout the United States?

Mr. Hough: I want to object to that as incompetent, irrelevant and immaterial.

A. It has advertised it very extensively—certainly to the extent of more than a quarter of a million dollars.

Q. 26. Were you acquainted with the late Edward C. Homan

in his lifetime?

A. I knew him very intimately. He was a salesman for my firm of Paris, Allen & Co. of New York, and was employed by me personally for that firm in the seventies. He was also continuously in our employ until the date of his death, and was one of our principal salesmen.

Q. 27. Was he ever in the employ of the complainant W. A.

Gaines & Company?

A. Never.

Q. 28. When did you first have any knowledge of any claim of title to the trademark "Crow" or "Old Crow" being made by the defendants, or their immediate predecessors, A. M. Hellman & Co.?

A. Just prior to the time when the complainant brought this suit. Q. 29. There is set up in the answer of the respondent an allegation that "The whiskey produced by the complainant and sold by it under the name of 'Crow' or 'Old Crow' represented by it to be whiskey of superior excellence, is in point of fact a whiskey containing a large and dangerous percentage of fusil oil, a deadly poison, and a large percentage of other dangerous and deleterious impurities, and that the same is unwholesome and impure, and that the same has not been subjected to any process of rectification, blending, or vatting for the purpose of removing such dangerous and deleterious impurities, and that in representing such whiskies to be pure and of superior excellence, the complainant is guilty of fraud upon the public, especially upon purchasers or consumers of whiskey." I will ask you to state what the facts are in this regard?

Mr. Hough: I object to the question as being too indefinite.

A. The statement dictated by you is entirely misleading, and broadly stated, false, except as to the allegation that the Old Crow whiskey is not vatted or blended. This statement is strictly true, as the Old Crow whiskey is a perfectly straight originally distilled whiskey, whereas if it were blended or vatted it would be mixed

and adulterated necessarily.

The facts in regard to the Old Crow whiskey are these: In its distillation the liquid part of the material is vaporized by heat, and this vapor condensed in two distinct operations called singling and doubling in the old-fashioned parlance of the distiller. In these processes of distillation, there is necessarily no reclaim of substances having a lower boiling temperature than the mixture of alcohol and water induced into the stills, except that as the distillation proceeds and the residue in the still becomes reduced in alcoholic strength, some of the bodies boiling at higher temperatures, including the water, pass over and are condensed and reclaimed. By this process of distillation a partial refining or rectification of the original beer and whiskey is effected, consequently it is not true that no purification of the whiskey occurs in the process. The whiskey thus produced at the Old Crow distillery does contain, as all grain spirits when first distilled must contain, a certain percentage of so-called fusil oil made up of several bodies, some of which are little understood by chemists. The percentage of fusil oil, however, in this whiskey is never sufficient, when the whiskey is made as at the Old Crow distillery, to be deleterious to health or in any way objectionable after the whiskey has been stored in an oaken barrel a reasonable length of time in order that this fusil oil to a large extent shall be converted into harmless and desirable ethers which impart to fine old whiskey its characteristic flavor. Even if this whiskey were consumed when perfectly new, it could have no such effect upon the consumer as could be classed as poisonous, although it is a fact that no whiskey should be used until it has been stored a reasonable length of time in wood.

of time in wood. This question of fusil oil in whiskey is analogous to the presence of poisonous substances in articles of daily consumption by all humanity, such as coffee and tea. In fact, a large percentage of the human family's foods and beverages. Consequently, the toxic effect of the fusil oil in whiskey and not its mere presence must be considered if a charge of impurity is to be made against any whiskey containing it. The Old Crow whiskey of W. A. Gaines & Co., as a matter of fact, is practically never consumed until it has been in an oaken barrel three or four years, and the average is about four years, consequently the Old Crow whiskey as sold and consumed is a highly purified and entirely

healthful beverage.

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Cross-examination by Mr. Hough:

X Q. 30. You are not a chemist, are you, Mr. Bradley?

A. Not by profession.
X Q. 31. Are you in any way?

A. I am not, except that I have always taken great interest in chemistry, and have made some limited study of it

X Q. 32. Well, when you said "not by profession," did you mean

that you are a graduate in chemistry?

A. Oh, no, indeed. I studied it as all of us have, I suppose, in my youth, and have read a great deal on the subject since, but I have never been a professional chemist.

X Q. 33. You don't mean to qualify as a chemist?

A. No, sir; I do not.

X Q. 34. Are you a distiller, or have you ever been a distiller?

A. I have frequently run a distillery that I myself was the owner

of, part owner.

X Q. 35. What distillery was that?

A. The Old Crow Distillery, the Hermitage Distillery, and I have at times operated the Monticello Distillery in Baltimore, Maryland,

and a distillery in Hartford, Connecticut,

X Q. 36. Well, when you say that you have operated or run a distillery, do you mean that you have operated and run it as the owner, or that you have done all the work of the distillery as that is usually understood among those who understand that work?

A. I gave every order to operate, every detail of the houses, when
I had charge of it. I didn't do the work with my own hands.
X Q. 37. Then you never did what we refer to as distiller's work at a distillery?

A. Yes, I have, only I did it with my head and not with my

hands.

X Q. 38. For instance, what, tell us what work you did in that direction?

A. Well, I directed every detail of it, making the yeast—

X Q. 39. Tell us what the details were.

A. Well, the preparation—the start of the distiliery was the preparation of the yeast, of the small mash for the yeast. I did not do that with my own hands, but I directed its operation, what should be done and how it should be done. Also the mashing of the grain for the large mash of the distillery, the temperatures and time and all the details connected with it, and its cooling at the end of the mash, introduction into the fermenter when the yeast was added, the temperature at which the beer was kept, all the conditions of fermentation, and when the completed beer should be distilled, and thereafter the method of its distillation.

X Q. 40. Well, that does not quite answer the question I asked, or at least intended to ask. In order to make it a little more definite, will you just detail in consecutive order the entire process and the order in which it is carried on at the distillery? What is the first

thing that is done after the machinery is completed?

A. I have already told you in sequence every step of the process excepting only the grinding of the grain which preceded the first mash, of course. The grain had to be converted to meal, and thereafter the operation is exactly in sequence as I have described it.

X Q. 41. Well, when you were running it, what kind of yeast did you use?

A. I used a sweet yeast, what is technically called sweet yeast.

X Q. 42. Is that the only name it had?

A. That is the only name it had, the old-fashioned sweet yeast.

X Q. 43. Where did you get that yeast?

A. That was started from compressed yeast in some cases; in others, it was started from a portion of the yeast from the previous yeast distillation which had been placed in a jug or demijohn, and

lowered into a well or spring to keep it cool. That was carried over from one year to the other, and in fact that was the general process at the old-fashioned Kentucky dis-

tilleries.

X Q. 44. But I am asking you about what you did, in the matter

of the use of the veast?

A. At present, we bring the yeast from some other distillery in operation, if we can get it, in the neighborhood. If not, we start our fermentation with compressed yeast, use Fleischmann's compressed yeast.

X Q. 45. You don't, then, carry your yeast over from season to

season?

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A. No, that is a thing which is very seldom done, very little done nowadays.

X Q. 46. Do you know what is pure culture yeast?

A. Perfectly; made it many times.

X Q. 47. What difference is there between Fleischmann's yeast

and pure culture yeast?

A. Fleischmann's yeast has a great deal of the so-called wild products other than the saccharomyces cer-visiæ, which is the true yeast plant, the one which converts grape sugar to alcohol and carbonic acid gas, and which the distiller desires to obtain and continue as nearly pure as possible. The first yeast employed, however, in the starting of that distilling operation is not important. In fact, the ferment may be commenced by the natural fermentation arising by the introduction of ferments from the air into a proper medium, and the reason for this is that as the operation proceeds the yeast may be thoroughly purified of its original imperfections, and made the nearly pure yea-t that the distiller desires, so that its origin is not of much consequence. Another important reason for this is that, no matter what yeast you start with, the peculiar ferments of the locality where the operation is conducted will ultimately prevail. Nothing can prevent this.

X Q. 48. What do you mean by particular ferments of a locality?

A. I mean by that, that every locality has in it peculiar germs of fermentation, just as it has peculiar forms of floral fauna, and these ferments which are in the air and on all the utensils, on the grain, everywhere about the premises of the distiller, will

69 ultimately in the operation of that distillery be taken up by the fermenting material and monopolize it. It is this fact that gives to the spirits made of different liquids on the earth's surface the peculiar flavor which each has in its class.

X Q. 49. You don't think, then, that the flavors come through

other than the ferments?

A. The flavors of each kind of spirits undoubtedly come largely from the material used, but where the material is the same, that is to say, where it is corn or rye or molasses or grape juice, the ultimate flavors of each particular make arise from the germs of fermentation of the liquid, where the article is produced. For example, I have seen New England Rum made from molasses of Porto Rico, Dannemora, New Orleans and Jamaica, and every one of them produce identically the same flavors in New England Rum, whereas the same molasses distilled by some process in the countries where the molasses originated had entirely different and distinctive flavors.

X Q. 50. You don't think that could have been due to anything

else than what you have designated as ferments?

A. No, sir; that is unquestionably the reason for it.

X Q. 51. You don't think storage has anything to do with the flavor?

A. Storage has a great deal to do with the maturity of the flavor, undoubtedly. I am speaking always, of course, of the original flavor, when the distillation is complete.

X Q. 52. And before it is put in storage. You say you have been speaking of the flavor of the distillate as it is drawn from the re-

ceiving cistern and before it is put in any receptacle?

A. That is true, but of course whatever distinctive flavors the distillate may have at that time will influence an important development of that flavor and other collateral flavors, as the spirit matures in wood.

X Q. 53. You regard Pasteur as an authority on distillation, do

you?

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A. I didn't say so.

X Q. 54. Well, do you?

A. I consider him one of the greatest authorities the world has ever known on fermentation, not distillation.

X Q. 55. And the production of fermentation?

A. Yes.

X Q. 56. Now, you have compared whiskey and the impurities and poisons of whiskey, to tea and coffee. Don't you think a distinction should be made between the impurities of a manufactured article and the impurities of a natural article?

A. I see no reason to make any such distinction.

X Q. 57. Did you ever have an analysis made of your Old Crow whiskey for the purpose of determining the fusil oil contents at the time it was put into barrels?

A. Yes, I have had several in the years gone by.

X Q. 58. What is the largest percentage of fusil oil shown at that time?

A. I never was able to ascertain that fact, for the reason that the chemists who analyzed the samples had them two or three times, the same identical samples, without knowledge of the fact that they were identical, and never gave me two analyses alike. They varied in fact as much as fifty per cent in some cases.

X Q. 59. You mean fifty per cent of the amount of fusil oil?

A. Fifty per cent of the amount of fusil oil.

X Q. 60. But what was the percentage of source of error as be-

tween the percentages?

A. Well, I don't remember distinctly, but my recollection is that the highest percentage found by any of them was about .34 of one per cent, and the lowest about .14 or .15 of one per cent.

X Q. 61. You are referring now to an analysis before it had been

put into wood?

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A. Yes, this is perfectly new whiskey.

X Q. 62. Now, have you had analysis of your Old Crow made

after it had been in wood for three or four years?

A. Yes. I also had those analyses made and they show with a great many irregularities, however, a reasonably definite diminution of the percentages as the whiskey increased in age, but again the analysis was so contradictory that I never felt satisfied that they were conclusive.

X Q. 63. What were the highest and what were the lowest percentages stated at that time, after it had been in wood

three or four years?

A. Well, I think they were a little less than the figures I gave you; that is, the highest and the lowest, the extreme figures.

X Q. 64. I understood you to say that there was an appreciable reduction in the fusil oil of whiskey after it had been in the barrel

three or four years?

A. There was in the average of a large part of the samples examined, but your question was asked as to the extreme figures of any one sample. The average was considerably lower than the highest of the analysis of new whiskey, so that the average tendency was toward a material reduction of the fusil oil found.

X Q. 65. What have you found that average to be, the average

reduction in percentages in the four years' time?

A. Well, you of course are speaking of the analysis made by the chemists who had my samples.

X Q. 66. Yes.

A. I considered their analysis entirely unsatisfactory and misleading.

X Q. 67. Well, any other analysis you may have made?

A. I am very certain that fusil bodies are very difficult for any chemist to make a quantitative analysis of. I doubt if it is possible.

X Q. 68. But you have stated that you have found an appreciable reduction in the percentage on fusil oil after it had been in wood four years?

A. I told you these chemists pretended to find it.

X Q. 69. Well, on the direct examination you did not refer to chemists. You stated it reduced materially in the percentage of fusil oil, so that at the end of three or four years it was fit to drink, whereas it shouldn't be drunk at the time it was taken out of the receiving cistern?

A. Yes, that is true.

X Q. 70. Upon what, then, did you base that statement?

A. That statement was made on the broad theory which is accepted by practically all chemists, as far as I have any knowledge of them, that this thing does occur, and also by testimony of physicians and users of whiskey, an old whiskey is healthful and does not affect them as new whiskey does.

X Q. 71. Do you think that is good evidence as to the percentage

of fusil oil?

A. I do not. Your question, Mr. Hough, is a mystery. No man living can answer your question definitely, because chemistry does not reveal this fact. No honest chemist can ever tell you that he can give you a definite chemical quantitative analysis showing what percentage of the fusil alcohols are contained in any spirits.

X Q. 72. Are not different results obtained in determining the

proof of whiskey?

A. You mean alcoholic proof?

X Q. 73. Yes.

A. Certainly; that is a very different and simple matter. It does not require chemical analysis.

X Q. 74. Well, you say there are sources of error even in that?

A. You misunderstand me. I haven't referred to the question

of taking the proof of whiskey.

X Q. 75. You answered my question just awaile ago, saying different chemists would make some error even in determining the proof of whiskey?

A. Oh, no; you misunderstood me. I used the term "fusil alcohol"; that is what confused you. I used the term "fusil alcohol,"

and that confused you.

(Previous question read, X Q. 72.)

A. On reading over the previous question, I see I did not understand your question. In regard to the varying results in taking the proof of spirits. There are no variations in the taking of the proof of alcohol by the hydrometer, provided the work is accurately done, and the adjustment for varying conditions made with mathematical accuracy.

X Q. 76. Well, you could make that same statement with reference to the determination of fusil oil contents, couldn't

73 you?

A. No, for the reason that the taking of proof of spirits is a mechanical operation; has nothing to do with chemistry, whereas the other involves one of the most complicated quantitative chemical processes known.

X Q. 77. Now, in saying that taking proof is not a chemical question, are you not confusing the taking of proof as taken by chemists with the taking of proof as usually done by Government gaugers?

A. The question you ask me I take to relate solely to the ascertaining of the specific gravity of a distilled spirit, which is of course a merchanical operation. If you refer to the ascertaining of the exact amount of absolutely pure alcohol in a mixture of alcohol and water, this, of course, cannot be so obtained, but as a problem in chemistry this is a very simple one and can be accurately done.

X Q. 78. You don't mean without any source of error?

A. Absolutely no, but within a very small margin.

X Q. 79. Then there are sources of error in the matter of making

any chemical determination, are there not?

A. Yes, but where they reach the figures as high as fifty per cent of difference, the value of a chemical investigation must be considered worthless.

X Q. 80. Your statement as to fifty per cent might be misleading, and I therefore ask you if you are comparing it with the total

A. I am comparing it with the total amount of fusil discovered in

the particular sample.

X Q. 81. Have you ever known of a source of error in determining the percentage of fusil oil contents in excess of .003 of one per cent?

A. Yes, I have known errors to the extent of between .20 to .25 of one per cent, where the same chemist had at different times attempted to analyze the same identical sample.

X Q. 82. In order to avoid mistake, will you call off the figures and the decimals to the stenographer as you have expressed them.

A. .20 to .25 of one per cent.

74 X Q. 83. What chemist was it who made that error?

A. Prof. Lasche.

X Q. 84. Do you me-n Prof. Lasche of Milwaukee?

A. Yes, sir.

X Q. 85. When was that done?

A. A number of years ago; I can't tell you just when; it was quite a while ago.

X Q. 86. And it was on a sample of Crow whiskey?

A. It was.

X Q. 87. You stated on your examination in chief that the whiskey was not fit to drink at the time it was distilled, but that it would be three or four years afterwards. What change is there that took place in the whiskey which makes it fit to drink at the end of four years when it was not at the time it was made?

A. I don't think a man lives who is wise enough to answer that question, Mr. Hough. At the same time, I think you misquoted my testimony; I don't think I said Old Crow was not fit to drink when

first made. I have said just the contrary.

X Q. 88. Well, you may state now what you wish to on that subject. Is Old Crow fit to drink at the time it is drawn from the receiv-

ing eistern, and before it is put into a barrel?

A. Well, I don't think I should hesitate to drink it, but I prefer to have it ten years old. It is much more palatable, and my general prejudice is to believe that as it grows older it is more healthful.

X Q. 89. Well, why is it more healthful as it grows older than at

the time it was taken from the receiving cistern?

A. I don't think any man can answer that question. I don't think any man can tell you that. There are many theories on the subject. Of course, the elimination or change of the fusil to ethers, which will impart the fine flavor to whiskey, is supposed by a majority of people to be the reason, but I don't think it has been proven.

X Q. 90. Then you discard that as a reason?

A. No, I incline to it very strongly, but I can't tell you anything more definite on the subject, because no one living knows it.

X Q. 91. In other words, the authorities on that subject are apparently nebulous?

A. Not in regard to that—

X Q. 92. You say you have no analysis which showed any change

in the percentage of fusil oil?

A. I have not, but we know, for example, that cooked vegetables are, as a rule, more digestible than those that are not cooked enough. I don't think you can give any very proper scientific reason for that.

X Q. 93. Reasons have been given.

A. Attempted. In fact, animals seem to digest them better when raw. We have to be guided in a subject of this kind by experience as much as by anything else, and experience has taught that whiskies when they are matured, agree with people better than when they are very new. My own personal belief is that whiskey should be kept a number of years before it is used. It is much more healthful that way, but that it is going to kill or poison anybody when new, I don't believe. I have seen too many barrels of it consumed when new without harm, to believe that.

X Q. 94. Well, there could be the same amount of strychnine or laudanum in forty gallons of whiskey that chemists have stated to be the percentage of fusil, without killing a man who took it?

A. It probably would be entirely innocuous. We take into our systems daily many poisons which if in large quantities would kill us. The average smoker, for example, could be killed quickly by an overdose of nicotine.

X Q. 95. The question was not whether the amount of poison is sufficient to kill, but whether the thing which is in there is a poison.

within the whiskey itself?

A. It is impossible to answer your question. I cannot drink coffee, for example, it poisons me, but an ordinary cup of coffee will make me ill, whereas other people can drink any quantity of it.

X Q. 96. Do you consider that fusil oil, as such, serves any useful

purpose in the whiskey?

A. It probably does account entirely for the agreeable flavors which old whiskey has. They do it, probably.

X Q. 97. You are referring now to the derivatives of fusil oil?

A. Yes.

X Q. 98. I didn't ask that. I asked you whether fusil oil as such, before it has been converted into anything else, serves any useful pur-

pose in the whiskey?

A. I don't believe it does any more than the poisonous element of tea and coffee serves any purpose there, but they are an individual part of the thing, and are necessary to it in order to give the flavors which are desired.

X Q. 99. How is the fusil oil which is in whiskey made, if you know?

A. Yes, it is one of the by-products of the fermentation of grain? X Q. 100. Isn't it of bacterial origin?

A. All of these things are.

X Q. 101. And doesn't it occur after the ferment has been per-

mitted to stand too long?

A. Not necessarily, no. It occurs to some extent as the entire fermentation progresses, and is present in the beer before distillation, no matter how quickly that beer may be distilled after the vinous fermentation ceases.

X Q. 102. Are you positive on that point.

A. Positive.

X Q. 103. Have you ever made any examination of analysis to determine at what stage of the fermentation fusil oil is produced?

A. No, but I will tell you how we know that it is produced without an excessive delay in the fermentation of the beer. I get that knowledge from the manufacture of alcohol in the large alcohol distilleries of my company. There the fusil oil is all removed by mechanical processes, the distillation and filtration processes, and no matter how quickly and promptly we might distill the beer, even sometimes before vinous fermentation has ceased, we still obtained almost an unvarying average percentage of the fusil oil separated from our distil-

late and, of course, this proves its presence. To a very minute percentage, of course, the thing cannot be stated, but within reasonable limits we get practically the same average product

of fusil oil from this distillery operation.

X Q. 104. You can determine in that instance, or in that case, just how much fusil oil is produced to each gallon of the liquid, can't you?

A. No.

X Q. 105. You know how much you separate, don't you?

A. We know how much we get, but we don't know how much we don't get. There is some waste and there is lots of filtering material.

X Q. 106. What is the greatest amount you get?

A. We get on an average about .30 to .40 of one per cent of the proof spirit obtained.

X Q. 107. Now, you have never gotten any more than that? A. I can't, of course, from my memory answer that definitely. I

am only giving you my general knowledge.

X Q. 108. Now, you stated that by the storage there was an appreciable reduction in the percentage of fusil oil in the Old Crow whiskey, though you couldn't state the exact amount of this reduction, and that the flavor which the aged whiskey has comes, in your opinion, in large part from the fusil oil which has been oxidized in the aromatic ethers?

A. Yes.

X Q. 109. It follows, therefore, that if there is only a small amount of fusil oil in the whiskey at the time it goes into the barrel, it will all be oxidized within a certain length of time, whereas if there was a large amount, it would not all be oxidized within the same length of time, is that not so?

A. I don't think that follows.

X Q. 110. Why not?

A. For the reason that, as I understand the theory of the matter, the change of the fusil into the ethereal bodies is a process which requires a definite length of time under certain conditions of heat and cold, and that it would take just as long, the conversion of a small quantity, as it would for a large quantity. Another limita-

quantity, as it would for a large quantity. Another limita-78 tion is a certain possible combination of the ethyl alcohol and the acids in the whiskey with the fusil, which would not be an oxidizing process in all probability, and which might produce a small or a large quantity of these ethereal bodies and not be dependent upon the amount of fusil oil present in the beginning. This is all a very complex subject that you are going into, Mr. Hough, and I am simply giving you my general views gathered from the

views of other people, and I told you previously, I believe no man living knows exactly what does happen.

X Q. 111. I was not asking what would happen, but I did ask if it did not follow that since, after a certain number of years, a part of the fusil oil had been oxidized into that which gave flavor to the whiskey, that if you started with only that amount which had thus been oxidized in the beginning, at the end of a certain time it would all have been oxidized and no fusil oil would be remaining as such—that is, as fusil oil. I understood you — say that would not follow?

A. I don't think that is conclusive. It is not an unreasonable

theory, perhaps.

X Q. 112. Don't you know there are blended—I won't say blended, but whiskies in Kentucky that you refer to as straight whiskies, which have no fusil oil, or at least no more than a trace of fusil oil

after the end of four or five years?

A. I don't believe there is any such whiskey in the State of Kentucky, unless, it was distilled within a still which by the process of fractional distillation mechanically removed fusil oil in the beginning and before it was barreled—before the whiskey was barreled, or else a process which included filtration through charcoal or some other body, which mechanically removed the fusil oil. In either of which cases the product is not what is technically known as straight whiskey, but is what is known as a continuous distilled or rectified whiskey. If the whiskey is made by the process employed in Kentucky for the manufacture of the high grade straight whiskies, it certainly has at the beginning a larger percentage of fusil than a mere trace.

79 X Q. 113. Possibly you misunderstood my question. I said that had such a small amount of fusil oil to start with as that the oxidized process within the fourth period would convert it all, or all except a trace, into the aromatic ether, leaving in the whiskey at the end of four years practically only a trace of fusil oil. Now, I understand you to say that any such product can't be made except by their taking a continuous process, and that does not entitle

it to be called whiskey; is that what you state?

A. That is what I state.

X Q. 114. Then the effect of what you state is to say that the

amount of fusil oil which goes into the receiving cis-ern cannot be

controlled by the distiller; is it not?

A. No, I said just the contrary. I say that if a distiller employs apparatus specially designed for the purpose, he can remove every trace of the fusil oil. There will be none left, but the product won't be whiskey.

X Q. 115. Is that the only method whereby the percentage of fusil

oil can be controlled in the process of distillation?

A. It can only be employed by the application of a process of fractional distillation, or by mechanical rectification through charcoal or similar substance.

X Q. 116. You are positive of that, are you?

A. I am, but of course the process of fractional distillation includes regulation of temperatures in distillation, so as to result in the division of the bodies of different specific gravity, and which may be to a certain extent regulated, of course, by any distilling apparatus. In the process of fermentation, where the fusil oil is made, the distiller has apparently no control whatever, provided he makes whiskey by the regular processes employed in the State of Kentucky for the making of straight whiskey. It can be to some extent controlled, as in England, or Scotland, where the entire grain does not pass through the process of fermentation, and worts being made by

saturation of the malted grain and drawn off of the liquid spirits from the grains and fermenting it. Here less fusil

oil is made than by our process in the United States.

X Q. 117. Did you have any rectifying heads in the still at the

Old Crow distillery?

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A. Our stills at the Old Crow distillery are the old fashioned single-chambered pot stills, and have no chambers for fractional distillation about them. These are the stills in which all of the high grade whiskies of Kentucky were originally made. Some distillers, in recent years, in order to cheapen their product, have used less fuel, and have employed stills of three or four chambers. This, however, resulted in whiskies of a very light flavor and inferior quality.

X Q. 118. Name a whiskey of that character which goes by the

name of straight whiskey?

A. The most prominent example known to me is the Cedarbrook whiskey, at the time when it was made by Judge McBrayer and his successor, Moore, and before this distillery was purchased by my company—the Kentucky Distillery & Warehouse Company. The Cedarbrook McBrayer for many years was known as one of the finest brands in Kentucky, but for the purpose of economy the owners introduced the chambered still, and during their use, the whiskey produced by that distillery was a light body and of quality very inferior to the early production, and the production of later years after that apparatus was discarded and the old style of stills reinstated.

X Q. 119. How is Elkrun, is if of that character?

A. Elkrun has always been one of the low-grade whiskies of Kentucky; never pretended to be anything else, and always was made with column stills.

X Q. 120. Now, at the Old Crow—after the vapor goes over in the neck and is condensed, what becomes of it?

A. At the end of the first distillation it is condensed in a copper coil surrounded by cold water, and is received into a cistern—the

product being technically known as singling. It is then put into another still called a doubler, and which has a single chamber, and is distilled and condensed a second time, when the product is the finished Old Crow whiskey except that it must be then reduced by the addition of distilled water to the United States standard proof.

X Q. 121. That water you had at the time, it is in the receiving

cistern?

A. Yes.

X Q. 122. It runs then by continuous process toward the doubler

to the receiving cistern, does it?

A. No, after being distilled in the doubler, it is received in the cistern, and from there it is pumped over through a closed copper pipe to the cistern room at the warehouse, where it is to be drawn out in the barrels and stored.

X Q. 123. Now, is anything added to it or mixed with it in that

first cistern you speak of?

A. Nothing.

X Q. 124. That is an open cistern, is it?

A. No, that is a closed cistern, and locked by the Government officer.

X Q. 125. The water is not added at that time?

A. No, that is added in the cistern room just before it is drawn off into barrels.

X Q. 126. What is the average proof of it at the time—before the water is added?

A. About 120.

X Q. 127. That was what would be known as high wines?

A. No, sir; that was never known as high wines. High wines—

X Q. 128. I was going to ask you what difference there was between that and what was formerly known as high wines?

A. High wines is the spirit which is distilled by one continuous operation from the beer, and in a chambered still which permits of fractional distillation.

X Q. 129. You are referring to the high wines as they are understood to-day. I am referring to the high wines as the term was used

in the sixties before these chambered stills existed.

A. The term "high wines" was never known or used, to my knowledge, in the manufacture of a Kentucky straight whiskey. It was only employed in connection with the product

of the large grain distilleries which produced this article for the exclusive purpose of rectification through charcoal, and redistillation for the manufacture of neutral spirits and alcohol. In those early days it was not permitted by law to finish the alcohol and neutral spirits in the distillery or at a distillery. Consequently, the manufacturer of the crude, high wines, sold his product to rectifiers who completed the purification and rectification of the alcohol from

the high wines.

X Q. 130. Probably you did not understand my question, for your answer does not seem responsive. I want to know what, in your opinion, was the difference between the product which is run into your cistern before you add the water, and what used to be known as high wines. I don't refer now to the process. What is the difference in the product?

A. The product of the Old Crow distillery, or of any similar Kentucky distillery, is a high grade, agreeable flavored spirit, whereas high wines which, by the way, is no longer made as a commercial article, is a rank, disagreeable flavored, cheap spirit, entirely unsuited for any use whatever until it has been purified by running

through charcoal or a similar body, and redistillation.

X Q. 131. What is it that makes what you call the high wines rank at that time, and so distinguishes it from this product which

you say should not be called high wines?

A. The chief difference was in the quality of grain used the short period of fermentation, the method of yeasting, and of fermenting, and finally, the carelessness with which the whole operation was performed, the only object of the high wines distillation being to obtain the largest possible percentage of alcoholic liquid from the grain, without regard to its quality.

X Q. 132. You still have not told me what it is that makes the

one rank in odor or distinguished from the other, have you?

A. I told you they used poorer grain. They yeast it differently. They use entirely different yeast, which produced entirely different fermentation.

X.O. 133. Let me ask the question in a different way. What

X Q. 133. Let me ask the question in a different way. What is the chemical difference between the two products?

A. I can't answer that, and I don't think anybody else can.

X Q. 134. Do you know of any difference in the odor of ethyl alcohol produced in one way, and ethyl alcohol produced in another way?

A. I presume ethyl alcohol, taken separately and distinct by itself, is identical in all fermented substances; but the accompanying products and those which give the agreeable or disagreeable flavors to the product, are certainly different. What they are and in what quantities they are present, I cannot tell you.

X Q. 135. Those are what are usually regarded as the impurities

in a distillate, are they not?

A. Yes.

X Q. 136. Those impurities are aldehydes, and the fusil oil, are they not?

A. Those which impart—

X Q. 137. Would you mind answering that yes or no?

A. It can't be answered yes or no. It is impossible, and for this reason: That some of those substances which you would class as impurities, that is to say, substances which are not solely ethyl alcohol, are just as necessary to a fine whiskey as the ethyl alcohol itself. They are impurities only in the sense that they are not ethyl alcohol, but they are not in any other sense impurities.

X Q. 138. You have used the expression "neutral spirits"?

A. Yes.

X Q. 139. What do you mean by neutral spirits?

A. Practically pure alcohol and water, the cheapest alcoholic substance known.

X Q. 140. How much neutral spirits is there in Old Crow whiskey?

A. As originally barreled, it contains approximately fifty per cent of absolute alcohol. There is no neutral spirits as that article is designated in commerce, for it is a separate and distinct article containing nothing but alcohol and water, and the Old Crow distillery makes no such product. The neutral spirits, I would explain, is the adulterant of the mixer and compounder of

whiskies, which is the cheap article with which he cheapens the fine whiskies, such as Old Crow, and which he buys for

the purpose of adulterating in many cases.

X Q. 141. If you should take old Crow whisky and take out the fusil oil, or these impurities which we have referred to as impurities,

you would have left then neutral spirits, would you not?

A. If you take Old Crow whiskey and put it through the process employed in alcohol distilleries for making neutral spirits, you would of course separate the alcohol and the water, and that would be neutral spirits.

X Q. 142. The only difference between Old Crow and what you refer to as neutral spirits is this fusil oil or other impurities in it which gives character to the alcohol, which is the same in neutral

spirits or Old Crow whiskey, isn't it?

A. The difference is identically the same as between milk and milk from which water has been taken. After they have been separated after the water has been separated from the milk, you have pure water, and you have the residuum which made the water milk. When you separate alcohol from Old Crow whiskey, you have neutral spirits, and you have the residuum which made the Old Crow whiskey.

X Q. 143. Then the difference there is this residuum, isn't it?

A. Yes, just as in the case of milk.

X Q. 144. Consequently, Old Crow whiskey is composed of so much water, so much alcohol, certain flavoring matters which gives it its character as Old Crow whiskey; neutral spirits contains so much water the same alcohol without these flavoring qualities; that

is the fact, isn't it?

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A. Yes, that is a fact; but if you will take additional neutral spirits and add it to Old Crow whiskey, you haven't got Old Crow whiskey. You can get neutral spirits from Old Crow whiskey, but you can't add it to Old Crow whiskey and have Old Crow whiskey left. It would be another thing. It would be a cheaper article and a poorer article.

X Q. 145. Do you find always the same percentage of

fusil oil in all your Old Crow whiskies?

A. I can't answer that question, because I don't know.

X Q. 146. Haven't you had many analysis made? A. Yes; they were so varied they were unreliable. X Q. 147. Taking the analysis as you had them made, without reference as to whether they were reliable or not, didn't you find a great difference in the percentage of fusil oil in different Old Crow whiskies?

A. No.

XQ. 148. Did you find them the same?

A. No, I didn't find anything, because the same chemists analyzed two identical samples differently, so his whole—the whole composition was destroyed—the whole basis for my calculation was destroyed.

I am unable to answer that question.

XQ. 149. Then, so far as reliability is concerned, I will ask you about the results, without reference to whether you consider them reliable or not. Didn't the results show differing amounts of fusil oil in different Old Crow whiskies—that is, different distilla-

A. Even there I can't say it did, for the reason that quite a number of the different samples of different days' distillation were examined, and the same, or about the same variation in the finest grade in the whole line of these samples, so it is impossible to make any comparison which is reliable. The only thing that could be gathered from the whole matter, after it was tabulated, was that there seemed to be a very strong average tendency to diminution in the percentage of fusil, as the whiskey grew older, but when it came to comparison of the entirely new whiskey made at different times, they were absolutely contradictory, so that it was impossible to get at any accurate conclusion.

X Q. 150. Is Prof. Lasche the only chemist who has made analysis of the new whiskies, new Old Crow whiskies, for the purpose of de-

termining the percentage of fusil oil?

A. I had these analyses made at that time by one other man. I have been trying to remember his name. He was an eastern chemist.

XQ. 151. In what city?

A. New York. I can't remember who it was.

X Q. 152. Was it Dr. Lederle?

A. No, it was before his time. This occurred a good while ago.

X Q. 153. You wish to say you don't know whether the percentage of fusil oil in the new whiskey is always the same or not? I refer to Old Crow whiskey?

A. I cannot answer that question. The nearest suggestion to it that I could give you was our experience in our alcohol distilleries, where we mechanically separated the fusil. There it seems to be reasonably constant in percentage, but, of course, that may not be the case in the Old Crow distillery.

X Q. 154. Then taking your knowledge as a chemist and as a distiller of Old Crow whiskey, would you say that the percentage of

fusil oil produced by each distillation is uniform?

A. I should think it was—very nearly so.

XQ. 155. What do you mean by "very nearly so," what variation would there be?

A. That I can't answer.

X Q. 156. Now, isn't it a matter of fact that the analyses have shown that in some of the distillations there was twice as much fusil oil—that is, the percentage was twice as high as in others, in fresh

whiskey?

A. Well, the examination of the chemists on the same samples were misleading; that is the reason why it was impossible to deduce any satisfactory conclusion from those tables, except the one general drift which I have explained, of the diminishing fusil oil as the whiskey aged.

X O. 157. Now, what is the color of Old Crow whiskey at the

time it is put in the barrel, is it white, water white?

A. Perfectly white, yes.

X Q. 158. And when it has been in there at the end of four or five years, it is colored?

A. Yes, it has a strong amber color.

87 X Q. 159. That coloring is produced by the caramel and tannin?

A. It is.

X Q. 160. Which it gets from the barrel?

A. Yes, sir.

X Q. 161. Now, you used the brand "Old Crow" on both Rye and Bourbon, did you?

A. Yes; we brand one Old Crow Bourbon and the other Old Crow

Rye.

X Q. 162. The Bourbon is not made in Bourbon County, Ken-

tucky?

A. I will explain that. The word "Bourbon" does not appeal in the commercial brand, but does appear on the Government head of the barrel as descriptive of the kind of whisky contained in the package—this being required by law. On the Old Crow Rye, however, we placed the word "Rye," in the commercial brand. The whiskey is not made in Bourbon County, Kentucky.

X Q. 163. In other words, it is descriptive of a kind?

A. Yes.

X Q. 164. Now, in your Old Crow Rye, how much corn do you use?

A. None; this mash is rye and barley malt exclusively, and the percentage of barley malt is less than twenty per cent.

X Q. 165. And no other grain?

A. No other grain.

X Q. 166. And in your Bourbon, how much small grain do you use?

A. About twenty per cent.

X Q. 167. And what small grain besides malt?

A. Rye.

X Q. 168. What is your average yield per bushel of rye?

A. About four gallons.

X Q. 169. And what is your average yield of the Bourbon?

A. About 4.20 gallons. Those figures vary a great deal. Sometimes a little higher and sometimes considerably lower, dependent

upon the quality of the grain used, and the success of the fermenting

operation.

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X Q. 170. Now, you stated that the percentage of fusil oil was not sufficient to be deleterious to health after storage a reasonable length of time?

A. Yes.

X Q. 171. What do you call a reasonable length of time?

A. Three or four years.

X Q. 172. Now, how can you say what is a reasonable length of time, if you don't know how much you had to start with or how much

you had to end with?

A. I cannot. This question is purely theoretical and based upon the general opinion, which is based again upon human experience in the consumption of the article and the observation by physicians of the use of the article.

X Q. 173. Now, by the doubler you stated that practical rectifica-

tion is accomplished?

A. Very slight rectification is accomplished.

X Q. 174. Now, in what direction is that rectification?

A. It is in the direction of reducing the amount of all substances other than alcohol and water, whatever those bodies may be.

X Q. 175. That is other than what you have described as neutral

spirits'

A. No, because the term "neutral spirits" could not be in any way applied to a Kentucky straight whiskey. It is a separate and distinct product. There is no such thing as neutral spirits present in the whiskey.

X Q. 176. Neutral spirits is ethyl alcohol and water, is is not? A. Yes, after it has been separated from all other substances.

X Q. 177. Then Old Crow whiskey is ethyl alcohol and water, and these flavoring matters?

A. Those are the component parts, yes.

X Q. 178. So that the doubling which is practical rectification, don't reduce the ethyl alcohol and water, but does reduce the percentage of these impurities which are in there after the first distillation which is designated the singling?

A. It does reduce the quantity of other bodies than alcohol and

water, but they are improperly designated as impurities.

X Q. 179. What are these other bodies?

A. I can't tell you.

X Q. 180. Well, how do you know they are improperly designated as impurities?

A. No man knows.

X Q. 181. No man knows?

A. Because the product which is known as fine whiskey, high grade whiskey, is recognized as a desirable, palatable and healthful stimulant, and while it may contain substances other than ethyl alcohol and water, they could not, unless they were proven to be undesirable, be called impurities.

X Q. 182. You said you were a practical distiller, didn't you?

A. I am.

X Q. 183. Then you know that there are certain impurities which are called heads, and certain impurities that are called tails?

A. Yes.

X Q. 184. And the heads include aldehydes and certain acetic ethers?

A. Yes.

X Q. 185. And the tails include propyl alcohol, butyl alcohol and valerianic alcohol?

A. Yes, and most of these bodies are the most desirable to be retained in a straight whiskey.

X Q. 186. Most of which bodies?

A. The ones of butyl alcohol, of valerianic acid and all these bodies which you have specified, nearly all of them, are important to be retained in the whiskey. They impart finally the fine flavors of high grade whiskey.

X Q. 187. They impart the flavor only provided they are con-

verted to something else?

A. Perfectly, but you have to have the original to convert them. X Q. 188. If they are in whiskey in an unconverted form, then

it is an impurity, is it?

A. No, not with the object in view of storing them in wood and converting them to desirable substances, they can't be called impurities.

X Q. 189. I am talking after the storage is ended, if it still remains

unconverted, it is an impurity?

A. Even then, if not in undesirable quantity so as to cause a bad flavor and make it unhealthful, no; no more than cream is an impurity in milk if it is found too heavy for people to drink. The milkman makes his milk sometimes better for human con-

sumption by adding water to it, X Q. 190. That is a natural product, and whiskey is a manufac-

tured product?

A. The addition of water to milk is not a natural product.

X Q. 191. I say, milk is a natural product and whiskey a manufactured product?

A. You make a distinction that I don't recognize as important.

X Q. 192. I think they are very important.

A. I can't agree with you.

X Q. 193. Now, these heads with a bad taste and tails with a bad taste, which, whether you regard them as impurities, or not, are generally regarded as impurities, have different boiling points from

ethyl alcohol, do they not?

A. I didn't say, by the way, they were not impurities. You are asking two questions. You started out by asking me what the effect of the second distillation was. Now, really, the operation that you are now questioning me about is the result of the first distilling operation, not the second.

X Q. 194. What difference does it make which distillation I

refer to, if I refer to the same product or same matter?

A. The only difference if you started out with a specific question in regard to the second distillation, evidently endeavoring to show

that that second distillation in a single-chambered still was the equivalent of a single distillation in a double-chambered still. At least, that is what I understood your question to mean, and I have been answering all your questions on that supposition and confining them entirely to the second distillation which you spoke about.

X Q. 195. I am not responsible for the understanding you give to my question. What I wish is this: if that fusil oil is an impurity in the singling, it is an impurity in the doubling. If the impurities

which are grouped together under the name "heads" are impurities in the singling they are impurities in the doubling.

Now, I asked you if they did not have different boiling points from ethyl alcohol?

A. You finally asked that question, and I answered yes.

X Q. 196. They can then be separated from ethyl alcohol by the distiller watching the temperature of the vapor, can they not?

A. No, not in the form of still which is employed by the old-fashioned Kentucky distiller. He can only to a very slight degree control that question. Now, you are confusing two different things here.

X Q. 197. Just answer when and where?

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A. Let me go on and answer it. You are confusing two different There are certain of these bodies, first, those distilling at a very low temperature, and which go over at the beginning of the distillation, and again those which distillat a very high temperature and which go over at the end of the distillation. The very beginning and the very end do give substances which have a disagreeable Those the distiller can eliminate by failing to collect in his cistern the first part of the distillation and the last end of the distillation, and that can be done with any still; that is true. when it comes to the fusil oils and all the bodies which pass over during that part of the distillation, where the careful distiller collects his product, although it contains these bodies, that spirit cannot be classed as having impurities in it, nor can those substances be called impurities, because instead of imparting bad flavor to the whiskey they impart a most desirable flavor to the whiskey. Now, so far as I am aware, all those bodies, both the objectionable and the non-objectionable, come under the head of what you call impurities, but where they are desirable they certainly should not be so called, and the distiller should retain them, and he does retain them.

X Q. 198. Now, when you run it through the doubler, after it is first collected in the first eistern, the operation simply reduces the percentage of these things we have referred to as impuri-

ties, whether desirable or undesirable impurities? .

A. It does very slightly in the form of still we use.

X Q. 199. Then, what is the object of using the doubler?

A. Just for the very slight reduction of the substances coming in the beginning and at the end, which do not give the whiskey a fine flavor. It is a question of the flavor of the whiskey.

X Q. 200. Now, you state that the value of your Old Crow brand

was \$500,000; how do you estimate it?

A. I will give twice that for it in cash, and pay my partners their share.

X Q. 201. How do you estimate it?

A. I estimate it upon the earnings of that distillery and the profits we make every year in the sale of the whiskey.

X Q. 202. You don't attribute all the profits to the trademark, do you? Don't you attribute some of the profits to the material?

A. The trademark represents very nearly the whole of the value. This does not mean that the quality of the whiskey is not in proportion to the value of the trademark, but simply that the consumer—the man why buys—purchases on the trademark in which he has confidence—the trademark which he has known to give him invariably the high grade whiskey which he wishes, and if he cannot get it under that trademark he would be so suspicious of the article that he wouldn't readily buy it, but would turn to some other well known trademark which he is familiar with.

X Q. 203. In you- estimating of four to 4.20 gallons a bushel what do you estimate in round numbers it costs you to produce a gallon of your Old Crow whiskey at the time it is entered into bond?

A. I don't know why you should go into that private business.

Mr. Hopkins: Read the question.

(The question is repeated by the stenographer.)

93 Mr. Hopkins: Objected to as immaterial and foreign to any issue in this case.

A. As that appears to be an unwarranted inquiry into the details of my personal business, I decline to answer that.

Mr. Hough: I think it is material in view of his statement as to the trademark value being the chief value of Old Crow whiskey, and I ask to have the question certified.

X Q. 204. Then it costs over nineteen cents a gallon?

Mr. Hopkins: Same objection; counsel instructs witness he need not answer.

A. Yes, a great deal more than nineteen cents a galion.

X Q. 205. I am not talking about after it has been in storage, but at the time it is drawn from the receiving cistern?

A. That is what I refer to.

X Q. 206. Does it cost over twenty-four cents a gallon?

A. All these questions are an attempt to inquire into my personal affairs, and I decline to answer them.

Mr. Hopkins: Same objection as to the last question.

The Witness: But, as a matter of fact, it does cost considerably more than twenty-four cents a gallon.

X Q. 207. Does it cost you any more to make whiskey at the Old Crow distillery than it does at the Hermitage or any of these other distilleries in that section of Kentucky?

A. It costs considerably more than at the Hermitage.

X Q. 208. Why does it cost more?

A. Because we have to haul every pound of coal, grain and all

material used in the manufacture six or seven miles over a rough country road, to the Old Crow distillery, and at the Hermitage we have railroad facilities. Those are the chief reasons, but we also make a larger limit at the Hermitage distillery.

X Q. 209. How much larger?

A. On an average about .10 or .15 of a gallon per bushel. X Q. 210. You say that Edward C. Homan never represented Gaines & Co.?

A. Never. He never was in their employ in his life.

X Q. 211. He told you, didn't he, in this conversation he had with Hellman in St. Louis, in 1897——

A. He didn't; there is not a word of truth in it.

X Q. 212. You never heard of it at all?

A. Never until this case.

X Q. 213. Didn't you state, when the matter was in Mr. Ropert's hands, that the reason you took no action at that time was that Heliman promised to Homan he would discontinue?

A. I don't understand that question.
X Q. 214. (X Q. 213 repeated).
A. Yes, that is right; that is correct.

X Q. 215. Then you must have known of Homan's conversation

with Hellman?

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A. No; I didn't know any such thing. The conversation that is reported by Mr. Hellman as having occurred between himself and Homan has no likeness whatever with the statement that *H*r. Homan made to me; that is what I mean.

X Q. 216. You knew from Homan in 1896 that Hellman was

advertising and seiling a Crow brand of whiskey, did you not?

A. I knew that he was infringing the Old Crow trademark; to what extent, I had no knowledge whatever. My information then was merely hearsay information. I was assured that whatever he had done, however—little or more—would never be repeated; and consequently I dismissed the matter entirely from my mind, and never heard of it again until this suit, or just prior to it, when we had proof of infringement, but the statement made in this case of an interview with Mr. Homan, my knowledge of it and all that, is false.

X Q. 217. Do I understand you to say that you knew who made

that label that you have introduced in evidence?

A. No. I told Mr. Hopkins that I had seen that same central device on numerous lithographers' stock labels. It has come before me many times on bottiings of Old Crow both genuine and spurious.

X Q. 218. Then the statement you made on direct examination with respect to this, you wish understood as confined to the figure of

the crow and the circle around it?

A. That is correct.

X Q. 219. What lithographer ever showed you a central figure exactly like that?

A. No lithographer ever showed it to me. I have seen it on bottles

put up by people in different parts of the United States, which had been furnished to them by different lithographers.

X Q. 220. The rest of the label, however, would be different?

A. The rest of the label would be different, yes.

X Q. 221. You spoke of having instituted a number of suits against alleged infringers. When were those suits instituted?

A. I can hardly remember when we have not had suits.

X Q. 222. Did you have them prior to 1896?

A. Well, I can't answer as to dates. I only know we had thousands of them. There was one time that we had nearly two thousand in court at one time.

X Q. 223. What year was that?

A. That I can't answer definitely; do you remember when that was?

Mr. Hopkins: 1898 and 1899.

The Witness: Along about 1898 and 1899, I can remember one very early suit brought against a man named McConihe of Troy, New York. I think that was prior to 1880. I happen to remember that particular one because of some peculiar incident in connection with it.

X Q. 224. Where did you live prior to 1875?

A. I lived in Germany, until 1871, when I returned to the United States and was traveling for several years, and looking after personal matters, things of my own, and in 1874 I went to Paris, Allen & Co., Mr. Allen of that firm being my father-in-law.

X Q. 225. That was when your connection with the whiskey bus-

iness commenced?

A. That was the first.

96 X Q. 226. Did you have any business prior to that? A. No.

X Q. 227. You weren't born in Germany, were you?

A. I was born in Connecticut. I lived several years in Germany. X Q. 228. Now, you stated that your Old Crow has been produced on the same formula continuously, with some exceptions. What

were those exceptions?

A. Well, the chief differences were varying percentages of the slop or spent beer from the previous distillation introduced into the fermenters. We always used this slop, as all the Kentucky distillers did, but we sometimes would vary a little in experimentation, with a view, of course, of increasing the yield. The changes, however, in our processes, have been very slight, and only those experimental ones, and had never in the slightest degree changed the quality or character of the goods.

X Q. 229. There is no radical difference between the process and formula used at your distillery and any other distillery in Kentucky?

A. It is a distinct formula, and I think is quite different. I know it is very different from that used at any of the large number of distilleries of the Kentucky Distilleries & Warehouse Company.

X Q. 230. But wherein is it different?

A. That, again, is a question which I must decline to answer, as it is an attempt to invade our private business. X Q. 231. Does it differ in any other respect than in the percentages of different kinds of grain used?

A. I can't answer that, Mr. Hough; that is an important matter to

us, and I can't tell you, nor is it relevant.

X Q. 232. Don't you think there are plenty of people in Kentucky who know exactly how you do produce it at your distillery?

A. I don't know that there are; I hope not.

X Q. 233. Haven't you at times had trouble at your distillery, and called other distillers in to help straighten it out?

A. Never to my knowledge.

97 X Q. 234. Did you ever have a sour mash?

A. Our mash is invariably sour.

X Q. 235. You are using the word in one sense, and I am using it in a different sense. Did you ever have trouble with the fermentation?

A. We have at times had trouble, but I am very glad to say we have had intelligence enough among us to work the problem out and get it right.

X Q. 236. You never called in outside assistance?

A. I don't remember that we ever did on our history—certainly not in my time and to my knowledge called in any outside distillers.

X Q. 237. You have just stated that your whiskey is sour mash. That is, you passed it as sour mash. Did you use yeast to hasten fermentation?

A. We used the spent beer of previous distillation in our fermenters as the chief fermenting agent. The process of sour mash manufacture is carried out strictly in our distilleries, and the use of yeast in a distillery is, after all, a mooted question between distillers as to what bearing, if any, it has on the question of sour mash or sweet mash whiskies. As a matter of fact, practically every distiller in the State of Kentucky uses fresh yeast, whether he makes sweet or sour mash whiskey.

X Q. 238. But the sour mash was always made without yeast?

A. No.

X Q. 239. To hasten fermentation?

A. Almost all distillers from the beginning of time used yeast.

There was some small stills that used none, but very few.

X Q. 240. Then you don't think a sour mash is a proper name to apply to a distillation in which yeast is used to hasten fermentation?

A. Well, it depends on what you use the yeast for.

X Q. 241. But I said to hasten fermentation?

A. The fermentation is not hastened by the use of fresh yeast where the process is conducted on the sour mash plan. The ferment which is added—fresh ferment which is added—does not change the

fermenting period at all. We ferment just as many hours 98 if we use yeast as if we did not use yeast when the process is the sour mash process.

X Q. 242. You don't ferment as many hours now as you used to?

A. Just the same.

X Q. 243. How many hours do you ferment? A. We ferment under the 96-hour period. X Q. 244. And never ferment shorter than that?

A. Never.

X Q. 245. Do you make Old Crow of different qualities?

A. Only Bourbon and Rye. Those are, of course, different qualities, but in every other respect the qualities are uniform—the same, and have always been.

X Q. 246. Do you know anything about the brand Old Crow ever

being put on whiskey made at the Hermitage distillery?

A. No.

X Q. 247. Do you know that it was never done?

A. There is one case in my recollection, where is was alleged to have been done of a St. Louis house, whose name I now forget, claimed they had received from Paris, Allen & Co. of New York a small lot of whiskey which was made at the Hermitage distillery, and which was branded "Old Crow." The fact was positively denied by Paris, Allen & Co. This whiskey had been exported to a foreign country and reimported, and the records all indicated that it was Old Crow whiskey, and to this day Paris, Allen & Co. so contend. If it was, however, Hermitage, and was branded "Crow," is was so branded by error.

X Q. 248. By whom? A. That I don't know.

X Q. 249. What relation or connection is there between Paris,

Allen & Co. and W. A. Gaines & Co.?

A. None, so far as the two businesses are concerned, except that Paris, Allen & Co. are very large handlers and distributers of Old Crow and Hermitage. But some of the members of the firm of Paris, Allen & Co. are stockholders in the corporation of W. A. Gaines & Company.

X Q. 250. They are both corporations?

A. No, Paris Allen & Co. is a partnership; W. A. Gaines & Company is a corporation. W. A. Gaines & Company was incorporated under the laws of Kentucky.

X Q. 251. How far is the Hermitage distillery from the Old Crow

distillery?

A. About six miles by road; about four and a half miles on a direct line.

X Q. 252. What is the nearest distillery to the Old Crow distillery?

A. The old Taylor, I think, X Q. 253. How far is that?

A. About three miles, I believe.

X Q. 254. In what direction, up or down the creek?

A. Up the creek.

X Q. 255. Then on the same creek, is it?

A. Yes, sir.

X Q. 256. What is the next nearest distillery?

A. The distillery of Labrot & Graham, also on the same creek up the creek.

X Q. 257. Are there any other than those two distilleries on that creek?

A. I think not.

X Q. 258. They both discharge sewer into that creek, don't they?

A. Yes, sir.

X Q. 259. You are lower down. A. Yes.

X Q. 260. Do you find that affects the water? A. We don't use the water from the creek.

X Q. 261. You use spring water?

A. Spring water. Spring water that comes from the hill in an entirely opposite direction from the creek, and from those distilleries.

X Q. 262. Now, as you have described the words "pure" and "impure," you would regard the Old Crow whiskey pure at the time it is drawn from the receiving cistern, wouldn't you?

I think that is a pretty good whiskey, just as it A. I should.

comes out of the still.

X Q. 263. Do you know what the odor of that whiskey is as it comes out of the still?

A. Yes, sir. X Q. 264. Very rank, isn't it?

A. No, it is very agreeable.

X Q. 265. What does the odor chiefly come from at that time? It is not the odor of ethyl alcohol, is it?

100 A. It is the odor of ethyl alcohol combined with the odor of the by-products, whatever they may be.

X Q. 266. Can you state what they are?

A. I cannot.

X Q. 267. Now, then, there is a radical difference between the odor or flavor of that whiskey at the time it is drawn from the receiving cistern and after it has been in the charcoal for four years, is there not?

A. Yes, a very decided difference. While it is particularly agreeable to begin with, it becomes still more agreeable as it advances and

obtains those flavors which age produces.

X Q. 268. What does the odor come from at the end of four years? A. From my personal knowledge I cannot say, but the general supposition is it comes from the change of the original fusils and byproducts to more ethereal bodies which impart these fine flavors.

X Q. 269. Then the word "pure" as you use it, don't mean any-

thing more than straight?

A. It means straight, and also harmless, innocuous,

X Q. 270. Is it any more innocuous than any other whisky with

the same amount of fusil oil?

A. I can't answer that question personally, but the general opinion is that the whiskies manufactured by continuous distillation are more harmful in their toxic effect than the high grade old-fashioned

X Q. 271. Now, what is the difference in the whiskies?

A. I am unable to tell you, sir. I can't say personally. I can only say that is the general opinion of those who use it, and the physicians who recommend it. These old Kentucky whiskies are a pretty old institution, and it would take a great deal of testimony by me or anyone else to convince the average American that they were not good for his health.

X Q. 272. That is true of any whisky, isn't it?

A. No, I think not. There has been a great deal of suspicion cast upon mixed and rectified and compound products by some unpleasant experiences with these articles that had been compounded

experiences with these articles that had been compounded
with wood alcohol, and a few people died, and while I am sure
that practice is not common, it is a practice that can't be applied to the straight product bearing the Government stamps.

X Q. 273. You are referring to the bottled in bond?

A. Bottled in bond or the barrel of whisky or goods with the In-

ternal Revenue stamp.

X Q. 274. You don't mean to say it is impossible to add alcohol to any of your two-stamp packages of Old Crow whisky—I mean wood alcohol?

A. It is, unless the person doing it deliberately violates the law and takes chances of confiscation of all his property and the stuff he has manipulated, and getting himself into a great deal of trouble with the Government.

X Q. 275. He equally violates the law if he buys wood alcohol

and sells it as whisky?

A. No, because the rectifier can put in all the wood alcohol he pleases with full knowledge of the Internal Revenue Department.

X Q. 276. I am not talking about the Internal Revenue Department, but I am talking about the law of the land?

A. That is what I am talking about.

X Q. 277. You don't pretend to believe that anyone ever intentionally put wood alcohol into ethyl alcohol?

A. Certainly I do. There can be no other possible conclusion in regard to this New York case where these people were poisoned.

X Q. 278. Don't you know, as a matter of fact, that they showed that it was deodarized wood alcohol that had been stolen from a drug store and was sold by the bartender as ethyl alcohol, or alcohol of whisky?

A. I don't care what the circumstances were; the fact remains the man who sold that whisky to the men who were killed deliberately placed the wood alcohol in the ethyl alcohol.

X Q. 279. You don't mean to say he deliberately placed the wood

alcohol in the ethyl alcohol, knowing it to be wood alcohol?

A. I strongly suspect he did.

X Q. 280. Don't you know it was proven, did he not, and the facts were as I have stated, that it was stolen from a drug store and supposed to be the alcohol of whisky?

A. I never heard of such a story.

X Q. 281. Did you ever make any investigation to find out the facts.

A. I never read any evidence in regard to it. I read the newspaper account. However, that has nothing to do with this matter. The fact remains, there is nothing to prevent a rectifier of spirits—a mixer of spirits, from putting wood alcohol or putting any poisonous substances in the whisky which he manufactures, except the general

law of the land. There is nothing in the Internal Revenue laws forbidding it. On the contrary, the Internal Revenue laws do forbid any adulterant being put in two-stamp straight whisky, and it is impossible to do it openly, whereas the other thing may be done openly, as far as the Internal Revenue law is concerned.

X Q. 282. As I stated, I was not talking about the Internal Rev-

enue law, but I was talking about the general law of the land.

A. I beg your pardon. This traffic we are discussing, supposed to be, and is, as far as straight whisky is concerned, under the absolute control of the Internal Revenue Department, and that is a safeguard to the consumer as to straight whisky which he has not got in regard to compound and mixed whiskies.

X Q. 283. Do you mean to say that a distiller could put anything—a rectifier could put anything—into whisky that would be any more deleterious to health than fusel oil in the same proportion?

A. If he put fusel oil in a poisonous quantity into a whisky, it would be, of course, deleterious to health. If he placed fusel oil in whisky in the minute percentages in which it is found in the straight whiskies of Kentucky, it certainly is not.

X Q. 284. It wouldn't be deleterious to health, but it certainly is

not conducive to health?

A. Yes, it is not conducive to health.

X Q. 285. You stated the doubling was for the purpose of getting some of these impurities out?

A. Because at the very beginning of the distillation, and at the very end of the distillation there are some very heavy bodies, and some very light ones, which have a bad flavor, and it is desirable to eliminate those. That is why that is done.

X Q. 286. That is fusel oil, isn't it?

A. They come under the general head of fusel oil, but fusel oil is a very indefinite compound, for it contains a great many different substances, some of which will always remain mysterious. We only know in a mechanical way that at the very beginning of the distillation and at its end there are undesirable flavors that we do eliminate, but we still retain, and desire to retain, and must retain, if we want the flavor, the characteristic flavor of whisky, the certain percentage of the fusels which come over in the middle of the distillation. That is so imperative that the mixer of whisky—the adulterer, the compounder, invariably must use straight, high-flavored whisky as the basis of his concoction. He takes his neutral spirits as his adulterant—the cheap article—and he mixes that with a certain proportion, little or great, of genuine whisky, for the purpose of getting the flavor of the genuine whisky and imparting it to his neutral spirits.

X Q. 287. You don't mean to say what you call neutral spirit is

not a whisky?

A. Neutral spirit is not whisky, no.

X Q. 288. In your opinion it is not whisky?

A. I don't mean that.

X Q. 289. Don't you know you brand it as whisky yourself, your companies?

A. We brand the compounds of neutral spirits and other substances as whisky.

X Q. 290. You brand it before it has been compounded, you brand it as whisky and the Government brands it as whisky?

A. That is true; it is not genuine whisky.

X Q. 291. How can you say it is not whisky, when the Government brands it whisky and you brand it whisky?

A. I will explain that. In the beginning of this traffic, before there were Internal Revenue laws, it was the custom of the dealer in whisky to cheapen his fine whisky by the addi-

tion of alcohol and water, the latter being a very much cheaper article. That became a custom. It was done, not with the knowledge and consent of the consumer. It is not done today with the knowledge and consent of the consumer. It is done in order to obtain a sulstance resembling whisky-the original whisky-which can be sold at a lower price than the original whisky. and still be a good profit to the seller. Now, to that extent, it is an imposition on the public, because the consumer don't know this He may know some very rare cases, but generally he is told that a whisky of that kind is not manufactured of cheap alcohol and water, and whisky, but a blend, as it is politely termed-of two or more straight whiskies. That was not permitted by law in those days, but later on when the laws were passed, the Government desiring first of all revenue, recognized or sanctioned this business of mixing, and it has come down finally to this point that, with the sanction of the Government, we find neutral spirit, after it has been colored with burnt sugar and blended and some little additions which are harmless, which gives it the apparent style of whisky. It is not proper to do it. We never ought to do it. The law never should recognize it, and if I can have any influence, I will have the law changed so it cannot be done, some day, so that when a man drinks it, he knows what he is getting and not as today buy for whisky or "pure rye whisky," as it is sometimes labeled, what is nothing in the world but alcohol and water, with a very small amount of whisky, and perhaps none.

X Q. 292. You stated awhile ago if you would take out of the Old Crow whisky the flavoring, you would have nothing but the alcohol and water. It would be the same kind of alcohol as is

referred to as the cheap article?

A. And so would the water taken from milk be pure water.

X Q. 293, If it has all the ingredients of what we call pure water?

A. That is perfectly true.

X Q. 294. You talked about this product being branded as whisky when it is sweetened and colored. Don't you know it is branded as whisky before it is sweetened and colored?

A. No, it is not, in our business.

X Q. 295. I am talking now of the rest of the United States?

A. No, it is not commercially branded whisky, but on the heads of the barrels the Government again lends itself to this fraud and permits a distiller of neutral spirits to put on the head of the barrel the word "Whisky" as the designation of the contents of the barrel. As a matter of fact, however, not only in the technical meaning of the word "whisky," but in its acceptance and understanding by the whole community, that sort of stuff is not whisky. It never is whisky unless it has the characteristic flavor which whisky bears.

X Q. 296. Don't you know that whisky has always been artifically

colored and flavored at all times?

A. I don't know anything of the sort.

X Q. 297. Don't you know Old Crow whisky is artificially colored and flavored?

A. Not with our knowledge and consent, sir.

X Q. 298. Don't you know that the preparation—the barrel contributes more than nine-tenths of the flavoring to the whisky and the entire color?

A. It is not true as to the flavoring. It is true, of course as to the color, but that might be classed among your natural products, might it not?

X Q. 299. No, because you wouldn't have it if you put it in glass?

A. No.

X Q. 300. I am talking about the manufacturing meaning and not the natural meaning. Don't you know before they made whisky in this country they made it in England?

A. Yes, for many years.

X Q. 301. And don't you know that in England the flavor of

whisky was artificially added to it.

A. I know just the contrary. I am very familiar with 106 the industry in England and Scotland, and have been for a good many years. There is no dealer or distiller there who would for a moment contend that the original whisky which he makes in his distillery required anything to be added to it or from it anything added to it. It is, as a matter of fact, made pure just like our whiskies are in this country. It is stirred not only in open casks, but generally in casks which have been frequently re-used, for the reason that they wish their whiskies there a very light color. They don't stain the whisky at all. This whisky, the original article which I speak of, of course, again in those countries as in this the rectifier or mixer takes that whisky, adulterates it with neutral spirits, colors it and flavors it—does all those things which the mixer does to disguise the fact that he has adulterated, and then sells the product as whisky.

X Q. 302. You don't go back far enough. I am not referring to the adding of anything such as you want to refer to, but the habit before that time of putting their whiskies, made as free from fusel oil as possible, in sherry casks and rum casks, before the practice you have just detailed was originated; that was done to color and

flavor that product, was it not?

A. It was done to color it just as the storage in wood colors our spirits.

X Q. 303. De you mean it was not done to flavor it?

A. It was not done to flavor it any, nor does it flavor it. I have myself put a very considerable amount of Crow and Hermitage

whisky in the sherry casks and stored it four years. There was no appreciable flavor whatever gained from such storage. On the contrary, it had less flavor than whisky stored in an open cask, for the reason that those sherry wine packages having had other liquid in them than sherry wine, which had taken most of the coloring and flavoring, there is less to be imparted to the whisky, and my personal experience is that no flavor is gained by that practice.

As a matter of fact, the further back you go in the manufacture of whisky in England or Scotland and this country,

the cruder become the methods of the distiller, and the ranker must necessarily have been his product. Consequently he had in those early days whisky of the very highest flavor—I mean whisky flavor—and it was never necessary for him to resort to any artificial means to increase that flavoring. It is only the modern ingenuity of man who desires apparently to adulterate all things he can without being caught at it, that has built up the rectifiers and mixing business.

X Q. 304. Don't you know that the flavor which fresh whisky

has is a flavor they want to get rid of?

A. I know that it is desirable, of course, to age whisky. I don't know that the flavor of a new, carefully made, fine whisky like these Kentucky whiskies we are discussing, is undesirable. On the contrary, I believe while it grows better with age, it is at the very beginning unobjectionable and is absolutely necessary in order to produce those finer flavors in the future.

X Q. 305. You disagree with all published authorities on that sub-

ject, do you?

A. Well, I think that practice is a better guide in those matters than theory.

X Q. 306. I say, you disagree with all published authorities?

A. And the fact that these fine straight whiskies I speak of bring very high prices always in the market and are much sought after and are absolutely essential for the whisky business, whether it be mixed whiskies or straight whiskies, is proof of the value and necessity of their peculiar flavors.

X Q. 307. You don't answer my question. You disagree then

with all published authorities on the subject?

A. I don't know of any authorities that suggest the elimination of the desirable flavors of fine whisky.

X Q. 308. You know what the United States Dispensatory says

on the subject?

A. The United States Dispensatory is not a reliable guide, nor is it an authority on the questions which the compilers of such a book could necessarily have the slightest knowledge about.

108 X Q. 309. Do you know what Nettleton says on the subject?

No

X Q. 310. Have you ever read his work?

1. No.

X Q. 311. He is an authority on the distilling industry in the British Isles?

A. I thought we were discussing Kentucky whisky.

X Q. 312. I asked you if you did not in effect disagree with them, and then I asked you if you were familiar with these statements, and you asked me who they were?

A. I don't know anything about them.

X Q. 313. Do you know what the statement in Allen's Organic Chemistry on the subject is?

A. No.

X Q. 314. Have you read Leach's work on the subject? A. No.

X Q. 315. What works have you read on the subject?

A. On those questions, none. It is a matter which can't be dealt with theoretically. You are here discussing the merits of a beverage which depends for its bid for public favor upon the flavors and characteristics which are recognized as desirable. Now, in that aspect of the matter we will have to treat; if you are to follow your apparent line of reasoning you would condemn the human race to the consumption of nothing but pure alcohol and water. It might be an extremely good practice from a temperance standpoint, but it would not find flavor with drinkers of whisky.

X Q. 316. Why wouldn't it be a good argument from a temper-

ance standpoint?

A. Because alcohol and water is a very unhealthful beverage, and people would not be so inclined to drink it as they would the very delicious well-flavored whisky we know.

X Q. 317. Don't you know that in Switzerland and in Norwey and Sweden that is what they come to on the ground it is very much

more wholesome?

A. My best information is they come to that conclusion through compulsion and that has been exercised for the same reason that has actuated our friends down in South Carolina who I

think have very considerably lined their pockets through that system. I don't think that the inhabitants of Switzerland would voluntarily choose to drink the alcoholic beverage which I have seen there, which is very distasteful. I might say among the better classes people drink the whiskies, brandies and other spirits imported from other countries, instead of their own beverages.

X Q. 318. The main idea is to get rid of the fusel oil in the

alcohol?

A. I think the main idea is to dispense at the highest price the cheapest article they can produce.

XQ. 319. Well, so-called neutral spirits cost as much to produce as your Old Crow whisky, didn't it, eliminating the storage?

A. Nonsense; you know better.

X Q. 320. What is the difference in cost?

A. The difference is double in the beginning, and in the end after the whisky has been matured and as it is invariably sold, ten fold.

X Q. 321. That additional expense is on account of the storage and loss during storage after it is made, isn't it?

A. Certainly; that is a part of its preparation.

X Q. 322. Now, if you had a railroad come to the Old Crow Distillery, it would cost the individual less to manufacture it than it does now?

A. Yes.

X Q. 323. And if you had the same facilities of getting grain to the Old Crow Distillery that you have of getting grain to your spirit house it would not cost any more, would it?

A. It would cost double.

X Q. 324. How would it cost double?

A. On account of the difference of the quality of grain we use, difference in the quality of cooperage, differences we employ in making it.

X Q. 325. Did you state how much small grain you used in your Bourbon whisky, what percentage of corn and what percentage of

rye?

A. I didn't tell you; I didn't intend to.

X Q. 326. But you stated you did use in addition to the corn a certain amount of rye and a certain amount of malt?

110 A. I gave some figures; the exact amount I didn't state.
X Q. 327. So the Bourbon is not pure Bourbon whisky?

A. Yes, it is. X Q. 328. It has a rye flavor?

A. All Bourbon whisky has rye and malt in it. There never was any bourbon whisky made that didn't have rye and malt in it.

X Q. 329. Are you sure of that?

A. Positive.

X Q. 330. How far back do you go?

A. 1875.

X Q. 331. Didn't the origin of the term indicate exclusively the manufacture of whisky from corn with only such malt as was necessary to convert it?

A. Certainly; the name Bourbon whisky came from the County of Bourbon, in the State of Kentucky, where it was first made.

X Q. 332. And at that time there was no rye in that section; isn't that the fact?

A. It is not the fact.

X Q. 333. Was there rye there?

A. I wasn't there, but I presume there was.

X Q. 334. Then you don't know?

A. I don't know, nor do you.

X Q. 335. Except what they say on the subject?

A. Nobody says such a thing.

X Q. 336. There are some statistics, but you don't agree with published authorities?

A. I don't think there are.

X Q. 337. You have said that your whisky sells for a very high price and that the largest element in the case is the brand?

A. I didn't say it.

X Q. 338. Isn't that the effect of what you said?

A. No; there are other costs in connection with whisky beside the manufacture. There are very heavy expenses in connection with

salesmen, advertising, maintenance of business offices, freights and insurance, interest on capital invested, deterioration of plant and so forth.

X Q. 339. Most of those come under the head of value of the brand, because that is made by advertising in these days, is it not?

A. They all tend to make the brand valuable. The expenditure of that money is what built up the brand.

X Q. 340. Now you speak of the reputation of Kentucky for old whiskies and straight whiskies. Don't you know that the reputation of Kentucky, or any other place, for whisky, has been due to this blending process which has made a rank article more palatable?

A. No; on the contrary, so far as my knowledge goes, and so far as all the history of the industry shows, the reputation of Kentucky for fine whisky was built up solely upon its straight goods, its high flavored fine old time straight goods, and the rectifier and mixer has traded upon that reputation and regulating of the State of Kentucky, and in many instances has put out his mixed product as Kentucky whisky and gained by the reputation which the old straight goods laid the foundation for.

X Q. 341. That, you say, was done continuously prior to the Internal Revenue laws—I mean exclusively prior to the Internal Reve-

nue laws they did this mixing without any limit?

A. I beg your pardon, not in Kentucky.

X Q. 342. You didn't say that?

A. No. In those prior days, my firm was one of the very largest handlers of straight Kentucky whiskies in the United States, not of its own manufacture, but distilled by other distillers all over the State of Kentucky, and those whiskies were sold in the distillery warehouses or were brought here and sold in the distiller's original packages as straight.

X Q. 343. You are talking about a period since 1875? A. No, I am not; I am talking about early history.

X Q. 344. You weren't in business then?

A. I have the history of the business, and I have books of my firm going back to the early sixties showing how they did their business. These whiskies were sold to jobbers and rectifiers and compounders and mixers all over the Eastern States by my house, and those people who bought this whisky were the men who used them very largely for making up the mixed article which they

112 sold under brands of their own—not as the distiller's original product, but as brands of their own—but the Kentuckian, the man who made the whisky in those early times, had the business all to himself. There was very little mixing done in Kentucky then; there was some undoubtedly in Louisville, but very little compared to what it is now, and those are the men, the distillers of the straight whiskies, who made the State's reputation. They made it all over the land. Now, I say that, having gained that reputation for the State of Kentucky, these mixers of later years have been trading upon it, and it has been one of the very serious problems of straight whisky distillers to fight that very unfair competition which the

adulterer of the Kentucky whisky and the maker of the artificial whiskies in the State of Kentucky, from any materials he might use imposed upon him.

X Q. 345. You use the word "artificial;" you have no right to use that word artificial, when it is an article that the Government

calls whisky.

A. The fact that the Government has lent its name to it does not make it any less a fraud.

X Q. 346. You have no right to state that it is a fraud.

A. It is a fraud so long as every person who receives it, including the man who drinks it, don't know what it is. Now, if the law required that the man who mixes and the man who adulterates will place upon his package the exact proportions of all the things he has put in it and say what it is, and let the man who buys it know what he is getting, I would say certainly that is no fraud, because I don't hesitate to state that the compounded whisky, or mixed whisky, has its peculiar merits. It is not injurious to health and it is made very much cheaper by the addition of neutral spirit, and there are many people who can't afford to pay the very high price for the straight article, and those people undoubtedly would know what they were getting if they were sold that sort of thing.

X Q. 347. Then, do you think the straight whisky should 113 have a label on it also, showing the percentage of the different

things it contains?

A. I think that is a problem which is ordinarily under the control of the United States Government and different Internal Revenue officers and should all of it be under this control, and that every gallon of whisky that is mixed should be mixed in a bonded warehouse under the supervision of a Government officer and that packages that went out of the bonded warehouse should have upon them some designating mark so anyone who buys them would know what they were of, but not necessarily stating the quantity of each article in them. Under those circumstances, the Government supervision would guarantee purity.

X Q. 348. Now, I don't see that it guarantees purity. The question asked was whether under present conditions if you say the ingredients should be stated on the bottle of the blended or mixed whiskies, whether you are of the opinion also that the ingredients

should be stated upon the bottle of straight whisky?

A. I think the bottle of straight whisky at the present time tells no lie. If it says this bottle contains rye whisky it is rye

whisky, but where the mixer taxes one part-

X Q. 349. I think you are answering something else than what I asked you. The question is this: You say you are in favor of having the ingredients of the contents of the so-called straight whisky put upon its label also?

A. It is already there.

X Q. 350. Then you are not in favor of having it put on. you are in favor of having it put on the mixed whisky?

A. There is no necessity for putting it on. The whisky has no ingredients. It is straight pure whisky.

X Q. 351. You are not willing to have stated on the label the percentage of ethyl alcohol which it contains, those what you have called neutral spirits, the percentage of fusel oil and the percentage of coloring matters and what they are, whether it is caramel

or tannin or part caramel and part tannin? 114

A. I am perfectly willing the world should know exactly the constituents of straight whisky or of the compounded whisky. The straight whisky, however, is a complete product. It has not been made by mixing together two or three or four things. compound, on the other hand, has been so made. It has been made by taking a part of this same straight whisky that you are endeavoring to run down and mixing with it an adulterant—a cheap alcohol and water mixture, for the purpose and only that purpose of cheapening the product and imposing upon the buyer. It has no other motive or intent.

X Q. 352. You have just stated that this thing which you say is an adulterant is the adding of water which is already in the whisky and adding of ethyl alcohol, which is already in your whisky, to the things without the impurities which are already in them?

A. The old question of the milk-man and the pump is the same

thing.

XQ. 353. Is adding water to water adulteration?

A. Yes, it is under these conditions; the addition of Croton water to Appolinaris or any other mineral water which has some peculiar market value.

XQ. 354. Is the addition of ethyl alcohol to ethyl alcohol adulteration?

A. Yes, provided one of those ethyl alcohols is in an article which has a very much higher market value than the other ethyl alcohol you put in it.

XQ. 355. Haven't you just stated that ethyl alcohol is the same

whether produced from one source or from another?

A. After that particular thing has been separated from what it is in combination, yes; but you can't make such comparisons as that, because in one case you have a complete product which has a very high value and very special characteristics. It isn't a question of splitting them up into original elements. It is a question in the case of the compounder and mixer of taking that valuable product

that is called whisky, and adding to it neutral spirits—that is to say, alcohol and water-of very much less cost, and not in-

115 forming the people to whom this alcohol is sold and who don't know by whom this adulteration has been practiced. is where the fraud comes in.

X Q. 356. But if that is labeled and the mixer put on the con-

tents there would be no fraud?

A. Yes; I haven't an objection to make to that. It is a new product, and if the knowledge of its being mixed or its being compounded is conveyed to those who use it, there can be no objection to it provided there is nothing deleterious in it.

X Q. 357. Now, then, you referred to this mixing which should take place under Government regulation. Don't you know that if that was done there would be no such thing as straight whisky any

longer, because the public wouldn't have it?

A. No, I don't know anything of the kind. We are probably the most concerned of any people in regard to this straight whisky question, because my big company controls so large a percentage of the straight whisky distilleries, but I would urge beyond all things without any regard to that, and still take my chance on the discrimination of the public that the whole traffic from beginning to end be conducted under Government control and that every manipulation should be in a bonded warehouse and that the law should forbid the putting together of anything that is deleterious to health and selling it as whisky.

X Q. 358. If that plan is not satisfactory to the so-called straight whisky, why did you apply to the Commissioner of Internal Revenue for the privilege to sweeten the straight whisky and add coloring matter to it on the ground that is something the distiller has always

been doing?

A. That is not a mixing or compounding in the sense in which we are discussing. The whole question here as between the straight whisky and the compound is the use of the cheap adulterant—neutral spirits—without the knowledge of the consumer, to cheapen the

genuine whisky. Now, the addition of color, the addition of sugar or the addition of any harmless flavor which the consumer may desire is no more adulteration or injury to the whisky than the making of a cocktail which we all drink when we want it.

X Q. 359. If the flavor of straight whisky is perfect, why should

you add any flavoring matter or sugar to it?

A. There is no question as to that, because the article may be perfect as whisky, but an individual consumer might require certain flavoring added to it. You don't forget, I suppose, the seductive Kentucky mint julip; that is best made from Kentucky straight whisky, but it is not a julip unless it has certain flavorings added to it.

X Q. 360. How do you know it is best made from Kentucky

whisky?

A. I have drunk it.

X Q. 361. Did you ever take it the other way? A. I think at Louisville at the Galt Hotel.

X Q. 362. Don't you know the only difference is in the percentage

of sweetening matters?

A. I do not, because they were made for me from very well-known compounds containing only a very small percentage of whisky.

X Q. 363. You mean whisky as you would like to have it limited?

A. No; that was merely my personal taste.

X Q. 364. I am talking about your use of the word "whisky." When you use the word "whisky" you want it limited to that which you make and excluding that which everybody else makes?

A. Certainly not. Whisky is a perfectly well understood term. It means only one thing. It means a pure straight whisky. It don't

mean an adulterated product.

X Q. 365. You know very well that whisky never was and never will be anything but alcohol and water with certain flavoring matters added to it?

A. I object to the words added to it. Whisky has no additions to

it. It has a distinct natural flavor.

Redirect examinations by Mr. Hopkins:

R. D. Q. 366. Referring to the Exhibit, Complainant's Exhibit Hellman's Label, I will ask you to state what the custom of 117 the trade has been in their bottling Crow whiskey of the com-

plainant with reference to the addition of the name to the

bottling?

A. In the case of the parties to whom we have sold this whisky and who have with our knowledge bottled it, the name of the party has almost invariably been given on the label as the bottlers of the contents, the whisky being described as W. A. Gaines & Company Old

R. D. Q. 367. What is the name of the creek to which you have referred in your cross examination on which the complainant's dis-

tillery is located? A. Glen's Creek.

EDSON BRADLEY.

Sworn to before me

JOHN A. SHIELDS. Sp'l Examiner.

In the Circuit Court of the United States, Eastern Division of the Eastern Judicial District of Missouri.

No. 5096. In Equity.

W. A. Gaines & Company, Complainant,

Max Kahn, Administrator with the Will Annexed of the Estate of Abraham M. Hellman, Deceased, and Moritz Hellman, Respondents.

Stipulation for Taking of Proofs.

It is hereby stipulated and agreed between the counsel for respective parties that Complainant be allotted to and including October 1st, 1905, for the taking of its prima — proofs. That Respondents be allotted to and including the first day of December, 1905, for the taking of their proofs, and that Complainant be allotted to and including January 1st, 1906, for the taking of its proofs in rebuttal.

It is further stipulated that respondents as complainants in this cross bill be allotted to and including October 1st, 1905, for the taking of their prima facie proofs upon their cross bill. That complainant as respondent to the said cross bill be allotted to and including the first day of December, 1905, for taking of its proofs, and that respondents as complainants in the said cross bill, as aforesaid, be allotted to and including January 1, 1906, for the taking of their

proofs in rebuttal upon the said cross bill.

It is further stipulated that the deposition of Elson Bradley in behalf of complainant may be taken before John A. Shields, as Special Examiner, or in event of his absence or inability to act, before any Notary Public, as Special Examiner, at the office of said John A. Shields, Post Office Building, New York City, New York, on Thursday, the 22nd day of June, 1905, at the hour of ten o'clock A. M., and continuing from day to day until completed, and if

respondents are not represented by counsel at the taking of said depositions of the said Edson Bradley, or if such counsel cannot begin or conclude the cross examination of said witness, respondents may, upon giving ten days' notice to complainant, or its counsel, at any time prior to the 1st day of January, 1906, cross examine the said Edson Bradley in deposition before a Notary Public or other officer authorized to take depositions; and it is further agreed that no other testimony than that of said Edson Bradley is to be taken by either party until after July 4, 1905.

It is agreed that the issuance of a commission to such Special Examiner is waived, and that all the testimony desired to be taken in this case may be taken before any Notary Public, who will act as Special Examiner, and without the necessity of the issuance of a com-

mission.

It is further stipulated that all testimony which has been taken or may hereafter be taken in this cause by either party thereto, insofar as the same may be applicable to the issues thereunder, may be introduced in support of both the amended bill and the cross bill and under the answer and replication of each respectively.

It is further stipulated that each party hereto shall give to the other, or its counsel, ten days' notice in writing of the time and place of the taking of any depositions which said party proposes to take in

this cause under the terms of this stipulation.

Dated at St. Louis, Missouri, this 15th day of June, 1905.

JAMES L. HOPKINS,

Solicitor and of Counsel for Complainant,

KLEIN & HOUGH,

Solicitor- and Counsel for Respondents.

In the Circuit Court of the United States, Eastern Division of the Eastern Judicial District of Missouri.

No. 5096. In Equity.

W. A. Gaines & Company, Complainants,

MAX KAHN, Administrator with the Will Annexed of the Estate of Abraham M. Hellman, Deceased, and Moritz Hellman, Respondents. United States of America, Southern District of New York, 88:

I, John A. Shields, Special Examiner in the above entitled cause, do hereby certify that on June 21st, 1905, at my office in the Post Office Building in the City of New York, I was attended by James L. Hopkins, Esq., of counsel for complainant, and Warwick M. Hough, Esq., of counsel for the defendant-, and by the witness Edson Bradley; that the said witness having been by me first duly examined and cautioned and sworn to testify the truth, the whole truth and noth-

ing but the truth in the above entitled cause gave his deposition, which by consent of counsel for the respective parties

was taken down in the presence of the witness and from his statements by a stenographer appointed by me for that purpose, the stenographic notes of the testimony being afterwards reduced to writing on a typewriter, and the witness having read over his deposition subscribed and swore to the same.

I further certify that said testimony was taken before me pursuant

to a stipulation hereunto annexed.

And I do further certify that I am not of counsel nor attorney for either of said parties nor in anywise interested in the event of the

cause in said caption and deposition named.

In Testimony Whereof I have hereunto subscribed my name this 27th day of July, in the year of our Lord one thousand nine hundred and five and of the Independence of the United States the one hundred and thirtieth.

JOHN A. SHIELDS, Special Examiner.

And afterwards, to-wit, on September 14th, 1905, the following further depositions on behalf of complainant were filed in said cause, to-wit:

In the Circuit Court of the United States, Eastern Division of the Eastern Judicial District of Missouri.

No. 5096. In Equity.

W. A. GAINES & COMPANY, Complainant,

Max Kahn, Administrator with the Will Annexed of the Estate of Abraham M. Hellman, Deceased, and Moritz Hellman, Respondents.

Depositions of witnesses on behalf of complainants taken before T. N. Lindsey, as Special Examiner, at the Law Offices of D. W. Lindsey, at Frankfort, Franklin County, Kentucky, on the 4th day of September, 1905, by consent of the parties and pursuant to stipulation.

Appearances:

James L. Hopkins, Esq., for complainant. Luther Ely Smith, Esq., for respondents.

JOHN A. STEELE, called as a witness on behalf of the complainant, being duly sworn, testified as follows:

Direct examination by Mr. Hopkins:

Q. 1. Please state your name, age and occupation?

A. My name is John Andrew Steele; my residence is Woodford, Ky.; my age is 64; my occupation is that of a banker and farmer.

Q. 2. With what bank are you connected and when did you be-

come so connected?

A. Citizens' Bank of Midway, Ky. Connected with it 25 years.

120 Q. 3. How long have you resided in Woodford County, Kv.

A. Sixty-four years.

Q. 4. Were you acquainted with James Crow in his lifetime?

Mr. Smith: I object to that question for the reason that it appears from the complainant's bill that no rights are claimed in the words "Old Crow" prior to the year 1867, and it is admitted by complainant that James Crow died in the year 1855,

A. Yes, sir.

Q. 5. Where did he live and what was his occupation when you knew him?

Same objection by respondent.

A. He lived in Woodford County on the farm of Oscar Pepper;

his occupation was that of distiller.

Q. 6. Did you have any knowledge of the whisky distilled by James Crow in his lifetime, and of the name by which that whisky was known?

Mr. Smith: Same objection as before, and the further objection that two questions are embodied in one.

A. Well, I knew that he made whisky, and it was called "Old Crow" whisky.

Q. 7. After the death of James Crow, and prior to the year 1867, did you know of any whisky made in Woodford County, Ky.? And which was known as Crow or Old Crow Whisky?

Mr. Smith: That question is objected to for the same reason, and for the further reason that it is leading.

A. No. sir.

Q. 8. After the death of James Crow, have you seen any of the Crow whisky made by him in his lifetime, and if so how recently did you last see any of it?

Mr. Smith: Objected to for the same reason heretofore given, and for the reason that it is leading and embodies two questions in one. And for the further reason that it is immaterial to the issues in this case what such whisky, if any, was called, or how it was marked.

A. I will say this, that a friend of mine, who usually kept Old Crow whisky on hand, told me that he had some he supposed was

the best in the country, and wanted me to come and take a drink with him at his home. This was five or six years ago.

Mr. Smith: I object to the answer, and move to strike it out, for the reason that it is clearly hearsay and is indefinite and is immaterial to any issue in this case. For the further reason that it does not even tend to show that the whisky was in fact made by Crow, and for the same objection heretofore made.

Q. 9. Who was the friend to whom you refer in your last answer?

Mr. Smith: I object to the question for the same reason.

A. Mr. Warren Viley, of Woodford County, Ky.

Q. 10. During all of the period after the death of James Crow and prior to the occasion to which you have referred in your answer to question 8, have you seen or known of Old Crow whisky distilled by James Crow in his lifetime, being still in existence in Woodford County, Ky.?

Mr. Smith: Objected to for the reason that it is leading, that it refers to whisky made prior to the time when this complainant claims any right to the words "Old Crow," and that it is immaterial whether or not such whisky continued in existence.

A. No. sir.

Q. 11. Then after the death of James Crow, in 1855, and up to this occasion, five or six years ago, that you have referred to, you had never seen or heard of Old Crow whisky, distilled by him in his lifetime, still being in existence in this county?

Mr. Smith: I object to that because it is leading, because it is not in evidence that the whisky referred to was Old Crow whisky, and for the general objection heretofore noted to in this line of testimony.

A. No, sir.

Q. 12. How long prior to his death were you acquainted with James Crow?

Mr. Smith: The same general objection.

A. Since I could remember—a little boy.

Q. 13. How near did you live to where he lived at that time?

Mr. Smith: I object as above.

A. I suppose about two miles and a half.

Q. 14. Did you ever know of a distiller named J. W. Crow?

A. No, sir.

# 122 Cross-examination by Mr. Smith:

X Q. 1. Captain, at what distillery did James Crow work?

A. Well, I can only say prior to the time he distilled for Oscar Pepper I had heard that he distilled for Captain Henry.

X Q. 2. Do you know what process James Crow used?

A. I have always understood that it was called hand-made sour-

X Q. 3. Do you know that of your own knowledge.

A. No.

X Q. 4. Of your own knowledge, you know nothing, then, about any particular formula which he used?

A. Just what I have seen.

X Q. 5. I understand you lived all your life in Woodford County? A. Yes, sir.

X Q. 6. You never lived in St. Louis?

A. No, sir.

X Q. 7. You don't know what brands of whisky were used in St. Louis during the years that you have referred to?

A. No.

X Q. 8. And as far back as 1850 or '63 in St. Louis?

A. No.

X Q. 9. You don't want to be understood as testifying with reference to the words "Old Crow" used upon whisky, except in the vicinity where you have lived?

A. I know nothing about any other.

X Q. 10. Captain, this is a limestone country, in this region of Kentucky, is it not?

A. Yes, sir.

X Q. 11. That is true of Woodford County and Franklin County? A. Yes, sir.

X Q. 12. And Anderson, Fayette, Mercer and Bourbon, is it not?

A. That is my knowledge.

X Q. 13. And the springs in those counties are limestone springs, are they not?

A. It is called limestone water, yes, sir.

X Q. 14: All the distilleries in those counties use water from limestone springs, do they not, as a rule?

A. That is my impression.

123 X Q. 15. How many distilleries are there in those counties I have mentioned, in round numbers?

A. I couldn't answer that. X Q. 16. Name some?

A. Greenbaum distillery, the Old Crow distillery, E. H. Taylor & Son, James Graham distillery, and there are several distilleries in Fayatte county—Stoll distillery, James G. Pepper, and others I don't know; quite a number.

X Q. 17. In Anderson County?

A. Yes, sir.

X Q. 18. And in Franklin County?

A. Yes, sir.

X Q. 19. And the water used at all these places is practically of the same quality—limestone water?

A. That is my information.

X Q. 20. Do you know where James Crow procured the grain that he used in distilling?

A. My observation was, in his own neighborhood. On the Oscar Pepper farm.

X Q. 21. From the Oscar Pepper farm and the neighborhood?

A. That's my recollection of it.

X Q. 22. Do you know what formula is used in making Old Crow whisky now?

A. I do not.

#### JOHN ANDREW STEELE.

Subscribed and sworn to before me this 4th day of September, 1905. My commission expires Jan'y 13th, 1906. T. N. LINDSAY,

SEAL.

Notary Public and Special Examiner.

George T. Cotton, being duly sworn, on the part of the complainant, testified as follows:

### Direct examination by Mr. Hopkins:

Q. 1. Please state your name, age, residence and occupation?

A. George T. Cotton, Versailles, Woodford County, Ky.; occupation at present, I think, I am trying to get well; I don't know what else. I will be 67 the 10th day of this month.

Q. 2. Were you born in Kentucky, and if so at what location?

A. Woodford County, near the waters of Glenn's Creek, I suppose about six miles west of Versailles.

Q. 3. How long did you reside at that same place?

124 A. Well sir, I was born there in '38 and left in '70. How much is that?

Q. 4. During that time, did you know of a whisky known as "Old Crow" whisky?

Mr. Smith: I object to anything prior to 1867, for the reason noted to Captain Steele's testimony: It is stipulated by counsel for complainant and respondents that the said objection may be regarded as being taken to each and all of the questions in all these depositions, and that it may be raised and argued upon the hearing or at any other time or place with the same force and effect as if specifically noted at the time.

A. Yes, sir.

Q. 5. By whom was that Old Crow whisky distilled to which you refer?

A. By Oscar Pepper.

Q. 6. Were you acquainted with James Crow in his lifetime?

A. Yes, sir.

Q. 7. Was the Oscar Pepper distillery located upon the Glenn's creek to which you referred?

Mr. Smith: I object to that as leading.

A. It was on the headwaters of Glenn's creek.

Q. 8. What connection, if any, did James Crow have with that distillery of Oscar Pepper?

A. None that I know of except to manufacture the whiskey.

Q. 9. In what business have you been engaged?

A. At what time?

Q. 10. Your general occupations or special occupations?

A. I have been a farmer all my life, and when I moved to Versailles I went into the stove and tinware business, and I have clerked there in the stores, and for the last twelve months I have done nothing, stricken with sickness. For the last twelve months unable to attend to any business.

Q. 11. During how long a time have you known of Old Crow

whiskey being distilled on Glenn's Creek?

Mr. Smith: I object to that for it does not appear in evidence yet that this witness knows of Old Crow whiskey being distilled on Glenn's Creek.

125 A. Well, it has been there ever since I can remember nearly.

Q. 12. Did you ever hear of any Old Crow whiskey that was not

distilled on Glenn's Creek?

A. None that I remember of. Ever since I have known Old Crow whiskey it has been on Glenn's Creek.

#### Cross-examination by Mr. Smith:

X Q. 1. Mr. Cotton, have you lived in Woodford Co. all your life?

A. All my life except two years I went to school at Sagre's in South Frankfort.

X Q. 2. Have you ever traveled very much?

A. No. sir.

X Q. 3. Ever been in St. Louis?

A. I think I passed through there once going to St. Joe.

X Q. 4. You didnt stop in St. Louis?

A. No, sir, only to change cars.

X Q. 5. You don't know about the brands of whiskey and the names by which whiskey are called in any other place except where

you have lived?

A. No, I don't think I do. I never used it myself and had no occasion. There was another man that made whiskey right there next to me, I don't know his name. My father he always used to get Old Crow whiskey, get it by the barrel, it was cheap and during his lifetime I don't know that there was a pint of any other kind of whiskey in the house.

X Q. 6. You say it was a cheap whiskey.

A. Well, at that time it was, there was no tax on it, I think it was about fifty cents a gallon. You would haul a load of corn down and take the whiskey home. I think that was about it.

X Q. 7. What time do you refer to—what year?

A. I couldn't tell you what year it was. Some time before the war, a long time before the war. It may have been some time about the '50's. I could not tell you the particular year.

X Q. S. How old were you when James Crow died? A. Well, sir I can't tell you what year exactly he died. 126

I think, though, my best recollection, he died in the '50's. I wouldn't be positive.

X Q. 9. You wouldn't be positive that he died in 1850 or '60 or '40?

A. Yes, he died in the '50's, between '50 and '60 but I can't say what year.

X Q. 10. At how many different distilleries did he work?

A. I know of one distillery, that I have heard of it. He worked for Tom Edwards, then he worked for Pepper, and I think he was distilling for-it is pretty hard for me to remember names-Johnson, that is it. I think he died when he was there.

X Q. 11. Where is the Edwards Distillery located?

A. It was five miles up Glenn's Creek.

X Q. 12. Above the Oscar Pepper distillery?

A. Yes, sir.

X Q. 13. Where was the Johnson distillery located?

A. The Johnson distillery is below the Pepper Distillery.

X Q. 14. What was the whiskey called that was made at the Johnson distillery?

A. I don't know sir.

X Q. 15. Or at the Edwards Distillery?

A. I don't know.

X Q. 16. Do you know where James Crow procured the grain he used in his distillery?

A. I think Pepper raised nearly all his grain, corn and rye.

X Q. 17. Near the distillery?

A. The distillery was situated upon the Pepper farm.

X Q. 18. On this farm he raised this grain?

A. Not all of it, I say most of it.

X Q. 19. Where did he get the rest of it?

A. I don't know.

X Q. 20. Did James Crow use a particular formula?

A. I can't tell you that.

X Q. 21. Do you know whether they use a particular formula in making Old Crow whiskey now on Glenn's Creek? 127 A. I don't know a thing about it. About the process of

making whiskey.

X Q. 22. How was this whiskey which you say you bought as Old Crow whiskey marked?

A. Well, sir, I don't believe I can tell you that. X Q. 23. How did you know that it was Old Crow?

A. I don't know that it was Old Crow, only they called it Old Crow.

X Q. 24. Who called it Old Crow?

A. Everybody in the neighborhood. They would send there.

X Q. 25. Send where?

A. To the Pepper distillery.

X Q. 26. Didn't they also call it Old Pepper?

A. Not then they didn't. I don't know as they ever did. I have no recollection of it ever being called that.

X Q. 27. Do you remember Thomas S. Edwards?

A. Yes, sir.

X Q. 28. Did he ever operate this distillery?

A. Not that I remember. I don't remember that he ever operated this distillery.

X Q. 29. How many distilleries are there on Glenn's Creek now? A. I don't know. I have not been down there for 30 years.

X Q. 30. Have you been on Glenn's Creek since 1867?

A. Down as far as the mouth, I have not.

X Q. 31. Do you know the Taylor distillery.

A. Yes, sir, the old Jack Johnson distillery that used to be.

X Q. 32. What kind of spring water do they use?

A. I don't know.

X Q. 33. Do you know what kind of spring water they had at old Oscar Pepper distillery?

A. Yes, sir.

X Q. 34. What kind was it?

A. It was a spring situated on the side of the hill about half way between his residence and the distillery.

X Q. 35. What was the character of the water?

A. I don't know sir.

X Q. 36. Was it a limestone spring?

A. I suppose it was. It was as all the springs around.

128 X Q. 37. The springs all around this country are limestone springs?

A. I think so.

X Q. 38. Are you familiar with the springs and the waters in Woodford, Franklin and Anderson counties.

A. No, sir.

X Q. 39. What counties are you familiar with?

A. Only my own, and I am not familiar with the waters except my own place and the neighbors.

X Q. 40. And they are all limestone?

A. Yes, sir.

X Q. 41. Do you know the Frazier & Greenbaum distilleries?

A. I know they are there.

X Q. 42. Do you know where the Old Crow people now procure their grain?

A. No, sir, I don't know.

X Q. 42. Do you know whether they get it from Woodford County or not?

A. Well, of my certain knowledge I can't say.

X Q. 43. Do you know the present distiller at the Old Crow distillery?

A. I do not. I have no idea.

X Q. 44. Do you know when brands were first used in Kentucky on whisky?

A. No, sir.

X Q. 45. Do you know whether it was prior to 1870?

A. Yes, sir I believe it was prior to 1870. X Q. 46. Do you know how long prior?

A. No, sir, I wasn't in the whiskey business, and had very little to do with whiskey.

X Q. 47. How large was the distillery in which James Crow worked?

A. Oh, it was a small concern, made of logs, I couldn't tell you exactly. It has been torn down about thirty years ago.

X Q. 48. How did he mash his grain?

A. Mash his grain-I couldn't tell you. I suppose he ground it.

X Q. 49. How did he make his mash?

A. I don't know what you mean.

X Q. 50. How did he mix it—was it in hand tubs?

A. Yes, sir.

X Q. 51. Had he nothing but hand tubs?

A. None that I know of, and very few of them. X Q. 52. Did he use any other grain than corn?

A. I can't tell you.

X Q. 53. You don't know?

A. No, sir.

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GEO. T. COTTON.

Subscribed and sworn to before me on this 4th day of September, 1905. My commission expires Jan'y 13th, '06.

SEAL.

T. N. LINDSAY, Notary Public and Special Examiner.

Adjourned till two P. M.

Pursuant to adjournment as above the following proceedings were had:

John C. Hawkins, being duly sworn, on the part of complainant, testified as follows:

Direct examination by Mr. Hopkins:

Q. 1. Please state your name, age, residence and occupation?
A. John C. Hawkins; I am sixty years old; residence, 420 Ann
Street, Frankfort; house carpenter and contractor.

Q. 2. How long have you resided in Kentucky.

A. Sixty years.

Q. 3. In what places in Kentucky have you resided during that time?

A. Woodford, Franklin and Boone counties.

Q. 4. How long did you reside in Woodford county?

A. The first twenty years of my life.

Q. 5. During that time did you know the late James Crow?

Mr. Smith: The same line of objections.

This question, and all subsequent questions put to this witness by counsel for complainant relating to matters and things prior to 1867, objected to by counsel for respondents in accordance with stipulation after question 4 of Geo. T. Cotton's deposition.

130 A. Yes, sir.

Q. 6. In what business was James Crow engaged when you knew him?

A. He was in the distilling business of whisky.

Q. 7. At what distillery or distilleries?

A. It was at a distillery on Glenn's Creek owned by Oscar Pepper on his own farm. It was so close to Glenn's Creek, I suppose you would call it that, but it was not on the waters of Glenn's Creek.

Q. 8. How near was that distillery to the banks of Glenn's creek?

A. It has been so long since I was up there, but it could not have been more than a few hundred yards.

Q. 9. What was the name by which the whisky made at that distillery was known?

A. Old Crow.

Q. 10. After the death of James Crow was the same distillery continued in operation?

A. Yes, sir.

Q. 11. By what name was the whisky produced at that distillery known after Mr. Crow's death?

A. So far as my memory goes I never knew it to be going by any other name than Old Crow.

Q. 12. Were you ever employed at that distillery?

A. Yes, sir.

Q. 13. About when?

A. Well, as near as I recollect it must have been in sixty-two or three when I was there to work.

Q. 14. How long did you work there?

A. I believe it was three years—I think it was three distilling seasons, we didn't run all the year.

Q. 15. In what capacity did you work there during these three dis-

tilling seasons?

A. There was two years I had charge of the distillery, and was the distiller.

Q. 16. What did you do the other year?

A. The first year I was learning how, is the reason I didn't have

full charge of it.

Q. 17. During the three years when you were employed at the distillery in question, by what name was the whisky produced known and called for there?

A. Old Crow.

## Cross-examination by Mr. Smith:

X Q. 1. Mr. Hawkins, when did you live in Franklin county?

A. Well, sir, I lived in Franklin county, I think, from sixty-one until about sixty-two.

X Q. 2. From 61 to 62?

 Yes, sir; Pepper comes down here and gets me to go in the still house.

131 X Q. 3. When did you live in Boone county?

A. I must have gone to Boone county in sixty-eight.

X Q. 4. How long did you live there?

A. I think not more than seven or eight years.

X Q. 5. During the three years that you worked at the Old Oscar Pepper distillery, did you use any particular formula? X Q. 5. Did you use any particular formula in making whisky? A. They learned me how to make the whisky, and I always made it the same way. I don't know what the meaning of the word formula is.

X Q. 6. What way was that?

A. Must I tell all about how I made it?

X Q. 7. Tell how you made it?

A. Well, in the first place I scalded the meal with hot boiling water, then I put a bucket of water on it, malt and rye meal, and broke up the tub that we called it, broke it up, one hour after it was scalded. Then I cooled it down as quick as I could, filled up the tub with cold water, put my yeast on it, and set the tub at 84 degrees with the thermometer, and then left it to work off itself. Then when those tubs would work four or five days, then it turned into beer—that was beer then, then I run it through a beer still, and then it run out singlings; then we put them singlings up in a still and run off what we called the doubling, that is whisky. Then we put it in a board—and rolled it away.

X Q. 8. How large were the tubs?

A. I don't remember how much they would hold, but we would mash in them a bushel and a half of grain.

X Q. 9. You mean that you put in a bushel and a half of ground corn?

A. One bushel of corn and a half bushel of rve.

X Q. 10. Did you put the corn and rye in at the same time?

A. No, sir.

X Q. 11. How did you do that?

A. The corn meal was scalded at a higher temperature than the rye was,

X Q. 12. What temperature did you scald the corn?

X Q. 12. What temperature did you scald the corn?

A. Two hundred and twelve.

X Q. 13. At that temperature did you add the rye?

A. After the corn meal had been setting there one hour. X Q. 14. You don't know what temperature it was after that time?

A. No, sir.
X Q. 15. How much malt did you put in it?

A. One-half gallon to the tub.

X Q. 16. When did you add that?

A. Immediately after the rye meal went in.

X Q. 17. Then you cooled it off to what temperature?

A. It depended altogether on the coolness of the water that day. If the water was very cold, we could get done early by cooking it off when it was hotter.

X Q. 18. Did the water vary in temperature?

A. Yes, sir.

X Q. 19. Where did you get the water?

A. Got it out of a little spring about one hundred yards from the still house on the side of the hill.

X Q. 20. Isn't that spring uniform in temperature?

A. Yes, sir.

X Q. 21. How did you convey the water from the spring?

A. We had a trussle work—and ran it there in pipes.

X Q. 22. How many mash tubs did you have?

A. We used never less than fourteen, and never more than fifteen, daily.

X Q. 23. When did you add the yeast?

A. As soon as our tub was cooled down properly the yeast was put on.

X Q. 24. At what temperature was that?

A. They were plunged up then and mixed good. We set it at eighty-four to eighty-six.

X Q. 25. Did you make your own yeast?

A. Yes, sir.

X Q. 26. How did you make it?

Complainant objects to the question upon the ground that 133 it relates to a secret process, to which the witness sustained a fiduciary relationship, and counsel for complainant advises witness that he may decline to answer the question.

Mr. Hopkins: You do refuse to answer the question, Mr. Hawkins? Witness: Yes, sir.

Counsel for respondent objects to counsel for complainant cautioning and advising witness not to answer; witness was anxious to answer question and had started to do so until interrupted by counsel for complainant; witness further stated that it was perfectly plain and a simple process; counsel for respondent gives notice now that he will move to suppress the deposition unless witness is permitted to answer, there being nothing in the record or in the facts to show any secrecy in the method of making this yeast, or any connection between this witness and the complainant, or the method employed by him and any method thereafter employed by complainant.

X Q. 27. What kind of yeast was this, Mr. Hawkins?

Mr. Hopkins: I make the same objection, and instruct the witness that he need not answer.

X Q. 28. Was it wine sour yeast?

Mr. Hopkins: Same objection, with the instruction to witness that he need not answer.

X Q. 29. What is your answer, Mr. Hawkins?

Mr. Hopkins: Same objection, same instructions.

X Q. 30. Why do you refuse to answer?

A. I think maybe it is better that I shouldn't.

X Q. 31. Why do you think it better that you shouldn't.

Mr. Hopkins: Counsel for complainant objects to the question on the ground that the previous testimony of the witness shows that he obtained his knowledge concerning the matters about which he is being now interrogated while in the position of trust and confidence,

and that they relate to the process employed in that business, and that he is consequently privileged from answering any questions relating thereto.

A. Witness asks counsel for complainant, "Shall I answer that?" Mr. Hopkins: You need not do so.

X Q. 32. (Question repeated to witness).

A. Well, I have no particular reason why, but I refuse to do it. X Q. 33. After 1866 did you work in any other distillery?

A. Never did since I left there.

X Q. 34. Have you been in other distilleries when they were in operation?

A. Yes, sir, sure; many and many a time.

X Q. 35. What ones?

A. Graham and Labrot, and Taylor's, one that is known here lately on Glenn's Creek by the name of Old Crow, the Hermitage, O. F. C., Carlisle.

X Q. 36. Any others?

A. Laval's distillery, Cochran's Spring Hill, Baker Brothers, Old Judge, Saffel's.

X Q. 37. You mean Cedar Run?

A. Yes, sir.

X Q. 38. Any others? A. That is all I remember.

X Q. 39. During the two years that you were the distiller for Oscar Pepper, how many men did you have working with you?

A. Two in the still house besides myself, outside of the mill.

X Q. 40. Did you carry your yeast over from one year to another? A. No, sir.

X Q. 41. Did these other men help you to make the yeast?

A. They made it themselves. They didn't want to pay a highpriced man to do nothing (witness pointing at himself).

X Q. 42. There was nothing secret about the way you made this

yeast, was there?

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Mr. Hopkins: Objected to on the same ground as before, and upon the further ground that it is not for the witness to determine what portions of the work done by him were intended to be held as secrets by his employer.

A. No, sir.

135 X Q. 43. Did this way of making yeast differ any way from the way other people-other distilleries made it at that time?

Mr. Hopkins: Objected to for the same reasons as before, and witness is instructed that he need not answer. I instruct you, Mr.

Hawkins, that you need not answer that question.

Counsel for respondent objects to instructions to the witness by counsel for complainant, and further informs the witness that he should answer the question, and that all that counsel for either party have a right to do is to note an objection, and if the objection is well taken the court will exclude his testimony.

Counsel for complainant further advises the witness that the statement just made by counsel for respondent is not correct, and is without any foundation in law, and counsel for complainant again

instructs the witness that he need not answer.

A. I believe I will have to quit talking about that yeast.

Mr. Smith: No, sir, you haven't; don't you be bluffed, don't you be bluffed; you are all right.

X Q. 44. Why do you think you will have to quit talking about that yeast?

Counsel for complainant repeats the former objection, and again instructs the witness he need not answer the question.

A. Well, I think I refuse to answer it.

X Q. 45. Sir?

A. I refuse to answer it.

X Q. 46. What is the ground of your refusal?

Counsel for complainant repeats his former objection, and objects upon the further ground that the question is an indirect attempt to examine concerning privileged matters, and again instructs the witness that he need not answer the question, and that he may refuse to do so upon the ground that he is so advised by attorney for complainant.

136 X Q. 47. Did you answer "no" to cross question 43 before Mr. Hopkins made his objection?

Mr. Hopkins: Same objection and same instruction to witness.

X Q. 48. What is your answer?

A. I refuse.

X Q. 49. Why do you refuse?

Mr. Hopkins: Same objection, and same instruction to the witness.

(Question repeated to witness.)

A. I refuse to state it.

X Q. 50. Do you understand that the notary has power to commit you for contempt for refusing to answer, and that nothing can be done to you if you do answer?

Counsel for complainant objects to the question as being an attempt to intimidate the witness, and instructs the witness that the notary has no such power as that suggested by opposing counsel, and that neither the notary or counsel for the respondent can in any way other than that which is provided by the Federal Statute proceed in this matter; that the witness is not compelled to answer the question; that the notary has no power to commit him for contempt and as the question relates wholly to a matter of law the witness is instructed that he need not answer.

X Q. 51. What is you-answer?

A. I refuse to answer.

X Q. 52. Why?

A. I refuse to answer.

X Q. 53. How much yeast did you put in this tub?

Mr. Hopkins: Some objection; same instruction to witness.

A. I refuse to answer.

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X Q. 54. How did you start your yeast at the beginning of the season?

Mr. Hopkins: Same objection; same instruction to witness.

X Q. 55. What is your answer? A. I refuse to answer it.

X Q. 56. Did you use any slop in the ferment?

Mr. Hopkins: Same objection; same instruction to witness.

X Q. 57. What is your answer?

Mr. Hopkins: Same objection; same instruction to witness.

A. I refuse to answer it.

X Q. 58. What kind of beer stills did you use?

Mr. Hopkins: Same objection; same instruction to the witness that he need not answer.

X Q. 59. What is your answer?

A. I refuse to answer.

X Q. 60. On what grounds.

A. I refuse to give any.

X Q. 61. Was there anything peculiar or unusual about this beer still that you used?

Mr. Hopkins: Same objection; and same instruction to witness that he need not answer.

X Q. 62. What is your answer?

A. I refuse to answer.

X Q. 63. How did you heat the beer still?

Mr. Hopkins: Same objection, and same instruction to witness that be need not answer.

A. I refuse to answer.

X Q. 64. On what ground?

A. I refuse to state any.

X Q. 65. What kind of a still did you run the doublings through?

Mr. Hopkins: Same objection, and same instruction to witness.

X Q. 66. What is your answer?

A. I refuse to answer it.

X Q. 67. On the same ground?

A. Yes.

X Q. 68. Did you run the whisky into charred barrels?

A. I never seed the barrel charred, but it was charred—I couldn't see in it.

X Q. 69. How do you know the barrels were charred?

A. I was ordered to feel in the bung hole of all of them to see if the man had make a mistake.

138 X Q. 70. And did you feel in the bung hole of all of them? A. No.

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X Q. 71. This was a limestone spring you got water from, was it not?

A. Yes, sir.

X Q. 72. This is a limestone country through here, isn't it?

A. Yes, sir.

X Q. 73. All the springs around here are limestone springs, aren't they?

A. I never heard of any other.

X Q. 74. They use limestone water at all these distilleries you mentioned awhile ago, don't they?

A. I couldn't tell whether they do or not, but I don't see where they could get any other.

X Q. 75. They all use spring water?

A. I couldn't answer, but I don't think they do.

X Q. 76. Do you know what kind of water O. F. C. use?

A. I think they get it from the Cove spring.

X Q. 77. Is that a limestone springs?

A. It must be.

X Q. 78. Do you know what kind of water the Old Taylor use?

A. I think spring.

X Q. 79. Limestone spring?

A. Yes, sir.

X Q. 80. In general, distilleries throughout this part of Kentucky use limestone spring water?

A. So far as I know they do.

X Q. 81. While you were the distiller at the Oscar Pepper distillery where did you get the grain you used?

A. He raised it on his farm all the time. We used no other

grain but his.

X Q. 82. That is true both of the corn and the rye?

A. Yes, sir, we made our own malt.

X Q. 83. Barley malt?

A. Yes, sir.

X Q. 84. Did you raise your own barley?

A. I won't be positive about that, I reckon we did.

X Q. 85. Well, give your best impression?

A. Well, he did.

X Q. 86. Mr. Hawkins, have you ever lived outside of the three counties you have mentioned—Woodford, Franklin and Boone?

A. Never did.

139 X Q. 87. Your answers with reference to "Old Crow" whiskey therefore, relate to those three counties?

A. Yes, sir.

X Q. 88. There might have been other Old Crow whisky sold in other places, such as Cincinnati, or St. Louis, or New York, and you would have known nothing about it?

A. Yes, sir.

X Q. 89. And that, too, as far back as 1863 or 1858, or earlier?

A. Yes.

X Q. 90. When you called the whisky that you were distilling "Old Crow," in 1862 and 1863, what did those words mean?

A. It was in the name of the old Scotchman that was distilling there when I was a boy.

X Q. 91. Did you keep the whisky which you made in storage?

A. We had a great deal on hand when I left there.

X Q. 92. How much did you have on hand?

A. We had less than a thousand barrels—pretty near a thousand. XQ. 93. Did you call your whisky Old Pepper whisky?

A. Everybody that I knew called it "Old Crow."

X Q. 94. How many other distillers have you known who made veast in the same way?

Mr. Hopkins: Objected to for the same reason given to former questions of the same character, and the witness is instructed that he need not answer.

X Q. 95. What is your answer?

A. I refuse to answer.

X Q. 96. Do you refuse?

A. Yes, sir.

X Q. 97. On what grounds?

A. I refuse to give the grounds.

XQ. 98. Isn't it true that all of the distillers in this part of the country at that time used the same kind of yeast?

Mr. Hopkins: Same objection.

A. I refuse to answer it.

140 X Q. 99. Did anyone at that time cons-der that you had a secret way of making yeast?

Mr. Hopkins: Objected to for the reasons given before, and the same instruction to the witness.

X Q. 100. Didn't you supply other distillers with the same kind of yeast?

Mr. Hopkins: Objected to for the same reasons as above, and for the further reason that it is incompetent, irrelevant and immaterial, and the same instructions to the witness.

XQ. 101. You considered that you were making a fine grade of whisky, did you not? -. Yes, sir.

X Q. 102. And wasn't the word "Crow," or "Old Crow" used in those days to indicate a fine grade of whisky, regardless of who made it, the same as "Bourbon" was used to indicate corn whisky, whether it was made in Bourbon county or not?

A. I knew no Old Crow at that time other than that, and that was considered by everybody I knew to be the finest in the world.

XQ. 103. When you say by "everybody you knew," you mean people in the neighborhood in which you lived?

A. Yes, sir.

XQ. 104. Did you ever rectify any Old Crow whisky?

A. No, sir, it was too good to rectify.

XQ. 105. At what pro-f did you run it into the barrel?

A. We took it off very peculiarly. I took a clean proof valve with

a string tied on it, and would hold to the string and drop it into the barrel of whisky with the mouth down. I would then take it back and rinse my hands cleanly, hold my thumb over the open end and beat it up against my hand that way—pour a little of it out. Whenever the bead would stand around the edge of it about like a number three shot, then I would move it away. Not let any more go in the barrel.

X Q. 106. You don't know whether it was a hundred proof or a

ninety-eight?

A. No, sir, but I do know this that after it was sold and the people got hold of it, and through the government some way, it had to be tested with instruments after they sold it, and I was told by many that it was the evenest lot of whisky ever taken off.

X Q. 107. How old were you when you were in charge of this dis-

tillery?

A. I don't know, sir. I was quite young—twenty or twenty-one, X Q. 108. What do the words "Old Taylor" mean on whisky?

A. So far as I know it means E. H. Taylor, junior. X Q. 109. Whisky made by E. H. Haylor, junior? A. Yes, sir, so far as I know, and I think I am right. X Q. 110. What do the words O. F. C. mean on whisky?

A. I have always understood it to be "Old Fashioned Sour-

mash."

X Q. 111. If you saw those words on a bottle of whisky what would you understand?

A. I would think it was made down here (indicating) it ought

to be.

X Q. 112. What do you understand by the words "Old Oscar

Pepper" on whiskey?

A. If it was plain "Pepper," I would think Jim made it at Lexington.

X Q. 113. Is that all your answer?

A. I don't believe I ever seen any Old Oscar Pepper, if there was any such whisky as that I would think it was the same whisky as made there by the Old Crow.

X Q. 114. Have you ever been in the distillery where Old Crow

whisky is now made?

A. I certainly have, but only a few times.

X Q. 115. Do you know where they get the grain that they use?

A. No, sir, I do not.

X Q. 116. Do you know what kind of yeast they use?

A. No, sir.

X Q. 117. You shipped your whisky only in barrels—do I understand that right—you sold none in bottles?

A. None whatever.

X Q. 118. Did you mark the barrels?

A. Simply put the day and the month and the year.

JOHN C. HAWKINS.

142 Subscribed and sworn to before me this 4th day of September, 1905. My commission expires Jan'y 13th, 1906. T. N. LINDSEY, SEAL.

Notary Public and Special Examiner.

WILLIAM J. GORMAN, being duly sworn, on the part of the complainant, testified as follows:

Direct examination by Mr. Hopkins:

Q. 1. Please state your name, age, residence and occupation? A. William J. Gorman, age 36; residence, Frankfort, Ky., acting secretary of W. A. Gaines & Company.

Q. 2. How long have you been in the employ of or connected with

the W. A. Gaines & Company?

A. Since September, 1900.

Q. 3. Are you acquainted with the Old Crow Whisky sold and distilled by W. A. Gaines & Co.?

A. I am.

Q. 4. Over what territory has that Old Crow whisky been sold and distributed by W. A. Gaines & Co. since you have been connected with it?

A. The United States, Great Britain, Yukon Territory, China,

that's about all I recollect at this time.

Q. 5. I will ask you if you have compiled from the books of W. A. Gaines & Company a statement of disbursements for advertising purposes, made by W. A. Gaines & Co., on account of its Old Crow whisky?

A. I did.

Q. 6. Have you that memorandum?

A. Yes, sir.

Q. 7. Does this memorandum correctly set forth the total amount of expenditures made directly by W. A. Gaines & Co. for the purpose named and during the period specified in the memorandum?

A. It does.

- Q. 8. I will ask you to state the bulk, that is, the size and number of the books which was necessary to refer to in order to compile these disbursements?
  - A. I judge the books would almost fill an ordinary size office vault.

Q.9. Complainant offers memorandum in evidence, and asks that the same be marked "Complainant's Exhibit Memorandum of Ad-

vertising Disbursements," which is accordingly done.

143 Counsel for respondents objects to the memorandum offered in evidence, first because the books themselves are the best evidence; second, because the memorandum contains a mere summary of figures with nothing to show the items or purposes for which the alleged expenditures were made. For the further reason that if covers a period prior to the time when complainant was in existence, and no connection is shown between this witness and any predecessor or predecessors of complainant.

Q. 10. Do the books to which you have referred and from which

this memorandum has been compiled, include the books of account of the complainant's predecessors in business, W. A. Gaines & Company, the copartnership, as well as those of the present corporation, complainant?

A. They do.

Q. 11. I will ask you to read into the record, from this memorandum, the total disbursements indicated thereby.

Mr. Smith: I object to the question for the reasons above noted. and for the further reason that the figures which witness has been requested to read into the record are merely the totals for the years 1884 to 1904, inclusive, respectively.

(Witness:) Total, 232,809.35.

Mr. Smith: I move to strike out the last answer for the reasons above noted.

Q. 12. Please state the amount of the capitalization of W. A. Gaines & Company?

A. Six hundred thousand.

Q. 13. Where is the principal place of business of complainant located?

A. Frankfort, Kentucky.

Q. 14. What distillery property, if any, are owned by it?

Mr. Smith: I object to that as being foreign to the issues in this case.

A. The Hermitage Distillery, in South Frankfort, Ky., known to the government as Distillery No. 4, and the Old Crow 144 distillery, in Woodford county, Ky., known to the government as Distillery 106.

Cross-examination by Mr. Smith:

X Q. 1. Did you draw these figures off yourself?

A. With an assistant, I directed the man who copied it. X Q. 2. You didn't go through the books yourself?

A. We went through together.

X Q. 3. Who was the other man?

A. F. H. Johnson.

X Q. 4. And he copied the figures?

A. Yes, sir.

X Q. 5. You have frequently been up to the Old Crow distillery?

A. I have been.

X Q. 6. You are familiar with its operation?

A. More so with the office work.

X Q. 7. Where do you get the corn you use there?

A. Principally in the west.

X Q. 8. At what point? A. It is purchased through Chicago brokers.

X Q. 9. Where do you get the rye?

A. Principally in the same way.

X Q. 10. And your malt?

A. Malt purchases generally made from Milwaukee. X Q. 11. Do you use any Kentucky grown grain?

A. We have made some purchases in recent years. My knowledge of this does not extend back any further than 1900.

X Q. 12. Do you get any grain from Woodford county?

A. Purchase corn there when available.

X Q. 13. What proportion of your corn do you get from Woodford county?

A. That I am not prepared to say.
X Q. 14. Approximately how much.

A. I would not care to state approximately. X Q. 15. Do you get as much as a third?

A. I don't know.

X Q. 16. What proportion do you buy through Chicago brokers.
A. These purchases made by a party other than myself,
but I am under the impression that an effort is made to anticipate what cannot be purchased around home locality.

X Q. 17. How much corn do you use per day?

A. The capacity varies—it is governed by the capacity under which the distillery is being operated.

X Q. 18. How much corn do you use in a season?

A. I do not know.

X Q. 19. You are secretary of the company, are you not? A. Acting secretary in the absence of the secretary.

X Q. 20. Don't you know, as a matter of fact, that most of the corn that you use is western corn?

A. I judge that the larger proportion of it is from the west.

X Q. 21. Isn't it a fact that you use comparatively little homegrown grain of any kind?

A. We use what can be purchased locally, as far as I know-what

can be secured locally, as far as I know.

X Q. 22. That won't exceed five per cent of what you use in an entire season, would it?

A. I don't know.

X Q. 23. What is your best impression?

A. My impression is that more than five per cent is purchased locally.

X Q. 24. Do you grow grain on your premises—the Old Crow? A. I think not—that is, not for the purpose of making whisky.

X Q. 25. Do you mash by hand?

A. Principally by hand, as far as I know. X Q. 26. How many hand tubs have you?

A. I don't know.

X Q. 27. What is the capacity of the hand tubs, each?

A. I don't know that.

X Q. 28. What is the capacity of your large mash tub?

A. I don't know that.

X Q. 29. Have you more than one large mash tub?

A. I do not know.

146 X Q. 30. You make both rye and bourbon at the distillery, No. 106?

A. Yes. sir.

X Q. 31. Do you run the rye first?

A. There is no set rule in regard to this that I know of.

X Q. 32. What is the yield per bushel for bourbon whiskey?

A. This varies.

X Q. 33. Between what figures?

A. Between four and five gallons per bushel, although sometimes below four gallons.

X Q. 34. Who is your distiller at the present time?

A. Lee Johnson.

X Q. 35. How long has he been the distiller?

A. I think he succeeded his father, Van Johnson, about six or seven years ago.

X Q. 36. What became of Van Johnson?

A. I do not know.

X Q. 37. Is he still alive?

A. He is still alive.

X Q. 38. Do you know where he lives?

A. I think he lives in the neighborhood of the Old Crow distillery. X Q. 39. How much corn do you put in the Bourbon mash?

A. I do not know.

X Q. 40. Do you know how much malt or rye they use?

A. I do not know the proportion.

X Q. 41. Do you know what kind of stills they use?

A. Copper stills.

X Q. 42. How do they apply the heat to the beer still?

A. I do not know.

X Q. 43. Do you know what kind of yeast they use?

A. I do not.

X Q. 45. How long have you lived in Frankfort?

A. I lived in Frankfort during the year 1887, and from September, 1890, continuously up to the present time.

X Q. 46. Where did you live prior to 1887, and from 1887 to

1890?

A. Louisville, Ky.

X Q. 47. Do you know what water they use at the Old Crow distillery?

A. The water is usually supplied from what is known as the Old

Crow spring.

147 X Q. 48. What is the character of that water?

A. I do not know.

X Q. 49. Isn't it true that all the country around here is a lime-stone country?

A. I believe that is generally supposed.

X Q. 50. And the springs are limestone springs? A. I don't know that that applies to the springs.

X Q. 51. Do you use any particular formula for making whisky now at the Old Crow?

A. I never heard of any change from the original formula used. They have always used the same formula so far as I know. X Q. 52. I understand you to say you do use a particular formula there in the making of the Old Crow whisky?

A. That is my understanding.

X Q. 53. Do you know it of your own knowledge?

A. I have never heard it questioned, and I never inquired into it. X Q. 54. You have no first-hand knowledge then on the subject one way or the other?

A. I have not.

X Q. 55. And you have no first-hand knowledge as to the alleged

original formula that you spoke of a moment ago?

A. The original, formula so far as I know, is the formula of James Crow, and is generally supposed to be still in use. That is the only one I know of. I never heard the question raised up there.

X Q. 56. You don't know of your own knowledge whether there

ever was such a formula?

A. I never saw the formula, but have always understood that such was in existence, but, of course, kept by whoever had charge of the distillation.

X Q. 57. You never knew James Crow?

A. I did not.

X Q. 58. And you have no direct knowledge of what his formula was, if he had one?

A. I have no knowledge of what his formula was.

X Q. 59. To what does the formula which you say you understand is now used at the distillery, relate?

148 A. The formula as I understand it, relates to the method used by James Crow in the manufacture of whisky by him.

X Q. 60. I was not referring to the time of James Crow, but to the present time. Does the formula relate, as you understand it, to the proportions in which the grain, that is the corn and the rye, and the malt, are mixed?

Counsel for complainants objects to the question on the ground that it relates to matters concerning which counsel has no right to examine upon any conceivable theory, and calls the attention of the court to the great length at which this cross-examination has gone into matters not developed on the direct examination of the witness, practically all of such matters being also irrelevant and immaterial. Counsel for complainant instructs witness that he need not answer the question.

A. I refuse to answer that. X Q. 61. On what grounds?

A. Mr. Hopkins: On the ground that I so advise you, if you like.

Witness: On the ground advised by the attorney. X Q. 62. Who is president of your company?

A. George H. Allen, of New York.

X Q. 63. How long has he been president?

A. I could not answer this without examining the record.

X Q. 64. More than a year?

A. More than a year.

X Q. 65. What relation does Mr. Edson Bradley hold to your company?

A. Vice president.

X Q. 66. He is also president of the Kentucky Distilleries and Warehouse Company? A. I believe he is.

X Q. 67. Is the Mr. Allen that you referred to connected with the firm of Paris, Allen & Company?

A. He is.

X Q. 68. Mr. Edson Bradley is also a member of that firm? A. Paris, Allen & Co.?

X Q. 69. Yes? A. Yes, sir.

149 X Q. 70. What relation does the firm of Paris, Allen & Co. bear to W. A. Gaines & Co.?

A. They act as agents for the sale of Old Crow and Hermitage

whisky.

X Q. 71. Is it through that firm that whisky is distributed to the various countries that you mentioned in your direct examination?

A. It is.

X Q. 72. That firm is located in New York?

A. It is.

X Q. 73. Are the goods shipped direct from Frankfort, or from New York?

A. Direct from Frankfort.

X Q. 74. And do you rectify any Old Crow?

A. We do not.

X Q. 75. Don't you carry a rectifier's license?

Mr. Hopkins: Question objected to on the ground that it is not germane to any question gone into on direct examination, and the witness is advised that he need not answer.

A. We do not.

X Q. 76. Is J. P. Williams in your employ?

A. He is.

X Q. 77. What is his position?

A. Bookkeeper.

X Q. 78. Isn't it a fact that a rectifier's license is carried in his name?

Mr. Hopkins: Same objection, and same instructions given to the witness.

Witness: I refuse to answer on instructions from counsel.

X Q. 79. Counsel has no right to instruct you not to answer.

A. I take it that he has the right.

X Q. 80. The court will pass upon this later. Do you still refuse to answer?

A. I do.

X Q. 81. Do you sell any Old Crow under the single stamp?

Mr. Hopkins: Same objection, and same advice to the witness.

Witness: I decline to answer it.

X Q. 82. For what reason?

A. For the reasons given above.

X Q. 83. There have been a good many reasons given 150 above—which reasons?

A. The reason in regard to J. P. Williams.

X Q. 84. Isn't it a fact, Mr. Gorman, that W. A. Gaines & Co. pays the special tax as rectifier for J. P. Williams?

Mr. Hopkins: Objected to as irrelevant and immaterial, and improper cross-examination, and having no relation to any matter concerning which the witness was examined in chief, and the witness is advised that he may decline to answer it.

A. I decline to answer it.

X Q. 85. What are the reasons? A. For the reasons given above.

X Q. 86. Isn't it a fact that you rectify, reduce in proof, old Crow whisky, and compound it in various ways, and sell it as Old Crow?

Mr. Hopkins: Same objection and same advice to witness as under cross-question No. 84.

A. We reduce in proof as permitted by the government with clear water only.

X Q. 87. You don't need any rectifier's license for that, do you?

A. We do not.

X Q. 88. Where do you make this reduction in proof?

A. On the distillery premises.

X Q. 89. Do you keep any whisky in Frankfort—Old Crow whisky, I mean?

A. We have the Hermitage stored in Frankfort, but no Old Crow. X Q. 90. Haven't you a storage room in the rear of your offices?

A. We have free storage room over part of the office. X Q. 91. Don't you keep any Old Crow there?

A. There may be a few cases of very old whisky, but I don't know how many.

X Q. 92. You don't reduce any Old Crow in Frankfort?

A. I believe there have been two barrels reduced in the building for local dealers before the government required the reducing to be done on the distillery premises. 151

X Q. 93. Who did the reducing at those times?

A. I do not know.

X Q. 94. Do you sell Old Crow to J. P. Williams?

Mr. Hopkins: Objected to for the same reasons and the same advice given to the witness as in cross-question 84.

X Q. 95. J. P. Williams also has a license as a wholesale liquor dealer, hasn't he?

Mr. Hopkins: Same objection and same advice given to witness as in cross-question No. 84.

X Q. 96. J. P. Williams also has a Federal license as wholesale liquor dealer, has he not?

A. I decline to answer that. X Q. 97. For what reason?

A. As it obtains to the same question as was objected to previously, X Q. 98. How much property do your offices cover here in Frank-

fort. Just describe the premises that they occupy?

A. They occupy a four-story brick metal roof building about sixty feet wide, I should judge.

X Q. 99. Describe them?

A. Fronting on Main street, on the south side.
X Q. 100. How far south do the premises extend?

A. I judge about one hundred and fifty feet.

X Q. 101. Do you have a connection with the alley in the rear?

A. The offices have no connection with the alley in the rear that I know of.

X Q. 102. Do W. A. Gaines & Co. own or have possession of any

building fronting on the alley?

A. I believe there is an alley entrance to one side of the building, and it is occupied by the Kentucky Distilleries and Warehouse Company as an office.

X Q. 103. W. A. Gaines & Co. and the Kentucky Distillers and

Warehouse Co. occupy the same building?

A. They do, but each occupies half of the building.

X Q. 104. But the entire building is owned by W. A. Gaines & Co.? A. It is.

X Q. 105. And also the brick building in the rear which faces on the alley? It is also owned by W. A. Gaines & Co.?
A. It is.

X Q. 106. That brick building in the rear is the one which has the first entrance on the right as you turn south from Main street?

A. Yes. sir.

X Q. 107. Isn't it a fact that over the entrance to that brick building facing on the alley there are these signs: "J. P. Williams" "Rectifier," "Wholesale Liquor Dealer?"

Mr. Hopkins: Same objection and same advice to witness as under cross question 84.

A. I decline to answer for the reasons given by the attorney.

X Q. 108. What are the duties of J. P. Williams as bookkeeper for W. A. Gaines & Co.?

Mr. Hopkins: Same objection and same instructions to witness as under cross question 84.

Witness: I decline to answer for the reason given above.

X Q. 109. Do you know what object a bookkeeper for a distiller could have in taking out a rectifier's license and a wholesale liquor dealer's license?

Mr. Hopkins: Same objection, and same advice as given under cross-question 84.

A. I decline to answer for reasons given by counsel.

X Q. 110. Do you carry any Old Crow whiskey in tanks, and if so, where?

A. We carry no whiskey in tanks that I know of.

X Q. 111. Do you know whether or not Mr. Williams, J. P. Williams, carries any Old Crow whiskey in tanks?

Mr. Hopkins: Same objection and same advice as under cross question 84.

A. I decline to answer, for the reasons stated by the attorney.

X Q. 112. Isn't it a fact that Mr. Williams dumps Old Crow whiskey, adds spirits to it, and restores the color with calomel?

153 Mr. Hopkins: Same objection and same advice to witness as under cross question 84.

A. I decline to answer for the reason given by the attorney.

X Q. 113. Isn't it a fact that Mr. Williams, J. P. Williams, sells whisky treated as described in the last question, to the trade, as Old Crow whiskey, and marked as Old Crow, with the knowledge and approval of W. A. Gaines & Co.?

Mr. Hopkins: Same objection and same advice to witness as under cross question 84.

A. Same answer.

X Q. 114. Do you know at what temperature the warehouses in which Old Crow whiskey is kept in storage are maintained?

A. I do not.

X Q. 115. You have been through those warehouses, haven't you?

A. I have never been through any of the warehouses.

X Q. 116. Have you never been in the warehouses at all?

A. I have never been in them at all.

X Q. 117. Don't you know, as a matter of fact, that they are

artificially heated?

A. I know that they have a system of fanning, permitted by the Government, which is supposed to remove the dampness from the atmosphere inside the house but this system is not continuously operated—only when necessary to drive out the damp air.

X Q. 118. Isn't it a fact that a high degree of temperature is main-

tained in the warehouse throughout the year?

A. A high degree of temperature is not maintained throughout the year.

X Q. 119. How do you know that?

A. I know this for the reason that the whiskey having top storage or high storage is of higher proof that the whiskey stored low.

154 X Q. 120. You maintain seventy or eighty degrees of heat in the winter time, do you not, in the warehouses?

A. I do not know this, but am of the opinion that this degree of heat is by no means maintained during the winter season.

X Q. 121. But you are certain that there is a system of fanning air heated by being passed over steam coils, throughout the buildings?

A. I am certain that a fan system is used, and for the purpose of drying the atmosphere, when it is considered damp.

X Q. 122. Do you not also seek to maintain a uniform temperature?

A. This is, no doubt, one of the reasons an effort is made to drive out the damp air.

X Q. 123. Is not the object to age the whiskey more rapidly?

A. The general impression is that an even temperature is beneficial.

X Q. 124. Is it not also true that heat hastens age?

A. This is supposed to be the case.
X Q. 125. Do you bottle in bond?

A. We do.

X Q. 126. What portion of your goods do you bottle in bond?

A. I am not prepared to state that.

X Q. 127. Do you put a guaranty of purity on the bottles bottled in bond?

A. The Government officer in charge of the bottling house superintends this, and the guaranty stamps are purchased from the Government.

X Q. 128. You refer now to the green stamp which is pasted over the stopper?

A. I refer to the stamp.

X Q. 129. Does not W. A. Gaines & Co. also put upon bottled in bond goods, a label of their own, which label of their own states that the contents of the bottle are guaranteed pure by the United States Government?

A. They put on a label of this kind.

X Q. 130. Is not the label as follows: "Bottled at the distillery in bond under supervision of the officers of the Internal Revenue and Guaranty by the United States Government pure and of age indi-

cated by stamp over cork and capsule"? Also: "Caution. Be sure that the Internal Revenue stamp over cork and capsule is unbroken, as this guarantees the genuineness, purity and age of this bottle"?

A. I believe that is the wording.

X Q. 131. Does the Government make any tests as to the purity of the bottled in bond goods?

A. The Government officer in charge is supposed to see that the whiskey is pure and unadulterated when bottled.

X Q. 132. By "Pure and unadulterated" you mean that nothing is added to it as it comes from the barrel?

A. The whiskey before being bottled in reduced in proof with clear water, the reduction made by the Government gauger on duty.

X Q. 133. Then by "Pure and unadulterated" you mean that nothing but pure water has been added to the whisky that comes from the barrel?

A. That is what I mean.

X Q. 134. You do not mean that the Government gauger tests the whiskey that has come from the barrel as to its purity, or makes any such test?

A. If the whiskey comes from a Government bonded warehouse

direct to the bottling warehouse, the Government considers this sufficient evidence that it is pure and unadulterated.

X Q. 135. Then your answer to my question 134 is "no"?

A. Yes; my answer is "no" to cross-question 134.

X Q. 136. Do you know what percentage of fusel oil Old Crow has as it comes from the receiving system?

Mr. Hopkins: Same objection and same advice to witness as in regard to cross-question 84.

A. I do not.

X Q. 137. Do you know what percentage of fusel oil Old Crow has after it has been in the bonded warehouse four years?

A. I do not.

X Q. 138. Do you keep it longer than four years before you bottle it in bond?

A. I don't think we have ever bottled any that young.

156 X Q. 139. At what age do you bottle it?

A. Usually about seven years old.

X Q. 140. Do you know what percentage of fusel oil it contains at that age?

A. I do not.

X Q. 141. Do you know, as a matter of fact, that Old Crow whiskey coming from the receiving system does contain fusel oil?

A. I do not. My knowledge of distillation is limited—very lim-

ited.

X Q. 142. You do know that fusel oil is a poison?

A. I believe it is generally supposed to be when taken in sufficient

quantity.

X Q. 143. The statement which you make upon the labels on your bottled in bond Old Crow as to its purity and the guarantee by the Government, has no reference, then, to the amount of fusel oil which still remains in the whiskey?

A. I believe the Government considers that by requiring whiskey to remain in bond for four years before being put into bottles, considers that this length of time will eliminate poisonous substances by

evaporation, if any exist.

X Q. 144. But your company makes no test at the time of bottling in bond to determine the amount of fusel oil?

A. None that I know of.

X Q. 145. Nor does the Government?

A. Not on each lot of whiskey dumped for bottling, but they occasionally call for samples which we think is for the purpose of X Q. 146. But you do not know of your own knowledge?

X Q. 147. Do you know whether J. P. Williams sells rectified goods in bottles or in larger packages?

Mr. Hopkins: Same objection and same advice of counsel as to cross-question 84.

A. I decline to answer it for the reasons given by counsel.

X Q. 148. Do you know whether J. P. Williams compounds and rectifies Old Crow solely?

Mr. Hopkins: Same objection and same advice given to witness as to cross-question No. 84.

A. I decline to answer for reasons given by counsel.

X Q. 149. You don't know how many years J. P. Williams has had a rectifier's license?

Mr. Hopkins: Same objection and same advice to witness as to cross-question 84.

A. I decline to answer the question.

X Q. 150. Do you know how many years J. P. Williams had a wholesale liquor dealer's license?

Mr. Hopkins: Same objection and same advice given to witness as in cross-question 84.

A. I decline to answer the question.

X Q. 151. In the hand tubs at the distillery where Old Crow is made, is the mixing done by hand or by mechanical power.

A. I think the mixing is done by hand, as I have often seen small

tubs filled with grain which had been mashed.

X Q. 152. Aren't the tubs, after they have been filled, moved over to another part of the room, where an arm is let down into them, which arm is operated by machinery, and the stirring done in that manner?

A. I do not know that this is done.

X Q. 153. You mean that you do not know whether this is done or not, as a matter of fact?

A. I have no knowledge of it one way or another.

WILLIAM J. GORMAN.

Subscribed and sworn to before me this 4th day of September, 1905. My commission expires January 13th, 1906.

[SEAL.] T. N. LINDSEY,

Notary Public and Special Examiner.

Adjourned till ten o'clock Tuesday, Sept. —, 1905. [SEAL.] T. N. LINDSEY,

Notary Public, Franklin Co., Ky.

My commission expires Jan'y 13th, 1906.

September 5th, 1905.—Pursuant to adjournment, counsel present as before.

EDMUND H. TAYLOR, a witness on behalf of complainant, being duly sworn, testified as follows:

158 Direct examination by Mr. Hopkins:

Q 1. Please state your name, age, residence and occupation?

A. Edmund H. Taylor, Jr., 70 years of Age; residence, Frankfort,

Ky.; and I am president of the E. H. Taylor, Jr., & Sons, Distillers, incorporated.

Q. 2. How long have you resided in the state of Kentucky?

A. I was born here; been here always.

Q. 3. How long have you been engaged in the distilling business?

A. Since 1866 or 1867.

Q. 4. Where did you first engage in the distilling business?

A. In Woodford County, Ky., at the little distillery on Glenn's Creek.

Q. 5. Were you acquainted with James Crow in his lifetime?

This question, and all subsequent questions put to this witness by counsel for complainant, relating to matters and things prior to 1867, objected to by counsel for respondents in accordance with stipulation after question 4 of Geo. T. Cotton's deposition.

A. Well, I could hardly say acquainted with him, but I knew him by sight. I was cashier of the Commercial Bank of Kentucky at Versailles, the county seat of Kentucky.

Q. 6. In what business was James Crow engaged, and where?

A. He was a distiller at the time, and my recollection is he operated a distillery with Oscar Pepper at the distillery on Glenn Creek, which I subsequently operated.

Q. 7. By what name, if any, was that whisky distilled by James

Crow at that distillery known?

A. It was generally spoken of as Crow whisky.

Q. 8. Was that whisky known by that name prior to Crow's death?

Mr. Smith: I object to that question as leading.

A. Oh, yes.

Q. 9. Did it continue to be so known after his death?

Mr. Smith: I make the same objection.

A. Yes. James Crow was the first man, as I recollect, who ever distilled sour mash in Kentucky, and it was the best whisky known in the counties, Woodford, Fayette, Franklin.

Mr. Smith: I object to the question as not being responsive to the question, and move to strike it out.

Q. 10. Were you associated with the firm of Gaines, Berry & Company when that firm was organized?

A. I was a member of the firm.

Q. 11. When was that firm organized?

A. In '66 or '67, I think.

Q. 12. In what business did your firm engage at that time, and where?

A. It was engaged in the manufacture of whisky at the distillery I have just mentioned in answer to the former question, and nowhere else at the time.

Q. 13. Prior to that time what significance did the words "Old Crow" have in the whisky trade in Kentucky?

A. The significance that attached to it was that it was manufactured by James Crow at the distillery I have mentioned in a former question and under his established formula.

Q. 12. Did the firm of Gaines, Berry & Company adopt any distinguishing name for the whisky distilled by it, and if so, what

was that name?

A. We called the distillery that we operated the Old Crow distillery, burning a brand on the barrel, as I recollect, as follows: "Old Crow Distillery, Hand-made sour mash whisky. Gaines, Berry & Company, distillers, Woodford County, Ky."

Mr. Smith: I object to the answer and move to strike it out.

Witness (resuming): "—and it was spoken of as "Old Crow" whisky.

· Mr. Smith: I object to the answer and move to strike it out, for the reason that the name of the distillery is not in issue, and the brand described by the witness is different from and unlike the words to which complainant makes claim in this suit.

Q. 13. How long did the firm of Gaines, Berry & Company continue to operate the Old Crow Distillery and produce the Old Crow whisky?

A. I couldn't state positively the time they operated it.

Q. 14. By whom was the firm of Gaines, Berry & Company succeeded?

A. I think by W. A. Gaines & Company.

Q. 15. Were you a member of the firm of W. A. Gaines & Company?

A. I was.

Q. 16. How long did you remain a member of the firm of W. A. Gaines & Company?

A. Several years, I think; I have no positive recollection now.

Q. 17. During the time that you remained a partner of W. A. Gaines & Company, did that firm continue to operate the same distillery and produce the same brand of whisky to which you referred?

A. That is my recollection.

Q. 18. Since the time that you withdrew from the firm of W. A. Gaines & Company, have you had any interest in the Old Crow distillery or its product, the Old Crow whisky?

A. None whatever.

Q. 19. How extensively is your acquaintance with the whole

sale liquor trade of the United States?

A. My acquaintance with the trade is general, in the general run of business, though I have a large personal acquaintance with the trade.

Q. 20. What is the significance of the words "Old Crow" as applied to whisky, in the liquor trade of the United States?

A. It is understood by the trade to mean that it is the product of W. A. Gaines & Company, made under the formula of Crow.

Q. 21. Have you ever known of any Old Crow whisky other than

that produced by the various persons that you have named, on Glenn's Creek, in Woodford County, Ky.?

A. I never have.

# Cross-examination by Mr. Smith:

X Q. 1. Mr. Taylor, you stated that the words Old Crow, as applied to whisky, meant the product of W. A. Gaines & Company, made according to the formula of James Crow, did you not?

A. That is my understanding.

161 X Q. 2. Do you not mean that the whisky is made by that formula and not by that firm?

A. I do not. I mean just the statement that I made.

X Q. 3. If the firm of E. H. Taylor, Jr., & Sons, distillers, were producing whisky by the Crow formula, you would call it "Old Crow" whisky, would you not?

A. We could not produce it by the Old Crow formula. I don't know what the Old Crow formula is; that is a hypothetical ques-

tion.

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X Q. 4. But if you did acquire a right to that formula; if there is such a formula, and manufactured whisky according to the

formula, it would be Old Crow whisky, would it not?

A. I should think not. Were we to manufacture—were E. H. Taylor, Jr., & Sons in possession of that formula—and were to manufacture by that formula, we could and would only represent it as the manufacture of E. H. Taylor, Jr., & Sons, after the formula of James Crow.

X Q. 5. The significant thing, then, in your opinion, is the form-

ula and not the distiller?

A. The significance that I would attach would be a joint significance that the product was both the manufacture of W. A. Gaines & Company by the formula, and I think the trade would take the same view of it that I have taken. I couldn't disassociate one from the other—the manufacturer from the formula, I mean.

X Q. 6. But if your firm bought from W. A. Gaines & Co. the formula and the right to manufacture by it, and W. A. Gaines & Company went out of existence, you could produce Old Crow whisky,

could you not?

A. At our distillery, manufactured at our distillery, we could only produce whisky after the formula of Crow.

X Q. 7. Suppose you bought the distillery of W. A. Gaines &

Company?

A. Were we to purchase the Old Crow distillery of W. A. Gaines & Company and continue to manufacture by the formula of Crow, at the distillery, we think we should have the right to continue to manufacture Old Crow whisky. W. A. Gaines

& Company, distiller-, if we acquired the right to use their name in the purchase of the distillery.

X Q. 8. You would not attempt to designate as Old Crow any whisky except that made by the Crow formula?

A. I should not.

X Q. 9. The formula, then, is an essential part of the whisky marked as Old Crow, as you understand it?

A. If I was manufacturing the whisky I should certainly regard

it as an essential.

X Q. 10. You so regard it, anyway, do you not?

A. I would regard any other representation as a misrepresentation.

X Q. 11. So that the chief significance of the words "Old Crow" on whisky is that the whisky to which they are applied was made by the Crow formula?

A. I should so regard it.

X Q. 12. And the trade so regards it, as you understand it?

A. I think the trade would so regard it in conjunction or connection with the firm of W. A. Gaines & Company. I think it would be a joint thing.

X Q. 13. W. A. Gaines & Company also make Hermitage whisky.

do they not?

A. They are manufacturers of the Hermitage brand, also, at a different distillery.

X Q. 14. Do they use a different formula in that distillery?

A. I am wholly unacquainted with their formula.

X Q. 15. You don't know, then, whether the formula by which Hermitage is made is the same as the formula by which Old Crow is made at the present time?

A. I have no personal knowledge of either formula.

X Q. 16. As far as you personally know, the two formulas may be identical?

A. As I have stated, I have no personal knowledge of either formula.

X Q. 17. What formula did you use when you began distilling in 1866 at the Osear Pepper distillery? If you know, of

163 vour own knowledge?

A. We employed William Mitchell as distiller, who had been in the employ of Crow for many years, and who was employed by us because of his previous employment by Crow, and who represented to us, which was confirmed to us by all the other employes, who had been employed by Crow, as being the formula under which Crow operated, of which we had no doubt, and I have none.

Mr. Smith: I move to strike out the answer of the witness on the ground that it is not responsive to the question, that it is hearsay and immaterial to the issues in this case.

X Q. 18. You have no personal knowledge of what that formula was?

A. It has been so long since my use of the formula that I have no recollection whatever regarding it.

X Q. 19. To what did the formula relate?

A. It related to the different materials used in the manufacture of whisky, and the proportions of each, with detail as to their application.

X Q. 20. By the phrase "detail as to application," do you refer to

the scalding and the different temperatures at which the various grains used were added?

A. Yes, sir; and all other details of manufacture.

X Q. 21. Did you grind your own grain in those days, Mr. Taylor?

A. Yes, sir.

X Q. 22. On the distillery premises?

A. Yes, sir.

X Q. 23. Did you make both rye and Bourbon?

A. We never manufactured any rye at all. That is my recollection.

X Q. 24. James Crow manufactured Bourbon whisky, did he not?

A. Crow manufactured what was known as Hand-Made Sour Mash Whisky, which, at that time, was never spoken of, as far as I know, as Bourbon whisky. Latterly, Bourbon whisky is applied to almost any thing.

X Q. 25. Crow made a corn whisky?

164 A. Corn was the chief ingredient used in the manufacture, not corn whisky.

X Q. 26. He didn't manufacture rye whisky?

A. I don't suppose he ever made a gallon of rye whisky, as far as I know he didn't.

X Q. 27. The firm of Gaines, Berry & Company manufactured whisky at the old Oscar Pepper distillery and also at what is now

known as the old Taylor distillery, did they not?

A. Both distilleries were used in the latter part of my connection with the firm in manufacture of whisky under the brand of Crow, but whether in the name of W. A. Gaines or Gaines, Berry & Company, I don't remember; but the same formulas were used at both distilleries and both run under the supervision of Mitchell and by one of Mitchell's employes.

X Q. 28. Who was that employe and at what distillery did he

operate?

A. J. W. Johnson was the employe, and was the operating distiller at the distillery that I now operate, on Glenn's Creek, some two or three miles below the distillery that had formerly been operated by Oscar Pepper with Crow as distiller.

X Q. 29. Mr. Taylor, how do you know the same formulas were

used at both the distilleries?

A. I have a personal knowledge that the same formulas were used at both distilleries, as I was virtually the operator of both.

X Q. 30. That is, you determined what proportion of grain should be used in making the mash?

A. I determined it?

X Q. 31. Yes, sir.

A. I was virtually the manager of both distilleries and they were both operated under the same formula.

X Q. 32. How do you know of your own knowledge that the same

formula was used in each one?

A. As the manager, such was my direction, and I have no doubt whatever about my having seen the observance of my direction.

X Q. 33. But you are not able to state now what that formula was?

A. I have no sort of recollection as to detail of the formula,

X Q. 34. Who succeeded Mitchell as distiller?

A. I have no knowledge—no recollection at this time.

X Q. 35. Give the relative locations of the three distilleries at which the firms of W. A. Gaines & Company and Gaines, Berry & Company produced whiskey which you say was called Old Crow?

A. The three distilleries to which you refer are all on Glenn's Creek, in Woodford County, Kentucky, within a few miles of each

other.

X Q. 36. Is not this the order in which they come as you descend the creek—Old Oscar Pepper distillery, then about three miles below the Old Taylor distillery; then, about a mile below that, the present distillery of W. A. Gaines & Co., which is about a mile from the mouth of the creek where it empties into the Kentucky River?

A. That is about the relative positions of the distilleries.

X Q. 37. Where did you get your grain when you began distilling?

A. From present recollection, I should say that all our grain was

the growth of Woodford and Franklin counties.

X Q. 38. Do you know where W. A. Gaines & Co. get their grain now?

A. I do not.

X Q. 39. Do you know any distillers in this part of Kentucky who use home-grown grain in any considerable proportions?

A. I know nothing of the habits of any other distilleries. I know

that my distillery does.

X Q. 40. Do you use spring water at your distillery?

A. Yes, sir.

X Q. 41. All the distillers in this part of Kentucky use spring water, do they not?

A. I should think not. I have no knowledge of other distillers,

however, in the use of water.

X Q. 42. What kind of water is used in making Old Crow whisky, and was used when you were connected with the manufacture 166 of it?

A. I have no knowledge of what kind of water is now used in the manufacture of Old Crow whisky. I built the present Oscar Pepper—I built the present distillery known as the Old Crow distillery, and they were both built because of their contiguity to the springs furnishing the same quality of water, and the same quality of water is also used in the spring at the present Old Crow distillery.

X Q. 43. The quality is limestone?

A. Yes, it is known as limestone water, spoken of as limestone water—bird's-eye limestone, I think they call it.

X Q. 44. All this portion of Kentucky is a limestone country, is

it not?

A. That portion of Kentucky known as the Blue Grass Country is all underlaid with limestone.

X Q. 45. There are a great many limestone springs throughout this Blue Grass region?

A. All the springs in this Blue Grass Country emanate from the limestone foundations, and take their properties therefrom largely.

X Q. 46. What counties are included in this region that you have

described?

A. Parts of Shelby, Franklin; I think all of Woodford, all of Fayette, a large part of Bourbon, parts of Scott, Harrison, Montgomery, Mercer and Anderson, Boyle, Garrard, these counties, as near as I can remember, now comprise what is generally spoken of as the Blue Grass region.

X Q. 47. The finest whiskies of Kentucky are produced in this

same region, are they not?

A. Unquestionably.

X Q. 48. The limestone water is generally sought after and used by the makers of these fine whiskies, are they not?

A. I wouldn't have any other to seek the manufacture of the best

whisky.

X Q. 49. Are there any natural advantages on Glenn's Creek for the manufacture of whiskey not possessed by other portions of the Blue Grass region?

A. My reason for the acquisition and construction of dis-167 tilleries on Glenn's Creek were that I considered their waters the sine qua non for the manufacture of the highest grade of whisky, and after nearly forty years' experience and acquaintance with the product of the different distilleries in the state I regard the product of the three distilleries under discussion as the highest grade and best whisky manufactured in Kentucky.

X Q. 50. How do the waters of those springs differ from other

limestone springs in the Blue Grass region?

A. I am not prepared to go into details of the differences and their analysis. I speak from my knowledge of results.

X Q. 51. What other springs have you tested?

A. I have tested none except by results, and by analysis of those I especially speak of.

X Q. 52. You have made no comparison with waters of other

springs?

A. The comparison of waters of one spring with another except by analysis would afford me no information; as stated in answer to previous questions, I speak from results—by results meaning the superiority of the whiskies I have named over other manufactured from different waters.

X Q. 53. But don't you attribute the superiority of the whiskies

you have named to the formula used?

A. Very largely to the formula used and to the processes of manufacture. The water being largely contributive to the general excellence.

X Q. 54. Do you know what kind of water is used in making 0. F. C. whisky?

A. I do not.

X Q. 55. Do you know their formula?

A. I do not.

X Q. 56. Do you know the formula of any other distillery than your own?

A. I do not. And wouldn't know my own without going to my

books.

X Q. 57. Isn't it a fact that all distillers have practically the same formula?

A. I think not. Many of them differing very greatly.

X Q. 58. For the same grades of whisky?

A. That is a very hard question to answer. There are very few whiskies of high grade.

X Q. 59. What whiskies do you consider high grade?

A. That is too general a question.

X Q. 60. Limited to this part of Kentucky?

A. The whiskies that come more immediately under my observation are the three whiskies that are now at issue. I consider them the highest grade of whisky, as I have stated, that are made in Kentucky—the present Oscar Pepper, Old Taylor, and Old Crow. The O. F. C. whisky during my connection with it, and probably now, was a very high grade whisky. I am unable to speak of the present there, as it has not come under my observation for ten or twelve years.

X Q. 61. What whiskies do you consider next best?

A. I would not like to go into a discussion of the merits of brands in which I have no connection and no possible interest and that don't come under my observation. I simply know generally that there are other brands of whisky made in the state that are in excellent repute.

X Q. 62. Isn't it true that most of the whisky made in this part of Kentucky is regarded by the trade as high grade whisky?

A. I am not prepared to answer your question—I don't know. X Q. 63. You don't know of your own knowledge whether James

Crow ever had a distinct formula, do you?

A. I have no other knowledge than I have given responsive to a

former question.

X Q. 64. Did not you and James E. Pepper operate the Old Oscar Pepper distillery in the early seventies after Gaines, Berry & Co.

ceased to be connected with it?

A. I built the present Oscar Pepper distillery. I don't remember the date. My recollection is that after it was built it was run in the name of James E. Pepper, but I am not distinctly certain of that even.

X Q. 65. Do you know what the product of that distillery was called?

A. Well, I am not prepared to answer that. It was only operated for a little while by Pepper, and I don't know what name, but I believe Old Oscar Pepper.

X Q. 66. Do you know who their distiller was?

A. I don't remember who the operative distiller was, neither do I remember the formula used.

X Q. 67. I understand that you did operate this in connection with

Pepper for a short time?

A. I erected the distillery, and it was operated, as I have stated, in the name, I think, of James E. Pepper, I being a party in interest.

X Q. 68. Did you not at that time claim and so advertise to the trade that you were using the formula of James Crow? And that

William F. Mitchell was your distiller?

A. As I have stated, the duration of my connection with that distillery was very short, and I have no recollection of W. F. Mitchell was or was — represented as being our distiller—being the distiller, though it occurs to me now that he was. But I have nothing to do with any representation in regard to processes or other matters, as I now remember, Mr. Pepper having undertaken to dispose of the whisky that was manufactured there, and its disposition was altogether, as I recollect, in his hands.

X Q. 69. Do you remember whether or not he so advertised the

whisky at that time?

A. The time is so remote and my connection so short that I do not.

X Q. 70. You are not prepared to say that he did not?

A. I am not prepared to say; I don't know.

X Q. 71. In 1866, when you began distilling, you mashed entirely by hand, did you not?

A. At the Old Crow distillery, yes; I think so entirely.

X Q. 72. Do you know the method of operation in the distillery of W. A. Gaines & Co., on Glenn's Creek, now?

A. I have no knowledge whatever of their present methods. I haven't been there for years.

X Q. 73. Do you know J. P. Williams?

A. I don't know as I do. I don't think I do.

X Q. 74. He is a rectifier?

I know Jesse Williams. He is an employe of W. A. Gaines.
 X Q. 75. Do you know whether he carries a license as rectifier?
 A. I do not. I have seen him advertised in the revenue books as

a rectifier; that is all I know.

X Q. 76. Do you know whether he is a rectifier?

A. I do not. I am not a rectifier myself; I know nothing about rectification—nothing about the business.

X Q. 77. Do you know what sort of water they use at the Her-

mitage?

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A. I do not. X Q. 78. Or at the Spring Hill?

A. I do not.

X Q. 79. John E. Fitzgerald?

A. I do not.

X Q. 80. Bond & Lillard?

A. I do not.

X Q. 81. The Old Jourdon?

A. I do not. X Q. 82. Arnold's Springs?

A. I could not say. I don't know the spring.

X Q. 83. Frankfort Distilling Co.?

A. I don't know what they use.

X Q. 84. Those are all well-known distillers in this region?

A. I don't know the Frankfort Distillery. It is a new concern, I think they manufacture for all sorts of people under different names.

X Q. 85. The others are all well-known distillers?

A. Yes; they are all of good standing. I don't mean that the Franklin distillery is not; I simply don't know.

X Q. 86. There are a great many other distilleries of first-class

standing in this part of Kentucky?

A. No, I think not; there can't be very many. I don't recall any, at least.

X Q. 87. Do you know the Cedar Brook?

A. Yes, sir. It is a whisky of high standing-high repute.

X. Q. 88. The Bell of Anderson?

A. I don't know that. They have so many "Bells."

X Q. 89. You don't know the formula or the water that is used to make the Cedar Brook?

A. I do not.

171 X Q. 90. You don't know in what respect the formula or the water used in the manufacture of any of the brands that I have named differs from that used by W. A. Gaines & Co., at the present time on Glenn's Creek?

A. I know nothing of the waters used in the manufacture of

any whiskies other than those I have named.

X Q. 91. The same is true of formula?

A. The same is true of formula.

X Q. 92. I understand you to say you lived in Kentucky all

your life?

A. I was born in Kentucky, and lived here always except when I was away for about a year. I was South during the war about a year.

X Q. 93. Is that the year that you refer to that you were away?

X Q. 93. Is that the year that you refer to that you were away? A. Yes, sir; during the war. That is the only time I was ever

away.

X Q. 94. Aside from that, you have resided continuously in this State?

A. I have resided here continuously and at that time I went away, and I don't consider that I lost my residence then.

E. H. TAYLOR, JR.

Subscribed and sworn to before me this 5th day of September, 1905. My commission expires, Jan'y 13th, 1906.

[SEAL.] T. N. LINDSEY,

Notary Public and Special Examiner.

Adjourned till 1:45 P. M.

Pursuant to adjournment as above, the following proceedings were had:

WILLIAM HENRY MASTIN, a witness on behalf of complainant, being duly sworn, testified as follows:

Direct examination by Mr. Hopkins:

Q. 1. Please state your name, age, residence, and occupation?

A. William Henry Mastin. I am 69 past. I used to be a carpenter, but I have quit it, and don't do much of any thing now 172 but job around. I reside in Woodford County, Ky.

Q. 2. How long have you resided in Woodford County,

Kv.?

A. All my life; I was born there.

Q. 3. Were you acquainted with the late James Crow in his lifetime?

A. Yes, sir.

This question, and all subsequent questions put to this witness by counsel for complainant relating to matters and things prior to 1867, objected to by counsel for respondents in accordance with stipulation after question 4 of Geo. T. Cotton's deposition.

Q. 4. In what business was he engaged?

A. He was a distiller in whisky.

Q. 5. At what distillery was he employed?

A. At the Pepper distillery—Oscar Pepper, when I first knew him.

Q. 6. Where was that distillery situated?

A. In Woodford County, between Frankfort and Versailles.

Q. 7. Was it near any stream of water? A. Yes, sir; it was near Glenn's Creek, it was on a branch leading into Glenn's Creek.

Q. 8. By what name was the whisky produced at that distillery

prior to James Crow's death known?

A. "Old Crow."

Q. 9. After Crow's death who succeeded him as distiller at the Pepper distillery?

A. William Mitchell.

Q. 10. By what name was the whisky known that was produced at that distillery after James Crow's death and while William Mitchell was distiller there?

A. As Crow whisky.

Q. 11. Were you personally acquainted with William Mitchell?

A. Yes, sir; I knew him. Q. 12. Is he still living?

A. No, sir. So far as I know. I am told he is not living.

Cross-examination by Mr. Smith:

X Q. 1. How far did you live from the distillery?

A. Well, in straight direction I don't suppose more than two miles. If you go by the road I guess it would be about three miles.

X Q. 2. How do you know that this whisky was called Old Crow? A. I only know it from hearsay and hearing them talk of it. I heard Pepper call it Old Crow and Old Man Crow himself.

173 X Q. 3. Then you have no knowledge except hearsay upon this subject of how the whisky was designated?

A. Only from hearsay, what I have heard them say.

X Q. 4. You never worked at the distillery?

A. Yes, sir.

X Q. 5. When Crow was there?

A. No.

X Q. 6. Was it under Mitchell?

A. No.

X Q. 7. Who was the distiller when you worked there?

A. Hawkins.

X Q. 8. Do you know how James Crow made his whisky?

A. Oh, I don't know as I do.

X Q. 9. Do you know how William Mitchell made it?

A. No. sir.

X Q. 10. Do you know how Hawkins made it?

A. I don't know as I do.

X Q. 11. How long did you work there under Hawkins? A. I don't remember, it was two or three days I was there.

X Q. 12. Who was the distiller after Hawkins?

A. I don't know. I don't know whether he had any distiller or not.

X Q. 13. Where did Crow work other than at the Old Oscar Pepper distillery?

A. He worked at Anderson Johnson's and Jack Johnson's, I

think.

X Q. 14. Where else?

A. Just near the old creek, between that and Frankfort, on Glenn's Creek.

X Q. 15. At what other place? A. I don't know of any other.

X Q. 16. Do you know whether Crow used any different method in making whisky from other distillers at that time?

A. I do not.

X Q. 17. Who worked with Crow in his lifetime?

A. When I first knew anything about him there was Mr. Mitchell, and I think two black men.

X Q. 18. What became of the black men?

A. I don't know. One of them is dead. I don't know about the other.

174 X Q. 19. Did they continue to make whisky? A. Who?

X Q. 20. The negroes?

A. Not that I know of.

X Q. 21. Where did Crow get the grain that he used to make whisky?

A. I think Pepper raised most of the grain that he used when he was there. Probably all of it, I don't know.

X Q. 22. Do you know the kind of water that he used?

A. Yes, sir; spring water.

X Q. 23. Limestone spring?

A. Yes, sir.

X Q. 24. All this part of Kentucky is full of limestone springs, is it not?

A. Yes, sir.

X Q. 25. That is the kind of water which distillers in this region of Kentucky use?

A. Not entirely, they get water out of the river, I don't know that

it is entirely limestone water.

X Q. 26. This is a limestone country through here?

A. Yes, sir.

X Q. 27. Do you know anything about the present distillery of W. A. Gaines & Co., where Old Crow is made?

A. I don't know anything about it, I have been there; I have

been through it.

X Q. 28. Have you been there when it was in operation?

A. Yes, sir.

X Q. 29. How long ago was that?

A. I don't know as I could tell you, three or four years, I reckon, at least.

X Q. 30. How did they mash their grain? Λ. You mean at the Pepper distillery?

X Q. 31. No, at W. A. Gaines?

A. I don't know, I was not in the distillery at all.

X Q. 32. How did they mash the grain at the distillery when James Crow worked for Pepper?

A. In mash tubs.

X Q. 33. Entirely by hand?

A. Yes, sir.

X Q. 34. You don't know the present formula used at Gaines' Old Crow distillery?

A. No, sir.

175 X Q. 35. Have you ever traveled much?

A. No, sir.

X Q. 36. You don't know about the names of whiskies in St. Louis, Cincinnati and other cities?

A. I do not.

X Q. 37. And you did not know about names and brands of whisky outside of Woodford county in 1863, or prior thereto?

A. Not particularly, no, sir.

X Q. 38. There is a great deal of the fine whiskey produced in this neighborhood, is there not?

A. That is what they say.

X Q. 39. How many distilleries are there in Franklin, Woodford, Anderson and Fayette counties, as near as you can recall?

A. You ask me too much, I can't tell you. I could count up.

X Q. 40. How many would you say?

Counsel for complainant objects to the question upon the ground that it is irrelevant and immaterial and improper cross-examination, and calls the attention of the court to the fact while but twelve questions were asked the witness, upon his direct examination, is directed to cross-question 40, and that not more than ten of those forty questions are directed to matters evoked by the direct examination of the witness.

A. I have no idea, I can't state without I count; then I don't know as I could get them all.

X Q. 41. There are a large number?

A. Yes, sir.

X Q. 42. Are there say natural advantages on Glenn's Creek for the manufacture of whiskey which other portions of the four counties mentioned do not also possess?

A. I could only say from hearsay. I don't know.

X Q. 43. In so far as you have personal knowledge there are none?

A. There might be some exceptions, if spring water has anything to do with it; that's all I can say.

X Q. 44. Are the springs on Glenn's Creek any better than those elsewhere in this limestone country as far as you personally know?

L. Yes, sir, in some respects. X Q. 45. In what respects?

A. In that they run purer, the water is purer than in this mucky clay land.

176 X Q. 46. What other spring water have you ever compared?

A. Just from drinking water, I never analyzed the water.

WILLIAM H. MASTIN.

Subscribed and sworn to before me his 5th day of September, 1905. My commission expires Jan'y 13th, 1906.

[SEAL.] T. N. LINDSEY,

Notary Public and Special Examiner.

WILLIAM BOYETTE, a witness on behalf of complainant, being duly sworn, testified as follows:

Direct examination by Mr. Hopkins:

Q. 1. Please state your name, age, residence and occupation?

A. William Boyette; I will soon be seventy-one years old, 23rd of October; I live in Woodford county; I am a farmer.

Q. 2. Is your farm located in Woodford county?

A. Yes, sir.

Q. 3. How long have you lived there?

A. I came there when I was 5 years old. With the exception of four years I have lived there all my life.

Q. 4. Were you acquainted with James Crow in his lifetime?

A. Yes, sir.

This question, and all subsequent questions put to this witness by counsel for complainant, relating to matters and things prior to 1867, objected to by counsel for respondents in accordance with stipulation after question 4 of Geo. T. Cotton's deposition.

Q. 5. In what business was he engaged when you knew him?

A. In the distilling business—making whisky.

Q. 6. At what distillery?

A. Down there at what is called the Oscar Pepper distillery.

Q. 7. How was the whisky that he made at that distillery known and called for-by what name?

A. The Old Crow.

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Q. 8. After the death of James Crow was the whiskey produced at that distillery known by any name, if so, what? 177 A. Well, I have never known of any other name than the

Old Crow whisky.

Q. 9. How near to the Pepper distillery did you live at that time?

A. From two and a half to three miles.

Q. 10. Did you live near to Glenn's Creek?

A. Yes, sir.

Q. 11. Where was the Pepper distillery located with reference to Glenn's Creek?

A. It is not very far from — and Graham are now.

#### Cross-examination by Mr. Smith:

X Q. 1. Whom have you talked to about this case?

A. I don't know that I talked to anybody but this young man, I don't know what his name is; he was up at our town, Versailles. He came to me and asked me if I knew Crow.

X Q. 2. Was that Mr. Clayton?

A. He was in here a minute ago. X Q. 3. How long ago was that he talked to you at Versailles?

A. It was sometime last year, I can't tell the time, I think it was last year, I wouldn't be positive.

X Q. 4. Do you know how James Crow made his whisky.

A. I do not.

X Q. 5. Do you know whether or not he had a particular formula? A. I do not, I don't know a thing in the world about making whisky. I don't know now.

X Q. 6. How do you know that the whisky made by Crow at the

Old Oscar Pepper distillery was sold as Old Crow?

A. All I know is from hearsay, of course I was a boy. I was going to school there near the distillery, and I would go in the distillery and see old man Crow there giving orders.

X Q. 7. Did you ever work at that distillery? A. No, sir.

X Q. 8. When you heard the words "Old Crow" used in 178 connection with whisky, what did you understand that they meant?

A. Well, I just thought it meant whisky made by old Crow.

X Q. 9. By old Crow you mean James Crow? A. Old James Crow lived at the distillery then.

X Q. 10. You say that after his death whisky made at that distillery was also called Old Crow?

A. That is my impression about it and my understanding.

never heard it called anything else but "Old Crow."

X Q. 11. When you heard the words Old Crow used in reference

to whisky that had been made after the death of James Crow, what

did you understand by those words?

A. I just took it for granted that it was made under the same process as old Crow made it, as I told you I never made any whisky and never worked about a distillery in my life.

X Q. 12. You don't know whether Crow had several processes or

any one particular process, of your own knowledge, do you?

A. I don't know anything about that.

X Q. 13. During the four years when you were away from Woodford county where did you live?

A. I was in the army.

X Q. 14. Have you ever traveled except when you were in the army?

A. Only on pleasure to go to see my sister or my relations.

X Q. 15. You are not familiar with the names or brands of whisky in St. Louis, Cincinnati or other cities and have never been, have

you?

A. I never paid any attention to the brands only right around here, because I lived here all my life, the Old Crow and those distilleries on Glenn's Creek, when I lived right there on the creek I had government men boarding with me. I heard of Old Crow the best portion of my life because I lived right there in the neighborhood.

X Q. 16. James Crow never made rye whisky, did he?

A. I can't tell you whether he did or not.

179 X Q. 17. Where did Crow get the grain that he used?

A. I don't know where he got it, he might have got it right there in the neighborhood for all I know.

X Q. 18. Do you know what water he used?

A. I suppose it came out of the spring there, I don't know.

X Q. 19. It was limestone spring water?

A. I suppose so, I don't know. I suppose he got the water right there on the premises.

X Q. 20. That is the kind of water that is usual in this country?

A. Yes, sir.

X Q. 21. The same kind of water the best distillers use? A. I don't know what kind of water some of them use.

X Q. 22. Is the gentleman whom I introduced you to as "Mr. Clayton" the young man you referred to as having met you in Versailles last year?

A. Yes. I don't know whether it was last year or the year before

that he came there.

#### WILLIAM BOYETTI.

Subscribed and sworn to before me this 5th day of September, 1905. My commission expires Jan'y 13th, 1906.

[SEAL.] T. N. LINDSEY, Notary Public and Special Examiner.

RICHARD H. WHITTINGTON, being duly sworn, on the part of the complainant, testified as follows:

## Direct examination by Mr. Hopkins:

Q. 1. Please state your name, age, residence and occupation?

A. Richard H. Whittington; I am 61, will be next month, 19th; well, I claim Frankfort as my home, but I have been staying up on Glenn's Creek with Judge Shaw for three years, but I am backwards and forwards from one distillery to another, but here in Frankfort is my voting place. The Judge is an old friend of mine. I am store-keeper gauger, in the revenue service.

180 Q. 2. How long have you been in the revenue service?

A. Well, now, I can't tell you. I went in under Cleveland's first administration and then under Harrison I went out, and then, when Cleveland went in again, I went in, and have been in ever since.

Q. 3. How long have you lived in Kentucky?

A. Born and raised here.

Q. 4. In what part of the state did you live prior to taking up

your residence as you have described it?

A. Woodford county. I was born and raised there, within a mile of the Old Oscar Pepper distillery. I lived in Woodford off and on all my life. I have a room here in the hotel, and vote here, but I am in Woodford more than I am here.

Q. 5. When you lived near Pepper distillery as a boy who was the

distiller there?

This question, and all subsequent questions put to this witness by counsel for complainant relating to matters and things prior to 1867, objected to by counsel for respondents in accordance with stipulation after question 4 of Geo. T. Cotton's deposition.

A. James C. Crow. Pepper, by marriage, was an uncle of mine. His wife and my mother were sisters.

Q. 6. Where was the Pepper distillery situated? A. On Glenn's Creek, in Woodford county.

Q. 7. By what name was the whisky that was made at distillery

known and called for?

barrels.

A. I was a boy and was there around the distillery, and old man Crow would take a piece of chalk and would make the letters, and then he had a gouge that he would gouge it out with C-R-O-W.

Q. 8. What was it that he would gouge this name Crow on?
 A. It looked like a stee! hook. He gouged it on the head of the

Q. 9. What would he use to gouge this word with?

A. He had a steel point, a kind of a hook, made in that shape. He would first make his letters with a piece of chalk, and then he would take this gouge and follow it around.

Q. 10. How often did you visit that distillery as a boy?

A. It was every week, maybe I would go over there and stay three or four days every week, it was kin folks, and we lived there within a mile.

Q. 11. After Crow's death did you continue to live in the same place, and if so, how long?

A. Until 1868, the latter part of 1868.

Q. 12. During that time by what name was the whisky produced at that distillery known?

A. Known as "Crow." During three years of that time I was in

the Confederate army.

Q. 13. Did you ever know of any Old Crow whisky that was not made on Glenn's Creek, in Woodford county, Kentucky?

A. No, sir.

# Cross-examination by Mr. Smith:

X Q. 1. Except during the time that you were in the army, have you ever traveled much?

A. Well, I have been out west a time or two, and I was extensively

in the south during the war.

X Q. 2. Are you familiar with the names and brands by which whisky is designated in St. Louis, Cincinnati and other places?

A. No, sir, I am not. I didn't go there.

X Q. 3. Then your answer to the question put by Mr. Hopkins with reference to whisky designated as Old Crow had reference to your acquaintance with that brand or name in the part of Kentucky where you live?

A. Well, the whisky that old Jim Crow made for Oscar Pepper was known as the Crow whisky, they have got another distillery up here, not at the same place, that makes whisky that they call Crow

whisky.

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X Q. 4. Your knowledge of names and brands for whisky is confined to the part of Kentucky in which you lived?

A. Yes, sir.

X Q. 5. You wouldn't undertake to speak with reference to the names and brands in existence anywhere else?

A. No, sir, because I don't know anything about them.

X Q. 6. During the lifetime of James Crow, when you saw
the word "Crow" used in connection with a barrel of whisky.

what did you understand that word to mean?

A. It to mean Crow. C-R-O-W.

X Q. 7. You mean that the whisky had been made by James Crow?

A. Yes, sir, and known as Crow whisky.

X Q. 8. The word Crow on the whisky indicated to you that the goods were made by James C. Crow?

A. Yes, and known as Crow whisky.

X Q. 9. Do you remember when Crow died?

A. I was there at his burial, and I could tell you how the grave was dug.

X Q. 10. After Crow's death when you heard whisky spoken of as Crow whisky, what did you understand about that whisky?

A. After Crow's death Oscar Pepper had a sale up there, he had several bundred barrels of whisky, and it was sold as Crow whisky.

X Q. 11. How long after his death was that?

A. Oh, it was several years after.

X Q. 12. Was there any Crow whisky made after the death of James Crow?

A. Not by him.

X Q. 13. Was there any whisky called Crow made after the death of James Crow?

A. The firm of W. A. Gaines & Company up here makes what they call Crow whisky.

X Q. 14. Did old Oscar Pepper continue to make Crow whisky after the death of James Crow?

A. He continued to make whisky. X Q. 15. What did he call it?

A. I don't think he called it anything but Pepper whisky.

X Q. 16. He didn't call any of it Crow whisky?

A. No, sir.

X Q. 17. Do you remember when Gaines, Berry & Co. operated the old Oscar Pepper distillery?

A. It was just after the war.

X Q. 18. Did they manufacture Crow whisky?

A. No, they never manufactured any Crow whisky, I know they didn't.

183 X Q. 19. What did they call the whisky that they made?
A. They never called it nothing that I knew of. Ed Taylor was the man who run the house up there.

X Q. 20. Do you remember when Gaines, Berry & Co. ran the

old Taylor distillery?

A. You will have to tell me where the old Taylor distillery is at. X Q. 21. The distillery on Glenn's Creek, which is now run by E. H. Taylor, Jr. & Sons, Distillers?

A. In 1866 my father ran that house and the next year W. A.

Gaines & Company started it.

X Q. 22. What was the whisky called W. A. Gaines & Co. made there?

A. I don't know.

X Q. 23. You don't know whether they called it Crow or Old Crow?

A. No, sir; they called it whisky, they had no brands or anything of that sort at all.

X Q. 24. When, to your knowledge, was the first Crow whisky made after the death of James Crow?

A. Oh, well, I couldn't tell you, but it has been a good long time ago.

X Q. 25. Which house do you refer to?

A. That is the Crow up here, the first distillery you come to, on Glenn's Creek.

X Q. 26. Who manufactured that whisky?

A. W. A. Gaines & Co.

X Q. 27. You are positive that you never heard of any whisky that was made between the death of James Crow and the time when this distillery that you have last mentioned was started being called Crow or Old Crow whisky?

A. Never did, sir.

X Q. 28. Do you know how James Crow made his whisky?

A. No, I don't know nothing about it, of course. It was the natural process, of course. I know they had those negroes, Dick and Albert, working in the distillery there with old Crow, and they would draw the slop and pack it to these small tubs and always put in ten buckets to the tub, then they had a vat they would empty these tubs in the next day. 184

X Q. 29. How did they make their mash? A. Made it in those little tubs with a stick.

X Q. 30. What grain did Crow use?

A. Corn.

X Q. 31. Did he use any rye?

A. No, sir; if he did I didn't know it. They used corn and malt dried on a kiln.

X Q. 32. If he had used rye you would have known it?

A. Very likely

X Q. 33. You were over there a great deal?

A. Yes, sir, a great deal. He had his yeast like all the rest of distillers, you know.

X Q. 34. Did he make his own malt?

A. Yes, it was made there on the premises.

X Q. 35. Do you know how much malt he used?

A. No, how do I know. He would use some rye in the tubs when they would go to break it up, take it in sacks, they would break up the little tubs the next day.

X Q. 36. Was his way of making whisky different from that used by other distillers at that time?

A. They all have to go through a process to make the fermentation. X Q. 37. As far as you know it was not different?

A. Not materially different; it couldn't be. It had to go through fermentation. They have a different process of mashing now, and they get more whisky out of the grain. He just mashed it with those sticks.

X Q. 38. Do you know what yield he got per bushel? A. About three and a half gallons to the bushel.

X Q. 39. Are you familiar with the distillery of W. A. Gaines & Co., where they make their Old Crow whisky now?

A. I have been around there a great deal.

X Q. 40. How do they mash their grain there?

A. They mash with a rake.

X Q. 41. Explain what you mean by mashing with a rake?

A. For years they mashed just like Old Crow did, in a little tub, and rolled it back on the floor and left it set until the next 185 day, then they would take the sacks of rye and pour it in on that mash, and then break up the tubs, and then dump it

and run it over into the ferments the next day after it was mashed. But they changed that process and mash with a big tub the size of this room with a rake inside going around. They get more whisky out of the grain and they don't have so much lumps.

X Q. 42. When was it that they made that change?

A. About two years ago. When they would mash with that rake

they would run it down into these little tubs and let it set on the floor until the next day.

X Q. 43. But the mash was made by machinery instead of hand?

A. Yes, within the last two years.

X Q. 44. Do they mash any grain at all solely by hand, as in the days of James Crow?

A. Well, I don't think they do at the present time, X Q, 45. Do you know what yield they get now?

A. Four and a quarter or four and a half, I think they claim to

have made as much as five gallons this last season.

X Q. 46. Are there any natural advantages on Glenn's Creek for making whisky that other parts of Woodford and adjoining counties do not possess?

A. Well, I don't know, but they have got mighty good water up

there.

X Q. 47. That is the only advantage that you think of?

A. Yes, sir.

X Q. 48. That is limestone spring water, is it not?

A. Yes.

X Q. 49. Is it any better than any other limestone spring water in this part of the country?

A. No, sir, but the country has got water in all parts, but you don't

find distilleries in all localities.

X Q. 50. This region of Kentucky known as the Blue Grass country is a limestone country?

A. Yes, sir.

X Q. 51. And has a large number of limestone springs?

A. Yes, sir.

186 X Q. 52. And the distilleries use limestone water?
A. They are located where there is a good spring.

X Q. 53. Are the springs on Glenn's Creek any better than the springs at which other distilleries are located?

A. I don't know that they are, there are good springs on Glenn's

Creek.

X Q. 54. Do you know what formula they use at the Gaines distillery on Glenn's Creek now?

A. No. They are not making any whisky now there. X Q. 55. I mean when they run during modern times?

A. They use corn, barley, malt and rye. I don't know the proportions.

XQ. 56. What do you understand by the formula that a distiller

uses?

A. You mean in the proportion of his grain?

X Q. 57. Is that what you understand by the word formula, the proportion in which he mixes his grain?

A. I don't know anything about that.

X Q. 58. You don't know anything about the formula they use up there?

A. No. sir.

X Q. 59. You don't know whether or not they make whisky by the same formula that James Crow made it of?

A. No, Sir; I do not.

X Q. 60. Was there any secret about the way James Crow made his

whisky?

A. Not that I know of. If there was I suppose he kept it to himself. You take any of these distillers they won't tell you anything about how they make their whisky. They make their own yeast, and they won't tell you anything about it.

X Q. 61. Everything was open around the distillery when Crow

worked there?

A. Yes, sir; there wasn't any government locks on anything when Crow was making whisky.

R. H. WHITTINGTON.

Subscribed and sworn to before me this 5th day of September, 1905. My commission expires Jany. 13th, 1906.

[SEAL.]

T. N. LINDSEY,

T. N. LINDSEY, Notary Public and Special Examiner.

187 William R. Dean, being duly sworn on the part of the complainant, testified as follows:

Direct examination by Mr. Hopkins:

Q. 1. Please state your name, age, residence and occupation? A. William H. Dean; 80 years and a half; my residence is Versailles, I am in no business.

Q. 2. In what business were you engaged before you retired?

A. Well, you might say in the hotel business. I have been in the hotel business for fifty years, the last business I had was hotel business in Versailles.

Q. 3. How long have you resided in the state of Kentucky?

A. Just as long as I am old, sir; 80 years.

Q. 4. How long have you resided in Woodford county?

A. Well, now, that will take me a good deal of studying—oh, I have lived in Woodford county during my life, with the exception of ten or twelve years.

Q. 5. Did you know James Crow in his lifetime?

A. I remember how he looked, I was not familiar with him, personally.

This question, and all subsequent questions put to this witness by counsel for complainant relating to matters and things prior to 1867, objected to by counsel for respondents in accordance with stipulation after question 4 of Geo. T. Cotton's deposition.

Q. 6. In what other places than Versailles have you been connected with the hotel business?

A. I conducted the hotel business in Mortonsville, Woodford county, about ten years, then the next ten years was within three miles of the Crow distillery.—Pepper's distillery.

Q. 7. What was the name of that place that was within three

miles of the Pepper distillery?

A. It was known as Dean House.

Q. 8. Did you conduct the Dean House during James Crow's lifetime.

A. I am sure he was not dead, as I seen his several times. If he died previous to my opening of that Dean House I could not say, but I think not. I passed down by the distillery and sold corn, I think I can see Mr. Crow right before me now, understand. I dealt in corn and sold to the different distilleries, and I have hauled corn down to that distillery.

Q. 9. Do you recollect about what it was that you conducted this

hotel called the Dean House?

A. Yes, sir. I went to the Dean House in '65 and stayed there until '75.

Q. 10. During that time do you know what the whiskey produced at the Pepper distillery was called?

A. Yes, sir, always considered it Crow whisky.

Q. 11. Do you recollect what the whisky was called that was produced at that distillery during the lifetime of James Crow?

A. It was called Crow whisky, sir. Remember, I was not acquainted with that place much before I moved there. I knew Mr. Pepper and Jim Pepper was a regular visitor in my house. I ran a little blacksmith shop, grocery store and hotel, and Jim Pepper came there often, and I bought corn and soid it.

Q. 12. Did you ever hear of the whisky produced at the Pepper distillery while you were keeping this Dean House called anything

else than Old Crow?

A. I did not, sir.

Q. 13. Did you open the Dean House before the close of the war?

A. I moved into the Dean House in '65, all of '65 the troops were passing going into Louisville.

Q. 14. Did you ever purchase or handle any of this Old Crow

whisky yourself?

A. I am certain that I got it for particular friends in jugs, but I never purchased it to sell in the barrel. I sent down to Pepper's. Q. 15. Do you recollect how frequently you got the Crow whisky

in that way?

A. No, sir, not often, just particular occasions when I was called on to get them some whisky from Pepper's, always considered it Crow whisky.

189 Cross-examination by Mr. Smith:

X Q. 1. You say you ran the Dean House from 1865 to 1875?

A. Yes, sir. Now, as regards old man Crow seeing him some years before that my father lived, and I lived with him on the farm, and may be it was then I saw the old man. I could not say. I used to go down that way to the mill. But I was at Mr. Pepper's sale when he sold out.

X Q. 2. During the ten years that you ran the Dean House you say that whisky made at the Pepper distillery was called Crow

whisky?

A. Yes, sir; I do sir. That's my understanding.

X Q. 3. That was true from 1865 to 1867, and also from 1867 to 1875? During all those ten years it was called Crow whisky?

A. I lived there ten years and it was called Crow whisky all

those years.

X Q. 4. How do you know it was called Crow whisky?

A. I only know it from circumstances and talking about it, if there was anybody else made Crow whisky there I don't know it.

X Q. 5. You don't know of your own knowledge what the whisky was called in the trade?

A. No, sir. I never had any opportunity to know except what

I would want. I never had any whisky trade.

X Q. 6. The distillery which you have referred to as being the distillery where the Crow whisky was made as late as 1875, is what was known as the Old Oscar Pepper distillery, and was located where the present Labrot and Graham distillery is located?

A. Yes, sir.

X Q. 7. Have you any knowledge of Crow whisky prior to 1865?

A. Prior to 1865? Not more than I have been to friend's houses before I moved to that place and they asked me to have some of that Old Crow whisky; different places where I would be and they would invite me to take it.

X Q. 9. You don't know of your own knowledge where

190 such whisky as that came from?

A. No, sir, only what I was told. I was told that it came

from there. X Q. 10. Do you know how the whisky which was called Crow whisky and made at the Pepper distillery was manufactured—by what process it was made?

A. None in the world, sir.

X Q. 11. Do you know of your own knowledge anything about the manufacture of whisky by James Crow in his lifetime?

A. I do not.

X Q. 12. Where was the grain obtained which was used at the Pepper distillery in the manufacture of Crow whisky?

A. I would have to say in that neighborhood. X Q. 13. You bought grain yourself and sold it?

A. I dealt in grain, yes, sir, sold it to various distillers in this part of the country.

X Q. 14. You know nothing about the process of manufacture

at the present Old Crow distillery, do you?

A. I do not.

X Q. 15. What did you understand the words Crow, or Old

Crow, to indicate when used in reference to whisky?

A. I understood that there had been manufactured by Mr. Crow a very fine article of whisky, and people liked it, and the name would sell it.

X Q. 16. Crow was not the distiller at the Pepper distillery during the time you ran the Dean House?

A. I can't say positively that he was.

X Q. 17. But it is your best impression that he was?

A. It is my best impression that he was there when I moved

down, but I had seen him then.

X Q. 18. What did you understand by the words Old Crow, or Crow, used with reference to whisky made after the death of James Crow?

A. I understood that it was made at the same distillery and by the same process and carried the name on. The name was established there by Crow, and carried on after by Pepper, the same whisky, the same process.

X Q. 19. You don't know what that process was?

A. I don't know.

X Q. 20. Do you know whether it differed from the proc-

ess used by other distillers?

A. Oh, no, my father was a distiller, but I don't know anything about it.

X Q. 21. Have you traveled much, Mr. Dean?

A. I have not, sir.

X Q. 22. You are not familiar with the names or brands of whisky in other parts of the country, are you?

A. No, all the whisky that I handled was made in this part of

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the country.

X Q. 23. You don't wish to be understood as testifying to any other whisky than that made in this part of the country?

Λ. When I say I don't understand the process.

X Q. 24. No, the names and brands?

A. No, I once handled some whisky from Boyle county, but

that is this part of the country.

X Q. 25. You- knowledge of whisky brands and names is confined to Woodford county, Kentucky, and adjoining counties?

A. Yes, sir; this section of the country.

X Q. 26. Do you know what kind of water was used in the manufacture of this Crow whisky you speak of?

A. Oh, I am satisfied—no, sir, I never made an analysis of the water; no, sir. I don't know. I was going to say I drank it.

X Q. 27. Was it not a limestone water?

A. I consider it such, that is, it is a limestone country, but I have seen soft water scattered around through it.

X Q. 28. The water used by distilleries throughout this portion of Kentucky, is limestone spring water, as a rule?

A. As a rule, yes, sir.

X Q. 29. And of the same character as the spring at the Pepper distillery?

A. I think so, sir.

X Q. 30. Do you know how the mash was made in the Pepper distillery?

A. I do not, sir.

X Q. 31. Was it not hand-made mash?

A. That is my understanding, that was the old way, but my father mashed by hand. I suppose this Old Crow whisky was made by hand mash, I don't know.

### Redirect examination by Mr. Hopkins:

Q. 1. Do you recollect the building of the present Old Crow distillery by W. A. Gaines & Company on Glenn's Creek? 192

A. Yes, sir. Q. 2. Did that occur before you left the Dean House?

A. While I was at the Dean House.

Q. 3. What did they call the whisky that they produced at the new distillery?

A. Well, now, if they didn't call it Old Crow, that is my memory. W. R. DEAN.

Subscribed and sworn to before me this 5th day of September, 1905. My commission expires Jan'y 13th, 1905.

T. N. LINDSEY,

Notary Public and Special Examiner.

JOHN E. MILES, being duly sworn on the part of the comp-ainant, testified as follows:

### Direct examination by Mr. Hopkins:

Q. 1. Please state your name, age, residence and occupation? A. John E. Miles, 77 years old, and I reside in Frankfort; am

a flour dealer. Q. 2. How long have you resided in Frankfort?

A. Since '74.

Q. 3. Where did you reside prior to that time?

A. In Woodford county, Kentucky.

Q. 4. At what place in Woodford county?

A. Melville, on Glenn's Creek.

Q. 5. How long did you reside there? A. All my life until I move- to Frankfort.

Q. 6. Were you acquainted with the distillery of Oscar Pepper on Glenn's Creek?

A. I was.

Q. 7. Were you acquainted with James Crow in his lifetime?

A. Yes, sir.

This question, and all subsequent questions put to this witness by counsel for complainant relating to matters and things prior to 1867, objected to [my] counsel for respondents in accordance with stipulation after question 4 of Geo. T. Cotton's deposition.

Q. 8. Were you acquainted with James Crow while he was the distiller at that distillery?

A. Yes, sir.

193 Q. 9. By what name was the whisky known that was produced there during his lifetime?

A. "Old Crow."

Q. 10. After Crow's death what was the distillery named?

A. Pepper, I think, kept up the name of Old Crow. Q. 11. You have not been a distiller at any time?

A. No, sir.

Q. 12. What business were you in before you came here?

A. Milling flour, and merchandising, about a mile and a half from the distillery—below it.

Q. 13. Were you still residing at the mill when the present Old

Crow distillery was built by W. A. Gaines & Company?

A. Yes, sir; that was built in the sixties, and we moved here in seventy-four. That was built in sixty-seven or eight.

Cross-examination by Mr. Smith:

X Q. 1. Do you know when James Crow died?

A. Yes, sir. X Q. 2. When was it?

A. It was—I could not state the year positively, but my recollection is it was—it was fifty—it might have been fifty-eight or nine. Somewhere along there.

X Q. 3. When the words "Old Crow" were used with reference to whisky, during the lifetime of James Crow, what did you understand

by these words?

A. That it was Oscar Pepper whisky—whisky made by Oscar Pepper. Once Crow left Pepper and went down a half mile, perhaps, below where he was, to Johnson & Yancey's, and distilled for awhile there, and he died there in a house that was built for him on the Johnson place, and that whisky was not known as Old Crow whisky, although it was made by him, it was Johnson & Yancey's.

X Q. 4. So your understanding of the words "Old Crow" whisky,

so-called, was made at the Oscar Pepper distillery?

A. Yes, sir.

X Q. 5. And, was your understanding the same when Crow died after Crow died?

194 A. Well, I could not state as to that. I am not a dealer in whisky, and had nothing to do with whisky but drink some little, and what whisky I drank was usually that whisky, and I could not state as to that.

X Q. 6. Do you know what formula Crow used in making his

whisky?

A. I could not state that.

X Q. 7. Do you know whether he had any particular formula?

A. I do not. There was no brand in those days. My recollection is that it was—I am certain in my mind that he had a mark someway of the dates when it was made.

X Q. 8. When you say "he," whom do you mean? A. Crow or Pepper, either of them or both.

X Q. 9. You don't know how Oscar Pepper made whisky after Crow died?

A. No. sir.

X Q. 10. You don't know what process is used now in the manufacture of Crow whisky in the distillery of W. A. Gaines & Co.?

A. I do not.

X Q. 11. How near did you live to the distillery?

A. About a mile and a half.

X Q. 12. That is, to the Oscar Pepper distillery?

A. Yes, sir.

X Q. 13. Do you know what kind of water they use there?

A. Spring water from the hill. It runs in a spout from the spring on the hillside down to the distillery, overhead.

X Q. 14. A limestone spring?

A. Yes, sir.

X Q. 15. That is the same character of water that is used by distilleries to this day?

A. Yes, sir; all limestone spring water—that's my understanding. that the water is all limestone through here.

X Q. 16. All that same character?

A. Yes, sir.

X Q. 17. As far as you know that spring isn't any different from any other springs used by distilleries in this part of the country?

A. No, sir, the same water.

X Q. 18. Where did Crow get the grain that he used?

A. Neighborhood grain. Pepper had considerable land there, and he raised most of the grain himself. 195

X Q. 19. He made corn whisky?

A. Yes, sir. X Q. 20. No rve whisky?

A. I don't think he did. I think the whisky was corn whisky.

X Q. 21. Where do the distillers in this part of the country now get their grain?

A. The west.

X Q. 22. Altogether?

-. I think so. They do around here.

X Q. 23. That is true of W. A. Gaines & Co?

A. Yes, sir.

X Q. 24. They get their grain for Old Crow whisky from the west? A. Yes, sir; James R. Shaw, Jetts, brought some grain—furnished them some grain.

X Q. 25. When you speak of Shaw you are referring to James R.

Shaw?

A. Yes, sir.

X Q. 26. To what distillery?

A. The present Old Crow. He might have furnished some to the Hermitage and for Taylor's.

X Q. 27. But the great percentage comes from the west?

A. Yes, sir—yes, sir, the great bulk of it.

X Q. 28. Do you know how Crow mashed the grain?

A. He had mash-tubs. X Q. 29. Hand mashed?

A. Mash tubs sitting around on the floor about the size that would hold four bushels.

X Q. 30. It was mashed by hand with a stick? A. Yes, sir; a stick with a prong through it.

X Q. 31. Do you know how they mash the grain at the Old Crow distillery now?

A. I do not.

X Q. 32. Do you know J. P. Williams?

A. Living here?

X Q. 33. Yes, sir.

A. Yes, sir.

X Q. 34. What is his business?

A. He is employed by W. A. Gaines & Co.

X Q. 35. In what capacity?

A. Well, I don't know. He is about the office usually, a clerk or something, I don't know what. I have known them all—all around there.

196 X Q. 36. Do you know whether or not he carries a rectifier's license?

A. I do not.

X Q. 37. Do you know of more than one J. P. Williams in the employ of W. A. Gaines & Co.?

A. No, sir, he is the only one.

X Q. 38. Do you know whether W. A. Gaines & Co. "dump" any whisky?

A. What do you mean?

X Q. 39. Rectify it?

A. I do not. They bottle whisky, that is, they have a bottling bouse. I think their whisky is a pure whisky, and I don't think they rectify it—I don't know.

X Q. 40. You mean it is straight whisky?

A. Yes, sir; it is. And the Hermitage, they have got a house here in town. I don't know as I was ever in the house.

X Q. 41. What is the character of the whisky produced by the distillers throughout this part of the country?

A. It stands highest.

X Q. 42. Do you know about how many distillers there are in this locality?

A. Yes, sir, I know them all. You wish me to name them?

X Q. 43. Yes, sir—and give the counties?

A. Well, there is the O. F. C., in Franklin; the Carlisle—that's changed now to the Kentucky River; the Hermitage, Cochran's, Cedar Run, Blakemore; that is all in Franklin county.

X Q. 44. Now, in Woodford county?

A. The Old Crow, Woodford, E. H. Taylor, Jr., Sons, or Taylor & Sons, Labrot & Graham, that is all the distilleries—now, there are distilleries up in Woodford, the Clear Creek, but I don't remember. The Midway, Greenbaum's, Baker's, at the forks of the Elk Horn, in Franklin county.

X Q. 45. Are there many in Anderson county?

A. I am not acquainted with the distilleries in Anderson county. I only know of the Old McBrayer, the Tyrone, I can't name the others.

X Q. 46. These are all well known distilleries?

A. Yes, sir.

197 X Q. 47. And stand high?

A. Yes, sir. I have traveled all over the world and I have always called for Kentucky whisky—these brands stand the highest. I have traveled in Europe, West and East, and these brands of whisky

stand the highest of any brands of whisky in the world that I know of today.

X Q. 48. The virtues of these whiskies you attribute principally to the water—these waters?

A. Yes, sir; that is they have claimed always that it was the water.

X Q. 49. Is the water in the springs on Glenn's Creek any different from the other limestone water around here?

A. No.

X Q. 50. There are no natural advantages on Glenn's Creek more than there is in other parts of this region in Kentucky?

A. I think not.

X Q. 51. You never lived in St. Louis? A. Never was there but once in my life.

X Q. 52. You are not familiar with the names or brands of whiskies in St. Louis?

A. No. sir.

X Q. 53. Or any other parts of the country except in Kentucky?

A. I could state something, that in traveling I have often found whisky put off to me for Old Crow or Taylor, and I found it was not the genuine stuff.

Mr. Smith: I move to strike that out as not responsive to the question.

(Question repeated.) Witness: No. sir.

X Q. 54. Whom have you talked to about this testimony before today?

A. Talked to about it?

X Q. 55. Yes, sir.

A. I don't know anyone except Mr. Clayton.

X Q. 56. When did you talk to him? A. It has been about a year.

X Q. 57. Did you make a statement to him?

A. I did.

X Q. 58. In writing?

A. I did.

X Q. 59. Can you give the month when he was here?

A. I could not. I have no record to tell from it. I guess it was somewhere in the neighborhood of a year.

198 Redirect examination by Mr. Hopkins:

Q. 1. Mr. Miles, have you ever known of any Old Crow whisky, with the exception of what parties may have attempted to pass off on you, counterfeiting or spurious, except the Old Crow whisky made on Glenn's Creek, in Woodford county, Kentucky?

Mr. Smith: I object to the question on the ground that it is leading, and for the further ground that it is direct examination.

A. Well, how I can tell, tell it was not the whisky it was put up in bottles, and, of course, it was put up in different bottles, and I,

being acquainted with the bottles, could tell it was not the genuine

articles from the bottles.

Q. 2. By my last question I intended to ask you merely whether you had ever heard of any Old Crow whisky other than Old Crow whisky produced on Glenn's Creek, in Woodford county, Kentucky?

Mr. Smith: I object to the question as leading and as direct examination.

A. It's the only Old Crow whisky made, and it's when I go away from home I come across the other.

JOHN E. MILES.

Subscribed and sworn to before me this 6th day of September, 1905. My commission expires Jan'y 13th, 1906.

T. N. LINDSEY,

Notary Public and Special Examiner.

September 6th, 1905.—Counsel present as before, and the following proceedings were had.

WILLIAM W. DARNELL, being duly sworn on the part of the complainant, testified as follows:

Direct examination by Mr. Hopkins:

Q. 1. Please state your name, age, residence and occupation?

A. William W. Darnell; I was 75 the 19th day of last March; I am now living in Frankfort, retired.

199 Q. 2. What was your occupation when you were in active

A. I ran a farm up there; I had a store and I ran a mill.

Q. 3. Where was your farm?

A. My farm was up here on the Kentucky river, about seven or eight miles from Versailles.

Q. 4. How long did you live there?

A. I have been living there ever since two years after the war. I was born and raised up there about three miles from the Oscar Pepper distillery. I went to Missouri during the war, with the exception of the time I was in Missouri, I lived in Woodford county all my life until I came to live in Frankfort.

Q. 5. Did you know James Crow in his lifetime?

A. Yes, sir.

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Q. 6. What was his occupation when you knew him?

Mr. Smith: The last two questions and all subsequent questions put to this witness by counsel for complainant relating to matters and things prior to 1867 are objected to by counsel for respondents in accordance with stipulation after question four of George T. Cotton's deposition.

A. He was a distiller.

Q. 7. At what distillery?

A. Old Oscar Pepper distillery on Glenn's Creek, just a little bit above me there.

Q. 8. Where was your mill property?

A. In Woodford county.

Q. 9. Where was it with reference to Glenn's Creek, the mill?
A. It was on Glenn's Creek, about eight miles from Versailles,

Q. 10. What was the whisky called that was made in the Oscar Pepper distillery?

A. It had the name "Old Crow" whisky. It was made at the Osear

Pepper distillery there and it was called Old Crow.

Q. 11. Do you recollect when James Crow died?

A. I can't recollect the year now. He moved down a year or two before he died and ran a distillery for Yancey & Johnson,
 but he moved back up there on the old Oscar Pepper place, where he died.

Q. 12. Do you recollect whether Oscar Pepper continued to run

the distillery after James Crow's death?

A. Yes, sir; he had a negro man that was under him while he was

down at Johnson & Yancey's.

Q. 13. Do you recollect a sale that occurred at Oscar Pepper's place sometime after the death of Oscar Pepper?

Mr. Smith: I object to that question as leading.

A. Yes, sir.

Q. 14. Did you attend that sale?

A. I did.

Q. 15. Was any whisky sold at that sale?

A. My recollection was that the whisky was sold; they brought out some whisky to treat the men with it, very fine whisky, old, mild and yery pleasant, and everything.

Q. 16. What was that whisky?

A. Old Crow Whisky they called it. Q. 17. How much was there of it?

A. I disremember, somewhere from eleven to twelve barrels of the old whisky, in the cellar there.

Q. 18. Do you know how old that whisky was?

A. It was about eleven years old. Old Oscar Pepper had kept it in his cellar for his own use.

Q. 19. Have you ever been employed in a distillery?

A. Well, after the war I came back and old Brother Yansey was running an old distillery down here, and Johnson was sick in bed, and Yancey got me to run it.

Q. 20. How long were you there?

A. Old man Yansey got me to run it for him one month, and then gave it to me to run one month for myself.

## Cross-examination by Mr. Smith:

X Q. 1. How did this whisky that you say was called Old Crow, come to receive that name?

A. Crow got the name of making a good whisky for people around there, and it was called Crow whisky, that's all I know.

X Q. 2. It meant then whisky made by James Crow? 201

A. There were other distilleries up there, and they called it Old Crow whisky because it was better, and it was made at the Oscar Pepper distillery.

X Q. 3. Do you know how James Crow made his whisky?

A. Yes, sir.

X Q. 4. Go ahead?

A. He made his own malt, and in mashing the whisky in the tubs they let it set off and then they run the singlings in to other tubs, then the next day they took the doublings and made whisky out of it.

X Q. 5. How many mash tubs did he have?

A. I don't know, he had a set for one day's setting, and then another set for the next day.

X Q. 6. Was the mashing done entirely by hand?

A. By hand, yes, sir.

X Q. 7. How much grain did he use for a tub?

A. I don't recollect. I know when I ran my distillery down there it was about twenty-five bushels, about a barrel and a half to two barrels a day.

X Q. 8. You refer to the amount of whisky made?

A. Yes, sir.

X Q. 9. What kind of grain did he use?

A. Well, he used malt—rye, malt and corn. X Q. 10. Do you know how he made his malt?

A. Sometimes he made his malt on the place over the boiler, sprouted it there.

X Q. 11. Do you know what kind of yeast he used?

A. He made his own yeast. I don't know what it was. Malt X Q. 12. Was it any different from the yeast used by other dis-

tilleries at that time?

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A. Well, at that time they were running, they all run it on the same principle.

X Q. 13. Where did Crow get his grain?

A. Well, he got it there at home, what Oscar Pepper didn't have he would buy. I don't know as he bought much. 202

X Q. 14. It all came from that neighborhood?

A. Yes, sir.
X Q. 15. Do you recall when Crow died?

A. I don't recollect.

X Q. 16. Well, as near as you can recollect?

A. Well, near the close of the war or a little after. I don't know. X Q. 17. Was there any whisky made by Oscar Pepper and called

Old Crow, after the death of James Crow?

A. Well, it was called Old Crow; it was and all the whisky that was made there at the Old Oscar Pepper distillery was called Old

X Q. 18. That was true after James Crow's death?

A. It was called Old Crow as I recollect it.

X Q. 19. I understood you to state a little while ago that the

words Old Crow meant whisky made by James Crow?

A. All the whisky made there at the distillery was called Crow whisky because Old Crow learned this nigger man of Oscar Pepper how to still; that's how it came.

X Q. 20. What negro man do you refer to?

A. He belonged to Oscar Pepper. I have forgotten his name. I knew him well, too. I believe his name was Albert.

X Q. 21. Do you know by what formula that negro man made

whisky, of your own knowledge?

A. It was run just the same as Old Crow run it, put in tubs and dumped it the next day, they all ran that way then

X Q. 22. All distillers in this part of the country at that time

made whisky in the same way?

A. Yes, sir, the old-fashioned way.

X Q. 23. How long did Oscar Pepper continue to make whisky that was called Old Crow?

A. He made it ever since I was a boy.

X Q. 24. What was the last year that you can recall in which Oscar Pepper made that whisky?

A. I can't recall that, he was making whisky there until he died,

and I don't recollect what time he died.

X Q. 25. As near as you can recall, when did he die?

A. As near as I recall he died about two years after the close of the war. I don't know what time, but he died since the war, because I was in all the Missouri troubles and he died after I was back.

X Q. 26. You have lived in this part of the country most of your

life?

A. Yes, sir, except when I was in Missouri. I was out there because of the war. I went out there before the war.

X Q. 27. You are not familiar with the names of brands of

whisky in other parts of the country?

A. No. sir.

X Q. 28. When you speak of whisky being called Old Crow, you mean to be understood to be speaking of the neighborhood in which you have lived?

A. Well, it was called Old Crow whiskey wherever I went; they would set it out to you. They said it was Old Crow whisky, it was

like any other brand of whisky.

X Q. 29. What sort of water did Crow use in making whisky?

A. Crow had a fine spring there of his own; it was on a little branch that runs into Glenn's Creek. He had a spring there. That country is all well watered up there with fine springs all along.

X Q. 30. It is limestone water, is it not?

A. Yes, sir.

X Q. 31. All this portion of Kentucky is a limestone country?

A. All through here, yes.

X Q. 32. And the springs are limestone springs in this country?

A. All through my country there.

X Q. 33. And the distilleries throughout this portion of Kentucky all use limestone spring water?

A. In my country they do; up in Woodford they all use limestone

water.

X Q. 34. That is true of Franklin county?

A. I have never been over Franklin like I have my own. I knew more about mine that I do here.

X Q. 35. That is true of Anderson county, too, is it not?

A. Well, where you find limestone rock it is generally limestone water.

X Q. 36. And the distilleries locate near limestone springs?

A. It seems that way. In my country it is all limestone.

X Q. 37. You know the Greenbaum and Frazier distilleries in Woodford county?

A. Yes, sir.

X Q. 38. Do you know the process used in making Old Crow whisky today?

A. I do not, sir.

X Q. 39. You know nothing about the method employed at the distillery where that whisky is made by W. A. Gaines & Co. at the present time?

A. No, I don't know.

X Q. 40. There are a great many fine whiskies made in this part

of Kentucky?

A. There used to be, but I don't call it now. I am afraid to take the whisky that they make now. The very best they make is not very good, I don't think.

X Q. 41. Do you know how the whisky made by W. A. Gaines & Co. at their distillery in Woodford county now differs from the

whisky you say Crow made?

A. There ain't none as good as Crow made in my judgment, be-

cause it is not made in the old-fashioned way.

X Q. 42. Do you mean to say the whisky made today which is called Old Crow is not so good as that made by James Crow?

A. I say so, yes. It is not as good to me.

X Q. 43. You attribute the inferiority of the present product called Old Crow, to the different process used in manufacture of the whisky?

A. Well, I would suppose the way it is manufactured is not as good, I don't think any whisky is as good as the Old Crow whisky

unless they make in the old-fashioned way.

X Q. 44. When did you first discuss this case before you gave your

testimony here this morning?

A. I heard nothing of it only through my son. I was sick yesterday; he said they wanted me to come and give my deposition. I thought I gave it once before, but it was the affidavit. I didn't know nothing about it.

X Q. 45. When did you make this affidavit that you speak of?
A. Since I have been here in town. I have been here over two

vears.

205 X Q. 46. Who took your offidavit?

A. I don't recollect. I believe Tim Marshall.

X Q. 47. Did you talk with Mr. Frank Clayton of St. Louis at that time?

A. I knew nothing about it until they called me in here.

X Q. 48. Do you remember whom you talked to at that time? A. No, sir.

X Q. 49. Do you know what yield James Crow got a bushel?

A. I heard him say, but I don't know only what he told me. I know I ran a house on the same principle, and I never got over a gallon and a half or two gallons.

X Q. 50. Are there any advantages for making whisky on Glenn's Creek not possessed by other portions of this region in Kentucky?

A. Well, they claim it is the water that is better there than anywhere else. They used to make good whisky over Lawrenceburg and Tyrone they used to have the old-fashioned way.

X Q. 51. Those places are in Anderson county, are they not?

A. Yes, sir.

X Q. 52. As far as you know the water on Glenn's Creek, that is. the springs, doesn't differ from other limestone springs?

A. The water is purer in Woodford county than in almost any

other county of the state.

X Q. 53. Have you ever compared the water of this spring with

springs used by other distilleries?

A. I have never compared them to see what the difference would be, but these springs on Glenn's Creek, the water is pure, clear and in summer time as cold as any ice-water any man should drink.

X Q. 54. The same is true of other limestone springs is it not? A. I suppose so, if the stream is deep, there is a heap of difference it streams run deep. If the stream is close to the top of the ground it is not cold.

X Q. 55. You never analyzed the water of that spring? A. No, sir.

X Q. 56. Or of any other spring?

A. No, sir.

## WILLIAM W. DARNELL.

Subscribed and sworn to before me this 6th day of Sept., 206

My commission expires Jan'y 13th, 1906.

T. N. LINDSEY, SEAL.

Notary Public and Special Examiner.

United States of America,

State of Kentucky. County of Franklin, 88:

I. T. Noble Lindsey, Notary Public and acting as Special Examiner under the stipulation of the parties hereto, and being a notary public in and for the County of Franklin and State of Kentucky do hereby certify that on the 4th day of September, 1905, at the Law Offices of

D. W. Lindsey, in the City of Frankfort, in the County of Franklin. and in the State of Kentucky, I was attended by James L. Hopkins, counsel for W. A. Gaines & Company, complainant and Luther Ely Smith, counsel Max Kahn, administrator with the will annexed of the estate of Abraham M. Hellman, deceased, and Moritz Hellman, respondents, and by the witnesses John A. Steele, George T. Cotton, John C. Hawkins, William J. Gorman, Edmund H. Taylor, Jr., William H. Mastin, William Boyette, Richard H. Whittington, William R. Dean, John E. Miles and William W. Darnell, and the said witnesses who were of sound mind and lawful age, having been by me first carefully examined and cautioned and sworn to testify the truth the whole truth and nothing but the truth in the within entitled cause, gave their testimony which by consent of counsel for the respective parties was taken down directly upon a typewriter by Thomas W. Corley, a stenographer appointed by me for that purpose, in the presence of the witnesses and from their statements; except as to the testimony of John F. Miles, whose testimony was taken in stenographic notes by the said Thomas W. Corley, and by him afterwards reduced to writing upon the typewriter; the testimony of each of the said witnesses being afterwards subscribed by the respective witnesses before me, each of said witnesses swearing to his said completed testimony before me upon the completion of his testimony as attested by my signature and seal as to each of said several depositions.

207 And I do further certify that I am not of counsel nor attorney or solicitor for either of the parties hereinbefore named nor in any way interested in the event of the cause named herein.

In testimony whereof I have hereunto set my hand and affixed my notarial seal at Frankfort, Franklin County, Kentucky, this 6th day of September, A. D., 1905.

My Notarial commission expires January 13, 1906.

[SEAL.] T. N. LINDSEY,
Notary Public and Special Examiner.

And afterwards, to-wit: on November 18th, 1905, the following depositions on behalf of Complainant were filed, in said cause which said depositions are in words and figures as follows, to-wit:

In the Circuit Court of the United States, Eastern Division of the Eastern Judicial District of Missouri.

No. 5096. In Equity.

W. A. Gaines & Company, Complainant,

VS.

Max Kahn, Administrator with the Will Annexed of Abraham M. Hellman, Deceased, and Moritz Hellman, Defendants.

Depositions of witnesses on behalf of Complainant taken before Frederick C. Goodwin, Notary Public, at the offices of Offield, Towle & Linthicum, Number 1228 Monadnock Block, Chicago, Illinois, on Friday, October 13, 1905, at the hour of ten o'clock before noon under the provisions of the stipulation as to the talking of testimony heretofore entered into between the parties and now on file in this cause; and in further pursuance to the Notice served upon Counsel for Respondents on the 23rd day of September, 1905, which said Notice is thereto attached:

## Appearances:

James L. Hopkins, Esq., for complainant, Warwick M. Hough, Esq., for defendants. Witnesses: Charles H. Hermann, William Mida.

208 Charles H. Hermann, a witness produced on behalf of complainant, being duly sworn, testifies as follows:

Direct examination by Mr. Hopkins:

Q. 1. State your name, age, residence and your occupation.

A. Charles H. Hermann, Secretary Chapin & Gore; aged 35; No. 1825 Barry Avenue, Chicago.

Q. 2. How long have you been connected with the house of Chapin

& Gore?

A. About fifteen years.

Q. 3. In what business is Chapin & Gore engaged?

A. Wholesale dealers in wines, liquors and cigars, importers and distillers.

Q. 4. Are Chapin & Gore distillers of Kentucky Bourbon whiskev?

A. Both Kentucky Bourbon and Rye.

Q. 5. In your connection with the business of Chapin & Gore, have you become acquainted with the wholesale liquor trade of the United States, and if so, through what territory?

A. From time to time I have been in touch with it from New York to California, and as far south as New Orleans. We do business in those places.

Q. 5. Do you sell "Old Crow" whisky in those places?

A. We sell our own goods and also other prominent brands; principally our goods.

Q. 7. What brands do Chapin & Gore sell?

A. They sell "Old Crow," "Hermitage" and Chapin & Gore's "Best in the world," and others.

Q. 8. Is the house of Chapin & Gore incorporated? A. Yes.

Q. 9. Under the laws of the State of Illinois?

A. Yes.

Q. 10. Does Chapin & Gore own a whisky trade-mark?

A. Yes, it does.

Q. 11. Are you familiar with the leading brands of American whiskey?

A. Quite familiar.

Q. 12. What does the brand "Old Crow," as applied to 209 whisky signify?

Mr. Hough: Object to the form of the question unless you mean to him.

Counsel:

\_\_, 13. Please answer the question.

A. I should take it that it signifies a certain grade of whisky and a trade-mark. We can sell "Old Crow" whisky without showing samples of it by merely saying it is "Old Crow," because "Old Crow" means a certain grade of whisky.

Q. 14. Whose whisky does it indicate?

Objected to as incompetent and irrelevant.

A. W. A. Gaines & Co., of Frankfort, Ky.

Q. 15. Have you ever known or heard of any "Old Crow" whisky which was not the "Old Crow" whisky of W. A. Gaines & Co.?

Objected to as immaterial and incompetent.

A. I never heard of any whisky named "Old Crow" unless it was the whisky of W. A. Gaines & Co., of Frankfort, Kentucky.

Q. 16. What would be the effect of selling any other whisky than

that of W. A. Gaines & Co. under the brand, "Old Crow?"

A. I should think it would be a great loss to W. A. Gaines & Com-

pany.

Q. 17. If it was a better whisky than that of W. A. Gaines & Company, what would be the effect?

I want to make the same objection; objected to as incompetent, irrelevant and immaterial.

A. I repeat that I think it would be a great loss to Gaines & Company, also to all wholesalers who handle the genuine article, and I would consider it a great swindle upon the consuming public.

Q. 18. To what extent, to your knowledge, has the "Old Crow" of W. A. Gaines & Company been advertised in the city of Chicago?

Objected to as incompetent, irrelevant and immaterial.

A. It has been quite extensively advertised; in the daily papers; on sign-boards; on saloons; in street cars, and through the 210 medium of what we call "missionary" work, there has been a great deal of it done by W. A. Gaines & Company by direct salesmen, and also houses who have connections with them like our own.

Q. 19. What is the connection between Chapin & Gore and W. A.

Gaines & Company?

A. We are practically distributers for them for this market.

Q. 20. How long will that relationship continue, and how long has it been in force?

A. That renews itself from time to time according to our living up to certain obligations. It has been in force now for several years.

Counsel for Plaintiff: I want to introduce a photograph which I have made from copy of original, which you will find framed down in Mr. Hermann's office

(Photograph introduced.)

Q. 21. Mr. Hermann, I have here a photographic reproduction of page 9 of the "Chicago Times" of Saturday, December 15, 1877. Are you familiar with the original copy of this issue of the "Chicago Times," of which this is a reproduction?

A. Yes, I am.

Q. 22. Where is that copy?

A. We own it now.

Q. 23. And how have you preserved it?

A. We have had it framed under glass ever since the day of publication.

Counsel for Complainant offers the photograph referred to in evidence with practical reference to the item of "Old Crow Bourbon of 1872," and asks the same be marked "Complainant's Exhibit Chicago Times, 1877."

Counsel for Defendants: For the present I shall have to object to this as secondary evidence in the absence of the presentation here of

the original.

Q. 24. How is that original mounted in your place of business, Mr. Hermann?

A. Framed, under glass.

Q. 25. How is the frame fastened to the wall?

A. It is screwed on to the wall.

Q. 26. Is that photograph a correct photographic reproduction of page 9 of the "Chicago Times" of Saturday, December 15, 1877?

211 Objected to as incompetent.

A. Perfect.

Cross-examination by Mr. Hough:

X Q. 1. Who is the president of Chapin & Gore?

A. James S. Carter.

X Q. 2. Who are the other officers of the company?

A. E. L. Hagenbuck is treasurer.

X Q. 3. Are any of the officers or stockholders of W. A. Gaines & Company, or Paris, Allen & Company interested in this company?
A. Not one cent in any way. The only interest they have with

us is that we buy their goods.

X Q. 4. From whom do you buy, Paris, Allen & Company or W. A. Gaines & Company?

A. From both.

X Q. 5. Do you buy in bulk or in barrels?

A. We buy in bulk, barrels and in cases.
X Q. 6. Do you bottle it yourselves?

A. We do not bottle any "Old Crow."

X Q. 7. When did you stop bottling "Old Crow?"

A. We never bottled it. We never put up a bottle of "Old Crow" with an "Old Crow" label in our existence. We always bought "Old Crow" bottled by W. A. Gaines & Company.

X Q. 8. When did you first buy "Old Crow," bottled by W. A. Gaines & Company?

A. We have been handling it in that way for years.

X Q. 9. When did you first buy it that way?

A. I could not give you the exact date of that transaction.

X Q. 10. Now, you say you have never bottled any whisky which you bought from Gaines & Company in bulk as "Old Crow" and sold it under the label "Old Crow," but you have bottled that whiskey, have you not?

A. We put it up in bottles if customers wanted it that way. X Q. 11. When you put it in bottles, what would you call it?

A. We do not bottle "Old Crow" at ail.

212 X Q. 12. What label would you put on it?
A. We would not put any label on it at all.

X Q. 13. What would you sell it as? A. We would sell it as "Old Crow."

X Q. 14. Do you known how much of the bulk "Old Crow" you have transferred to bottles?

A. Very little. Most of it is sold in jugs or barrels.

X Q. 15. Have you not bottled large quantities of "Old Crow" and sold it under other trade names?

Objected to as irrelevant, imcompetent and frivolous.

A. No. We might have blended some with neutral spirits and bottled them under our own name.

X Q. 16. What would that name be?

A. We have a brand called "Chapin & Gore's Best in the World."

X Q. 17. Is the reputation of Chapin & Gore's "Best in the World" higher or lower than that of "Old Crow?"

A. The reputation of "The Best in the World" is first-class. However, there is very little sold.

X Q. 18. Is it higher or lower than that of the "Old Crow" of W. A. Gaines & Company?

A. I cannot answer that. I cannot say.

X Q. 19. Does it stand higher in the public estimation or lower?

A. "Old Crow" is perhaps better known.

X Q. 20. It cannot really stand as high then.

A. Well, anybody who buys whiskies from us knows that they are straight and that our whisky is as represented.

X Q. 21. That is not the question. Does it stand higher or lower?

A. That is the only way I know how to answer it. X Q. 22. At what price do you sell your whisky?

A. We sell it at different prices, according to age.

X Q. 23. How does this price compare with that for "Old Crow?" A. Sometimes higher and sometimes lower.

X Q. 24. Sometimes higher?

A. Yes.

X Q. 25. And sometimes lower?

A. Yes. It depends on its age.

213 X Q. 26. Are you sure that Chapin & Gore have never bottled "Old Crow" whisky and sold it?

A. I am positive of that.

X Q. 27. Do you recollect, in 1881, when Gage was Secretary, the suit which there was on account of your bottling "Old Crow" whisky?

A. Yes, very well.

X Q. 23. Did you not bottle that? A. We bottled "Hermitage" then.

X Q. 23. Was it not "Old Crow" that was bottled at that time?

No; that was not bottled; it was repacked.

X Q. —. Repacked?

A. It was repacked in bottles. The Government was very precise in that. It should not be called "bottling" it; it should be called "repacking."

X Q. 31. That was a distinction without a difference, was it not?

A. It was a distinction with a difference. The packages were broken, and on that account it was repacked, and they allowed us to repack them, but we could not repack but one barrel at a time, and each barrel had to contain what the old one had in it, and had to bear the serial number of the barrel, and had to be repacked as originally contained in that barrel, with the same proof and printing.

X Q. 32. Well, the effect of the whole transaction was that you

did bottle "Old Crow" whisky, didn't you?

A. No; we repacked it in glass bottles, not Old Crow, but Hermitage.

X Q. 33. You put it into glass bottles? A. We repacked it into glass bottles.

X Q. 34. And the bottles were just as any other bottles used in your business?

A. Yes.

X Q. 35. Since that time, you say that the only "Old Crow" which you have bought from Gaines & Company in bulk, you have sold in bulk, unless you sold it under a trade name with both of your names on it?

A. Yes.

X Q. 36. Has the most of it been sold in bulk in that way? A. Yes.

X Q. 37. Who is the buyer for Chapin & Gore?

A. I am.

214 X Q. 38. How long have you been the buyer? A. I don't know just how long—about ten years.

X Q. 39. Have you been in the habit of buying "Old Crow" whisky from Gaines & Company without referring to samples?

A. Yes; we bought entirely on trade-mark.

X Q. 40. Then you do not know whether there has been, in late years, a difference in the grade or not?

A. Yes; we watch that continually, X Q. 41. How do you watch it?

A. By examination; tasting, smell, etc.

X Q. 42. Is that the only examination?

A. We sometimes have had chemists analyze it. I remember having one analyze it.

X Q. 43. What chemist have you had analyze it?

A. I forget his name at present.

X Q. 44. How long has it been since you had it analyzed by a chemist.

A. We only had it analyzed once to my knowledge.

X Q. 45. When was that. A. Three or four years ago.

X Q. 46. What did you discover?

Objected to as incompetent, irrelevant and secondary.

A. It was satisfactory to us at the time.

X Q. 47. Do you recollect what is disclosed as to fusel oil?

A. No.

X Q. 48. Then, of course, you have made no comparison of analyses of "Old Crow" bought by you in years?

A. We have only had it analyzed once to my knowledge in late years, and we consider ourselves competent to judge of good whisky.

X Q. 49. How do you judge.

A. By taste and smell.

X Q. 50. By taste and smell alone?

A. By taste and smell. X Q. 51. What else?

A. It would be difficult for me to explain to you, entirely. We are satisfied with our method of examination.

215 X Q. 52. You mean that you do not want to tell how

that examination is made.

A. We can tell by taste, by smell, and the general run of the whisky. We are satisfied that when the whisky comes from Gaines & Company marked "Old Crow" that it is all right. If whisky is made from certain proportions of grain and under a certain formula, there is no reason why it should differ.

X Q. 53. Did you ever buy or receive any musty whisky from

Gaines & Company.

A. Not that I can recollect. It happens once in a while that a barrel tastes musty after wood, if it is too old.

X Q. 54. So that you have never noticed any musty "Old Crow"?

A. Not that I can remember.

X Q. 55. Don't you think the percentage of fusel oil which is in the whisky has a great deal to do with the whisky?

A. I believe it has.

X Q. 56. You do know that the percentage of fusel oil, after the whisky has been in a charred barrel for some time, will not only materially diminish, but will give the whisky a better flavor?

A. Age gives flavor to whisky, and also reduces the quantity

to fusel oil by evaporation.

X Q. 57. But age alone will not give flavor to whisky?

A. Yes; whisky mellows with age.

X Q. 58. If distilled whisky is put into tanks would it gain flavor?

A. It would not improve in a hundred years.

X Q. 59. If it is put into charred barrels and contains no fusel oil, would it improve?

A. No.

X Q. 60. What does improve it, then?

A. Principally age, under certain conditions. It is common practice to store it in barrels, and I never heard of any one who was foolish enough to store it in tanks.

X Q. 61. Do you know that there is a great deal of whisky made

that is not put into charred barrels?

A. I have never heard of any first-class. The only kind of whisky that it put into other barrels than charred barrels is that which is occasionally put into spirit barrels.

X Q. 62. You are not well acquainted with English and

216 Irish whiskies then?

A. I know that they are a different type from ours.

X Q. 63. Do you know that they are not put into charred barrels?

A. No: I know very little about them.

X Q. 64. The greatest percentage of the Scotch and Irish whiskies are blended spirits. Don't you know that the term "whisky" was first used to mean blended spirits?

A. No, I never knew that.

X Q. 65. So you didn't know what the term meant one hundred years ago?

A. I think that is too far back for me to look into.

X Q. 66. Did you ever buy any tank "Old Crow" whisky?

A. I never did.

X Q. 67. Did you ever know of any tank "Old Crow" whisky? A. I have only heard of one kind of "Old Crow" whisky, and that is the whisky made by Gaines & Company, of Frankfort, Kentucky.

X Q. 68. You have never heard of any tank "Old Crow" whisky

sold by Gaines & Company?

A. I never did.

X Q. 69. What would the term "tank 'Old Crow' whisky" convey to your mind?

A. I know of nothing of the kind.

X Q. 70. Did you not take "Old Crow" whisky and blend it

with other whisky and bottle it?

A. That would mean compound or rectified. The distillers at the present time are under government supervision and they are very strict about that. It must be marked what it is,

X Q. 71. But they cannot ship it out in barrels?

A. I am not clear on that point. The government would not allow it if it was under their supervision and not tax paid.

X Q. 72. You are not familiar with the law on that point?

A. No.

X Q. 73. But if "Old Crow" whisky called "tank whisky" was sent out in barrels?

A. That would indicate that it had been rectified.

X Q. 74. If it was not stamped "rectified" would you be able to tell it?

A. No; I would have to taste it before I would say that it was rectified.

X Q. 75. It might be put into the tank from the bottle, might it not?

A. If it was tax paid and dumped into tanks, it would have to be stamped as such.

X Q. 76. Not necessarily.

A. I am talking about whisky rectification in law. X Q. 77. Are you familiar with the law on the subject?

A. I have been in the whisky business long enough to have some knowledge of it. It may not be all there is on the subject, but it is all that has been necessary.

X Q. 78. Then tank whisky is an unusual occurrence?

A. Yes, unless it is dumped for blending purposes. However, there is a possibility that a firm might own a lot of whisky and dump it into tanks so as to stop evaporation, and rebarrel it under the single stamp, and it never be touched.

X Q. 79. And be unblended?

A. Yes.

X Q. 80. But as you have never received any tank whisky, you have not compared it.

A. We have never bought any.

X Q. 81. You say you have never heard of it?

A. I may have, I don't recollect at the present time.

X Q. 82. Have any of the salesmen of Paris, Allen & Company asked you to buy any?

A. Not to my knowledge. Not that I can remember.

X Q. 83. If they had, you would remember it, would you not?
A. I believe so. I am liable to forget some things in the course of a great deal of conversation; but I don't recall any such conversation.

X Q. 84. Then your method of determining that "Old Crow" is "straight goods" is done by the occasional comparison; by eye and smell?

A. We rely on Trade-Mark and brand. We have never had any complaints from customers that it was not always the same.

X Q. 85. But if it contained different amounts of fusel oil, you would not regard them as being of the same grade?

A. Yes; as different ages contain different amounts of fusel oil. There is no whiskey that does not contain more or less fusel oil.

X Q. 86. Different percentages of fusel oil would indicate different grades, would it?

A. Different ages possibly.

X Q. 87. Isn't that also different grades?

A. Yes, you can put it that way if you want.

X Q. 88. Now when you used the expression on examination-in-

chief "genuine 'Old Crow,' " you meant nothing more than a whiskey distilled by Gaines & Company at Frankfort, Ky., didn't you?

A. I meant a whiskey distilled by Gaines & Company. They have

another place.

X Q. 89. You stated on examination-in-chief that if any other whiskey than the whiskey distilled by Gaines & Company should be sold under the name "Old Crow" it would represent a distinct loss to the person who bought?

A. It certainly would.

X Q. 90. Would that not depend upon whether the whiskey that

was sold was better or worse than "Old Crow?"

A. No. The brand of "Old Crow" has a value so well known that every dealer concedes it. It commands a high price on account of its reputation and its good quality. Yet there might be whiskies made in Kentucky that are made just as well that would sell for less, possibly.

X Q. 91. You do not understand my question. How can a man be hurt if he gets something better than what he expected; gets some-

thing better than he stipulated when he asked for it?

A. I believe every man is hurt if he gets something different from what he asks for.

X Q. 92. If the article received is better?

A. He is the judge of that.

X Q. 93. How would he be hurt if he gets better than he pays for?
 A. I don't believe he would have an arm or leg cut off, but if he doesn't get what he asks for, he considers himself damaged.

219 X Q. 94. But would be be hurt?

A. If you go into a store and ask for a Dunlap hat, and you get a different make of hat, you would be hurt, for you would have paid for a Dunlap hat and gotten some other make. It might be as good a hat, but in the opinion of the purchaser, the Dunlap is the best hat.

X Q. 95. That is not the question I am asking. If the article delivered is better then, in the opinion of the purchaser, he would not

be hurt, would be?

A. He still would be hurt, to my thinking, for he did not get what he called for.

X Q. 96. Damaged financially?

A. If I asked for "Old Crow" whiskey and got something else, I would be hurt; I would feel as though I had been swindled, even if the article I received was better.

X Q. 97. Suppose you intended to buy a \$100 horse, would you feel you had been damaged because you got a \$1,000 horse instead?

A. I might want the \$100 horse for a certain purpose for which the \$1,000 one would be entirely unsuited.

X Q. 98. But you could sell it for \$1,000. You surely would not object to getting \$1,000 for something which only cost you \$100?

A. As an investment it would not hurt me.

X Q. 99. Would you feel damaged?

A. I cannot answer that question. It is giving me something that I have no use for, and I have gotten something different from what I

bought. I believe any man is damaged when he buys one thing and gets another-without reference to better or worse.

X Q. 100. You can answer "yes" or "no." Is he damaged?

A. Yes, I think he is damaged.

X Q. 101. What is the extent to which you have blended "Old Crow" whisky and sold it under your own trade name?

A. That would be hard to say; quite a number of barrels.

X Q. 102. When you said "missionary" work, you mean having a man go around to the saloons and call for their brand, don't vou? 220

A. No. Having a man go around to places and try to sell

the "Old Crow" brand to them.

X. Q. 103. That is what is called "plugging," isn't it?

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X Q. 104. Did you know Blood?

A. Yes.

X Q. 105. Wasn't Blood originally employed by Paris, Allen &

Co. as a "plugger?"

A. No; as a "missionary man"—to sell whisky to hotels, clubs, restaurants and saloons. A whiskey house would be wasting money to employ a man and pay him a big salary for "plugging."

X Q. 106. The company did not always pay Mr. Blood a large

salary, did they?

A. To my knowledge he has always received a large salary.

X Q. 107. How far back does that go?

A. I believe he first started to work for them eight or ten years

X Q. 108. Was that before the death of Mr. Homan?

A. Yes; before.

X Q. 109. How long before the death of Mr. Homan? A. Three, four or five years. I don't know the exact date.

X Q. 110. So Mr. Blood was not, you say, a "plugger?"
A. I never heard of "plugging" being done in the interest of a brand of whiskey. I never heard of it in the interest of any whiskey. It would not pay.

Signature waived.

WILLIAM MIDA being duly sworn, testifies as follows:

Direct examination by Mr. Hopkins:

Q. 1. Please state your name, age, residence, and your occupation. A. Name, William Mida; age, 66; residence, Chicago; occupation, publisher of trade journals devoted to he wholesale liquor interest.

Q. 2. What is the name of your journal?

A. "Mida's Criterion of the Wholesale Whiskey and Wine Market."

221 Q. 3. Are you also the publisher of the Register of Trade Marks of the Liquor Trade," known as "Mida's Register?"

A. Yes, sir.

Q. 4. How long have you been acquainted with the wholesale

liquor trade of the United States, and in what capacity other than

as publisher of these journals?

A. I have been connected with the wholesale liquor interest for the past thirty-six years. I first acted as representative of Freiberg & Workum of Cincinnati, and located at St. Louis. Have taken charge of their interest in that city, and subsequently Chicago and the Northwest. After eight years of my connection with the firm. I resigned and started a brokerage and commission whiskey business, and as an adjunct to my commission business, started a price current, giving quotations on all kinds of straight whiskies, which I named "Mida's Criterion," of the wholesale whiskey market, and which was accepted as authoritative price current; all prices current of all values of all brands and all ages. Have subsequently discontinued the "Price Current," which was used in connection with "Mida's Criterion & Trade Journal," and devoted my entire attention to the publication of the above journal. Sixteen years ago I started "Mida's Trade-Mark Register," which comprised all the known brands used by the wholesale liquor interest; in which branch of business I still continue in connection with my trade journal publication. Now you have got my history.

Q. 5. About when was it that you represented Freiberg & Workum

in the City of St. Louis?

A. Thirty-six years ago,

- Q. 6. Were you acquainted with the firm of 1, & L. M. Hellman? A. Yes, sir.
- Q. 7. Were you acquainted with the late Abraham Hellman?

A. Yes, sir.

Q. 8. When you began to represent Freiberg & Workum in the city of St. Louis, please state what their leading brands were.
 A. Their leading brands were J. A. Bowen, Snyder Sour Mash, Lynchburg Rye and Highland Rye.

Q. 9. Do you recollect whether or not the firm of I. & A. M. Hellman were purchasers of Freiberg & Workum's Bowen whiskey?

- A. Yes, sir. I do distinctly recollect of their Leing permanent customers of Freiberg & Workum for the purchase of J. A. Bowen whiskey.
- Q. 10. How long have you been personally acquainted with the brand or Trade-Mark for whiskey, consisting of the words "Old Crow?"

A. Ever since I have been in business; thirty-six years.

Q. 11. During that period of thirty-six years, have you had any personal contact and experience with the wholesale liquor trade of the United States, outside of the cities of St. Louis and Chicago? If so, where?

A. My connection with the wholesale liquor trade was extended all over the United States by reason of my brokerage and commission business, which was not limited to any special state, but the transactions have covered every section of the country.

Q. 12. Have you visited other sections of the country, in connection with your business, either as a broker in whiskies or as a publisher?

A. Yes; in the capacity of a broker my transactions were extended all over the United States, and as a publisher, my paper circulates

in every section of the country.

Q. 13. Please state what the words "Old Crow," as applied to whiskey, signify in the wholesale trade of the United States with which you are acquainted?

Objected to, as incompetent, irrelevant and immaterial.

Counsel: Please answer the question.

A. "Old Crow" is recognized as a brand of one of the finest whiskies made, in the country; and has been so recognized since I have been connected with the whoiesale liquor interest, either in the capacity of a representative, or as a broker.

Q. 14. To whose product are those words understood by the liquor trade of the United States to refer?

Objected to as incompetent.

A. It refers to the product of W. A. Gaines & Company, of Frankfort. Kentucky.

Q. 15. Has this been true during all of the period to which you have referred, covering your experience?

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Q. 16. What would be the effect of offering to the public a whiskey not produced by Gaines & Company, under the Trade-Mark "Old Crow"?

Objected to as incompetent, irrelevant and immaterial.

A. It would be regarded as a substitution or infringement.

Q. 17. During your business experience in the City of St. Louis, did you ever know or hear of the firm of I. &.L. M. Hellman making any claim or right of title to the words "Old Crow" as a brand or Trade-Mark for whiskey?

Objected to as incompetent, irrelevant and immaterial.

A. No; I never heard of "Old Crow" being either offered, sold or claimed by I. & L. M. Hellman to use it in connection with their whiskey as their own brand.

Q. 18. In what year was it that you first engaged in the whiskey

business in St. Louis?

A. In 1869.

Q. 19. At that time was the "Old Crow" whiskey of W. A. Gaines & Company being bought and sold in the St. Louis market?

A. Yes. .

Q. 20. Did the words "Old Crow" at that time have the same significance in the St. Louis whiskey market that, as you have testified, they now have in the liquor trade of the United States?

Objected to as incompetent, irrelevant and immaterial,

Q. 21. Is the Trade-Mark Register, published by you, Mr. Mida, 34 - 311

the same "Mida's Trade-Mark Register" which is referred to by the Court in the case of Heublein vs. Adams?

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A. Yes.

224 Counsel for Complainant offers in evidence the portion of Mida's "Trade-Mark Register" containing the "Old Crow" brand or Trade-Mark, which includes the words "used since 1870,"

Cross-examination by Mr. Hough:

X Q. 1. How many years did you remain in St. Louis, Mr. Mida? A. Six years.

X Q. 2. Did you recollect when that Trade-Mark was filed with you by W. A. Gaines & Company?

A. No, I don't recollect.

X Q. 3. When did you start that "Register"?

A. About sixteen years ago.

X Q. 4. That would be in the year 1889, wouldn't it?

A. Yes, sir, '89.

X Q. 5. Now don't you think you could have been mistaken as to the fact that Trade-Mark was used by Gaines & Company in 1869; might it not have been during the latter part of your stay in St. Louis?

A. The date of production of the Trade-Mark was given to me by those who were connected with the business, and had recollection of when it was first used. And in inserting the date of when it was first commenced being used, I guided myself to a large extent by the general knowledge of members of the trade.

X Q. 6. The Trade-Mark, as you have printed it in your register.

is just as it was furnished you by them, was it not?

A. Yes, sir.

X Q. 7. You never change a Trade-Mark, do you? A. No, sir.

X Q. 8. Well, you inserted the date, didn't you?

A. Yes, sir.

X Q. 9. Was that the date as given by them, or ascertained by you? A. As ascertained by me after having made inquiries among the trade who have used a given brand from a given time.

225 X Q. 10. What you learned on the subject sixteen years ago would be more apt to be accurate than what you might

remember with reference to it now, would it not?

A. I have a very good memory, and I believe I remember things of sixteen years ago probably better than those which occurred a year ago.

X Q. 11. Since both you and they state that they commenced to use it in 1870, you may be mistaken if you now think that you knew

of it in 1869, is it not so?

A. I don't quite catch your question. What was it?

X Q. 12. Since both you and they state that they commenced to use it in 1870, you may be mistaken if you now think that you knew of it in 1869; isn't that so?

A. Yes; that might be. Wait; now I have your question. I will

change what I said, because I did not understand it. The fact that I have been in business since 1869 and knew of the existence of "Old Crow" as a recognized brand, I cannot be mistaken about, and as to the brand being in use as a trade-mark in 1869. I did not understand your question.

X Q. 13. Then you infer, from the fact that the trade-mark, "Old Crow," was in use in 1869, that therefore, it was used by Gaines,

Berry & Company in 1869?

A. It was at that time used by Gaines & Company, in 1869. You called the company "Gaines, Berry & Company"; I don't remember that title.

Mr. Hough: Yes, it was called Gaines, Berry & Company then.

X Q. 14. Then why did they not claim they commenced to use it in 1869?

A. They did not claim anything in the publication of my "Register"—in my book. I have inserted the date approximately, and in order to be on the safe side, I generally insert a date a little later than it has probably been used.

X Q. 15. Then you do change the trade-marks as they are sent

in to you for registration?

A. No; but when trade-marks are sent to me and dates are not given exactly, as a rule—in order to be correct—I state a date probably of shorter use than it may have been actually in use.

X Q. 16. Don't you know that the name "Old Crow" was applied

to whisky a long time before Gaines & Company used it?

A. I didn't know that. It probably may have been used longer. My knowledge of "Old Crow" dates from the time that I have been connected with the business—since 1869.

X Q. 17. How long after you started the "Trade-Mark Register"

was this trade-mark filed with you?

A. I believe it was filed in the first book published by me.

X Q. 18. When was that?

A. It must have been twelve or fourteen years ago. I don't remember how long since the first volume was published.

X Q. 19. You don't know, then, when the name first came to refer to the product of Gaines & Company?

A. No, sir.

X Q. 20. Wasn't there a number of other "price currents" at the

same time you published yours?

A. No, sir; I was the first one to start a price current; the first one to classify whisky by brands and ages, and was the only one to issue prices current for five years before any one started a similar publication.

X Q. 21. When was the next "Price Current" started?

A. The next "Price Current" was started sixteen years ago by J. W. Biles & Company.

X Q. 22. When did you start yours?

A. I started mine 21; no, 23 years ago, and incorporated the price

current in my trade journal 21 years ago. I started first as a broker issuing a prices current.

X Q. 23. And you knew of "Old Crow" whisky then?

A. Yes; I have known of that brand as long as I have been in the whisky business, and of the high reputation it bears.

X Q. 24. Then you have reference to the reputation made by ad-

vertising, and not reputation based upon analysis?

A. I have reference to the general opinion that is connected with that brand, and to the price which the brand commanded and which was a criterion as to its high quality and grade.

X Q. 25. The price of whisky is controlled largely by the manner

of advertising that is done respecting it; isn't it?

A. To some extent, yes; but advertising alone cannot permanently establish a value among wholesale liquor dealers, who guide themselves, not by the advertisement, but by the intrinsic merit of the goods.

X Q. 26. But it will among consumers; will it not?

A. Yes.

X Q. 27. But if the consumers create no demand for a certain article, the value of that article cannot be kept up by wholesale dealers, can it?

A. No, sir.

X Q. 28. Consequently, the value is really regulated by the value the public gives it, isn't it?

A. Not necessarily.

X Q. 29. How about "Peruna?"

A. Well, I don't know anything about that. The wholesale dealer is a distributer of a given brand. He employes a staff of salesmen who make steady and constant propaganda for a given brand, and if the wholesale dealer recognizes a certain brand as possessing superior merits, he will instruct his salesman to represent the goods in that light, and they will be the basis for establishing it in the market, and in turn, create for it a demand among the rank and file of consumers. The advertisement may act as additional leverage, but the value of a brand is decided first, by the wholesale dealer, and subsequently followed by the consumer.

X Q. 30. In other words, you mean the wholesale dealer helps out?

A. Yes, sir. He is the first advertiser, by promulgating the brand

among the saloon trade.

X Q. 31. He will only be induced to advertise it, by inducements

offered by distillers, won't he?

A. No, sir. If he believes in a given brand, he will, in the prometion of his own reputation, advocate the use of that brand; and if he can make the saloon-keeper believe that he is getting

228 the best whisky, he can command the best price. Thus he is in a certain sense, acting as a distributing agent for the distiller, and in doing so, he is promoting his own interests by establishing his reputation for handling good goods, and by getting a remunerative price for it.

XQ. 32. Why is it, that the price of Gaines' "Old Crow" is quoted higher than "Old Overholt" of the same age?

A. Because there is a larger demand and larger distribution of "Old Crow," and because the selection of customers who handle "Old Crow" may be more judiciously done than that of "Old Overholt."

XQ. 33. Then it is not because "Old Crow" is inherently any

hetter than "Old Overholt?"

A. Probably not; but the management of the brand is possibly better, which is emphasized by the value in the market.

XQ. 34. Then what I said about the advertising must be true,

isn't it?

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A. It's only acting as an additional adjunct to a distributing wholesale liquor dealer, which is the prime factor in establishing

the reputation of a given brand.

XQ. 35. Don't you know that the reputation which any straight whisky has achieved in the market has been due to the fact that it has been softened and toned down by the blender and wholesale dealer?

A. That does not apply to straight whisky. There is a distinction between straight whiskies and blended whisky, as straight whisky is quoted on the market and can be bought and sold just as readily as stocks and bonds are sold on the market. Blended whisky-no matter how much its reputation may be-has no intrinsic market value.

XQ. 36. Why isn't it?

A. For the reason that no one can tell what it consists of.

XQ. 37. Why can't they?

A. Because the formula by which it is made is a secret of the manufacturer.

XQ. 38. How can you tell what "Old Crow," as made by Gaines

& Company, consists of?

A. It consists of the best possible selection of grain, distilled under the best known formula of straight hand-made sour mash whisky, and aged and matured in the most scientific and careful manner.

X Q. 39. How do you know about the selection of the grain and

the formula?

A. The selection of the grain must have been most scrupulously made in order to bring about certain results.

X Q. 40. "Must have been"—then you don't know?

A. I have not been present when the whisky was made, but nothing good can be gotten out of the pot, unless you put something good into the pot.

X Q. 41. Do you suppose Gaines & Company made their "Old Crow" whisky better than they made their "Hermitage" whisky?

A. I am not prepared to answer what care they spend upon one brand or another; but I do know that both brands stand at the top of the ladder. They must be very carefully made, and with a view of producing the best that could possibly be secured.

X Q. 42. You speak of the formula for "Old Crow" being the best. Tell us what it is.

A. I cannot answer you how much of corn, or small grain, is used for making "Old Crow." This is a secret that no distiller is apt to give out for the benefit of his competitors.

X Q. 43. Then what you said about "the selection of grain" and "formula" was mere guesswork. You don't know anything about it?

A. I do not know what formula they use; but I know the selection of grain must be careful, and the formula the best, or they could not make the whisky they do.

X Q. 44. Would you regard whisky a good whisky that comes

out musty?

A. No, sir; I should not.

X Q. 45. Don't you know that Gaines & Company has turned out whisky which was musty, and which they called "Old Crow?"

A. That may occur in any distillery; but the distiller, when he makes whisky, tries to avoid buying any musty grain for it, because if the whisky is musty, if falls back upon him, and he has to

230 either buy up the goods in order to save his reputation, or he will make some arrangement with those who have purchased a musty whisky, to use it up in the blending tub; so as not to have the whisky come out among consumers as a defective whisky.

X Q. 46. Then it follows that the mere fact that the whisky is sold under a given name does not prevent its being thrown back

upon the distiller, does it?

A. No; it sometimes might occur that the best brand, might, perchance, in its manufacture, turn out to have a part of musty grain—it, but these are very rare occurrences in whiskies of leading brands.

X Q 47. Now, do you personally know the character of that whisky made by Gaines & Co., which they call "Old Crow," or do

you know anything about it?

A. I know personally that the whisky is unquestionably one of the standard, highest-grade whiskies made, by reason of my handling it, both as an owner, purchaser and commission merchant on account of others.

X Q. 48. Doesn't that simply mean, that by advertising, they have

created a demand for it?

A. It means that the whisky has attained the highest possible recognition by reason of its distillation, careful storing and judicious management in the selection of those who were distributing the goods, both to wholesale and retail trade.

X Q. 49. How much better is the article which they call "Old

Crow" to their article which they call "Hermitage?"

A. That is a matter of personal opinion. I, for one, might prefer "Hermitage" to "Old Crow," but the prevailing and general opinion is, that "Old Crow" is superior; which is emphasized by the highest price it brings in the open market.

X Q. 50. You know, do you not, that they use precisely the same formula, and use precisely the same storage for that product which they call "Hermitage" as they do for that product which they call

"Old Crow?"

A. I am not competent to answer how much more care they use for "Old Crow" than they use for "Hermitage:" I 231 don't know.

XQ. 51. What is it that you don't know about?

A. I don't know as much about "Hermitage" as "Old Crow." am answering questions as to "Old Crow."

X Q. 52. Now, I am asking you about "Hermitage" and why

it is not as good goods.

A. The quantity of "Hermitage" produced is probably five times larger than that of "Old Crow," and if a given brand is produced in larger quantities, the price generally offered by the distiller is lower, in order to find more purchasers for it. quality itself, however, may, for what I know, be as good as that of "Old Crow." Yet there is more made of the "Hermitage." That raises the price of "Old Crow" above "Hermitage."

X Q. 53. Irrespective of the quality of the two brands? A. Yes, irrespective of the quality of the two brands.

X Q. 54. Do you know anything about the character or quality, personally, not by reputation-of that product Gaines & Company call "Old Crow"-what percentage of impurities does it contain when

it is four years old? How much fusel oil it contains?

A. I have not analyzed "Old Crow" as to its contents, or quantity of fusel oil, but no fine whisky is free of impurities, and the fact that some may have more fusel oil than others does not imply that it is regarded by the trade as inferior by reason of the percentage of fusel oil it may contain.

X Q. 55. Don't you think the trade would regard that whisky containing a large amount of fusel oil as inferior to another whisky

of the same flavor which contained less fusel oil?

A. I don't think the amount of fusel oil would make any difference.

X Q. 56. Don't you know that fusel oil is a rank poison?

A. Yes, sir; but no straight whisky for maturing purposes can be produced without fusel oil.

X Q. 57. Are you positive of that?

A. For maturing purposes, yes, sir. I am perfectly sure whisky is not produced without fusel oil-I mean no whisky 232 for maturing purposes by age. It cannot be produced without fusel oil, as it would have no basis for improvement.

X Q. 58. What is your authority for that?

A. Myself.

X Q. 59. Yet you say you have never made any analysis? A. I have never made analysis of "Old Crow."

X Q. 60. Did you ever see a whisky out of which the fusel oil has been taken which had been kept in barrels for four or five

A. You mean that was kept for ageing purposes?

Counsel: Yes. Did you?

A. No, sir.

X Q. 61. What do you mean by being kept for ageing purposes? A. Straight, fine Kentucky whisky improves by the natural process of ageing in barrels. This is regarded as the only way to mature whisky without sacrificing any of those ingredients which are essential for the development of the flavor. If, however, whisky that has been stored for several years, and for some reason or other is unpalatable, then it may be run through a process of re-distillation where all impurities are extracted, but all of the best qualities of flavor are, to that extent, diminished or eliminated.

X Q. 62. What do you regard as the natural process of ageing

whisky?

A. The natural process is maturing whisky by keeping it in barrels, keeping the bungs open, so that the whisky should come into contact with the atmosphere, by occasionally stirring up the whisky, and by the action of that very atmosphere it become oxydized and the fusel oil in evaporation is then turned into a flavor and aroma which gives it its value.

X Q. 63. Are you positive that that is the natural process?

A. Yes, I am.

X Q. 64. Isn't it true that that result would not be achieved unless charcoal was brought into contact with the liquor, as a result of the

A. No, sir. In the case of Tennessee whiskies the matur-

charring of the barrel?

233 ing of goods is done in barrels without being charred, and whisky matured in this way, after four or five years, shows a decided improvement, in maturing mellowness and bouquet over that that is only one year old. Thus the charring of barrels is done more as a matter of tradition, which has always been associated with Bourbon or Rye whiskies, and has probably also some effect in giving it a distinct flavor, but it does not cause the actual maturing of whiskies as exemplified in goods made in Tennessee, which are sold on their age, the same as Bourbon or Rye whiskies, and

X Q. 65. Now, one minute. I understood you to say that the flavor which whisky gets as the result of age comes from the fusel

are considered not standard if they show any color whatsoever,

oil. Is that right or not?

A. Yes, sir; it is right.

They must be absolutely white.

X Q. 66. I understand you to say that the charring of the barrel on the inside has nothing to do with the maturing of the whisky; why is that?

A. Because whisky is matured in Tennessee without the charring of the barrel; but I said at the same time, it may add some distinct

character to it by reason of the charring of the barrels.

X Q. 67. Why then, are barrels into which whisky is to be put, charred, if, as you say, it has nothing to do with the maturing of the whisky?

A. It is done more as a matter of tradition than anything else. Bourbon whisky was always put into charred barrels, and for that

reason it is still done.

X Q. 68. Wait a minute again. You know, do you not, that the flavor which any whisky gets results from the oxydation of the fusel oil?

A. Yes, sir.

X Q. 69. Consequently, if the oil is not oxydized, it gets no flavor from the fusel oil; is that true?

A. Yes, sir,—but—

X Q. 70. If it gets no flavor from the fusel oil, it serves no useful purpose then. Why then is fusel oil, as you say, necessary in whisky.

A. If fusel oily is extracted, it does not improve.

X Q. 71. If, as you admit, fusel oil is rank poison, why wouldn't whisky be better without it?

A. It only serves the purpose of improving it. It does not im-

prove without it.

X Q. 72. If the fusel oil remains in whisky as fusel oil, instead of aromatic ether, then it is there as an impurity and serves no useful purpose. Is that true?

A. Yes.

X Q. 73. Don't you know that the fusel oil which is kept in an uncharred barrel will never oxydize and diminish in per cent?

A. I believe that whisky containing fusel oil, whether in a charred barrel or not, if subjected to the heat of the sun or atmosphere, will oxydize and improve the whisky.

X Q. 74. Have you ever read Shidrowitz on this question?

A. No.

X Q. 75. Or Hehner?

A. No.

X Q. 76. Or Pasteur?

A. No.

X Q. 77. Or Allen?

A. No; I have read none of those.

X Q. 78. Do not all authorities state invariably that there is no diminution of the oil in spirits where storage is in an uncharred barrel?

A. I do not know, because these authorities which you quote are not read by me; but I believe I am as much authority as Shidrowitz or any of the others.

X Q. 79. Are you a chemist?

A. No.

X Q. 80. Are you a doctor?

A. No; but—may I qualify that?

Counsel: What?

Witness: The question as to whether I am a doctor.

Counsel: Yes. All right.

A. Am I a doctor?—no; but if fusel oil is extracted from the hand-made whisky, run through a still, and if the fusel oil is thereby removed, the whisky will never improve—no matter how

long stored in barrels; for the essential element of the improvement of the whisky, the fusel oil, having been removed, there is no basis for its improvement.

X Q. 81. Are you familiar with the Report of the British Par-

liamentary Commission on that question?

A. No; but I have had personal experience as a practical au-

thority on distillation, and as both dealer and wholesaler have handled what is known commercially as spirits—which is a whisky according to the authority of Prof. Hough, but from which fusel oil was extracted—is absolutely neutral, thereby pure, but it is not commercially recognized as whisky, but merely as spirits.

X Q. 82. Is it not also whisky in the eyes of the Internal Revenue

Law, and so branded?

A. No, sir; all whiskies are classed as distilled spirits, which covers

all kinds of alcoholic liquors.

X Q. 83. Is it not true that this product which you say has been run through the continuous process, is branded as "whisky" under the Internal Revenue Law?

A. No. sir.

X Q. 84. Are you as positive about everything as you are that that

product is never branded as "whisky" if the fusel oil is taken out?

A. If it is entered as "whisky" it is re-entered as "whisky," but if while rectifying is run through the continuous process for the purpose of producing spirit, is entered as "spirit" and re-entered as 'spirit."

- X Q. 85. You do not answer my question. What I asked was, whether you did not know that the product to which you have just referred as having had the fusel oil eliminated in the process of distillation, is branded under the Internal Revenue Law as "whisky," if it is stored in a charred barrel?
- A. Yes. It is entered as "whisky" if the fusel oil is eliminated by a continuous process of distillation.

X Q. 86. How long have you ever kept a barrel of that kind of spirits, so as to determine that there is no improvement?

236 A. I did not keep any myself, but I have sold for many years whisky made under such process, known as Boone County whisky, which was made as whisky run through a continuous process, fusel oil eliminated as much as possible, and such whisky has never attained any maturity which was sufficiently perceptible to make any difference in price, either by the seller or buyer.

X Q. 87. How long did you keep that? A. For a year and even up to two years.

X Q. 88. That is the only experience you have had on that line

upon which to base the conclusion you have stated?

A. No, sir; in my capacity as the leading broker of the United States, handling more liquors than all others combined, I necessarily come very frequently into contact with such goods.

X Q. 89. What is the oldest of that character of whisky you have

known in barrels?

A. Two years.

X Q. 90. Which do you regard as what you have referred to as "the natural process," the storage in charred barrels, or the storage in uncharred barrels?

A. Both are regarded as the natural process of improvement. This is guided entirely by the preferment of the distiller or purchaser. Goods made in Kentucky are required to have charrel barrels for them, so as to get that color with which Kentucky whisky is identified. Whiskies made in Tennessee, if in charred barrels, are regarded as detrimental to their conception of standard quality as of taste in that section.

X Q. 91. What percentage of impurities would there be in this

Kentucky whisky to which you refer?

A. Probably as high as 4-100.

X Q. 92. Does that mean 4-100's of one per cent?

A. Yes, sir.

X Q. 93. And no higher than that?

A. Probably as high as 5-100, but the general average is about

3-100 of one per cent.

237 X Q. 94. You say they char the barrels in Kentucky as a result solely of tradition. How far back does that tradition go?

A. About fifty or seventy-five years.

X Q. 95. Then prior to that the whisky in Kentucky was white, the same as in Tennessee now?

A. Yes, sir.

X Q. 96. Do you know how the barrel-charring process happened to be commenced?

A. Yes, sir. I have read an account of it. It was given very correctly by Mr. Hinde of St. Louis, who was in business for the past fifty years, and he gave the history how it happened to originate.

X Q. 97. The statement you think is correct?

A. Yes, sir.

X Q. 98. Don't you know that the brand "Old Crow," was owned by Pepper before it was used by Gaines & Company?

A. I don't know that.

X Q. 99. You didn't know that?

A. It might have been. I didn't know that.

X Q. 100. You don't know how long the Pepper people or their successors used the name "Old Crow?"

A. No; I don't know that.

X Q. 101. I think you have stated that you didn't know what percentage of impurities there is in four or five-year-old "Old Crow." and you don't know what percentage there is by being kept in charred barrels?

A. Probably there isn't any.

X Q. 102. Don't you know that the amount or percentage of fusil oil in "Old Crow" five years old is ten times the amount you have stated to be in the Tennessee whisky?

A. I could not say that.

X Q. 103. Do you know the kind of still that is used in the production of the Tennessee whisky?

A. No.

X Q. 104. Do you know the kind of still that is used in the production of "Old Crow," as made by Gaines & Company?

A. Yes.

X Q. 105. Have you ever seen it?

A. Yes.

238 X Q. 106. What kind?

A. They are single and duplicate.

X Q. 107. You mean they distill it twice?

A. When they make the whisky they make the first run and then run it over again in order to produce through a duplicating process, the best distillation.

X Q. 108. You know the character of still that is used in both of

the processes?

A. In the last eight or ten years they may have changed it.

X Q. 109. Do you know that they use yeast to hasten fermentation?

A. I could not say that, because if they do, that is one of the processes which is kept secret by the distiller.

X Q. 110. They call their whisky "hand-made sour mash," don't

they?

· A. Yes.

X Q. 111. If they use yeast, it is not entitled to be called sour

mash, is it?

A. That is a question not answered by distillers themselves. Some claim it is necessary, and yet does not affect the quality. Others claim that artificial yeast used for fermentation is not the proper way of producing sour mash, as it is not in conformity with the traditions as obtaining in Kentucky in making sour-mash whisky.

X Q. 112. You say you have been in the "Old Crow" distillery?

A. Yes, sir.

X Q. 113. Then you know they don't make what is understood as

a "hand-made" whisky?

A. When I was visiting the "Old Crow" distillery, some eight or ten years ago, I saw a great many small tubs, and what is technically known as "hand made sour-mash whisky" was the process that the mash was stirred up by hands of negroes in those small tubs. A distiller who was stirring up the mash by the hands of his employes, claimed to have made a "hand-made" whisky. This process, however, has been largely substituted by the same distillers, who, instead of stirring the mash by hand, are putting it in the larger tub,

and stirring it by machinery; and this is the only difference between what is called "machine-made" and what is called

"hand-made sour-mash whisky."

X Q. 114. Now, you know that in addition to the small tubs, they

have large tubs for using machinery?

A. I saw but small tubs, but at that time they were making what is known as "hand-made sour-mash whisky;" but I am fully convinced that whisky made thirty years ago for ageing purposes in Kentucky, was made by Gaines & Co. in small tubs, stirred by hand, and known as "hand-made sour-mash whisky," for the reason that any other process was then unknown.

X Q. 115. You know that they do not make it that way now?

A. I don't know, for I have not been there for ten years.

X Q. 116. For the same reason that they made it then by hand—because no other process was then known—don't you know that they now make it by machinery, because machinery is known to be just as effective and better?

A. No, I don't know that; because from tradition I have thought they would stick to the stirring by hand in spite of the fact that machinery can stir it just as effectively as the negroes by hand.

X Q. 117. If the mash is stirred in a large tub by machinery, it

is not entitled to be called "hand made," is it?

A. The distillers continue calling it "hand made," for their system of yeasting remains the same, in spite of the fact that it may have been stirred by machinery.

X Q. 118. Doesn't the system of yeasting have reference, only and exclusively, as to whether it is called "sweet" or "sour" mash?

A. Yes, sir.

X Q. 119. Then the system of yeasting has nothing whatever to do with its being called "hand made" or "machinery made?"

A. No. sir.

X Q. 120. Consequently, if stirred by machinery, it is not entitled to be called "hand made," is it?

A. No, it is not.

240 Counsel: Well, that's what I have been trying to get at.

X Q. 121. Have you any knowledge whatever of the whisky busi-

ness, prior to 1869?

A. No, sir. Well, yes; in a general way, for I acted as a book-keeper for one year in the house of Moore, Solomon & Moore, of Cincinnati, who were then large wholesale dealers, rectifiers and compounders.

X Q. 122. You know, then, do you not, that prior to 1868 no brands whatever were ever put upon the original packages of straight

whiskies?

Witness: What do you mean by the "original packages?"

Counsel: The distillers' packages.

A. Yes, there were. Good whiskies were sold, prior to that period, also by distillers, in their own packages.

X Q. 123. Precisely; but there was no brand put upon the pack-

age, the barrel itself?

A. That being prior to my time, I cannot answer that question.

X Q. 124. You have stated that you don't know anything about the business prior to that time?

A. No. sir.

Signature waived.

## 241 STATE OF ILLINOIS, County of Cook, ss:

I, Frederick C. Goodwin, a Notary Public, in and for the county and state aforesaid, do hereby certify that the foregoing depositions of Charles H. Hermann and William Mida, were taken before me at the time and place therein specified, pursuant to notice hereto annexed; that the parties to said cause were present at the taking of the same, complainant by its counsel, Mr. James L. Hopkins, and defendants by their counsel, Mr. Warwick M. Hough, as therein appears; that before deposing, each of said witnesses was by me first duly

sworn to tell the truth, the whole truth, and nothing but the truth, in the cause now pending in the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, wherein W. A. Gaines & Company is complainant, and Max Kahn, administrator with the will annexed of Abraham M. Hellman, deceased, and Moritz Hellman, are defendants; that the said depositions were reduced to writing from the statements of said witnesses, and the signature of each of said witnesses was waived, as therein appears.

And I do further certify that I am neither attorney, nor of counsel for any of the parties in said depositions or caption named, and in no

wise interested in the result of said cause.

In testimony whereof I have hereunto set my hand and notarial seal, this nineteenth day of October, A. D. 1905.

[SEAL.] FREDERICK C. GOODWIN,
Notary Public.

And afterwards, to-wit: on December 27, 1905, the following deposition on behalf of complainant was filed in said cause, which said deposition is in words and figures, as follows, to-wit:

In the Circuit Court of the United States, Eastern Division of the Eastern Judicial District of Missouri.

No. 5096. In Equity.

W. A. Gaines & Company, Complainant,

MAX KAHN, Administrator with the Will Annexed of Abraham M. Hellman, Deceased, and Moritz Hellman, Defendants.

Depositions on behalf of Complainant, taken before Thomas W. Corley, Notary Public, at the offices of James L. Hopkins, 400 Tobin Building, St. Louis, Missouri, on Wednesday, December 13th, 1905, at the hour of two-thirty o'clock in the afternoon, under the provisions of the stipulation as to taking testimony hereinbefore entered into between parties and now on file in this case.

Appearances:

For Complainant, James L. Hopkins, Esq.

For Defendants, Judge Jacob Klein and L. E. Smith (Klein & Hough).

Witness: Lyman T. Hay.

243 Lyman T. Hay, a witness produced, sworn and examined on the part of the complainant, testified as follows:

Direct examination by James L. Hopkins:

Q. Please state your name.

A. Lyman T. Hay.

Q. What is your age? A. I am forty-seven.

Q. Where do you reside?

A. In St. Louis.

Q. What is your occupation?

A. Manager of the Jefferson Hotel.

Q. Are you connected with any other hotel than the Jefferson Hotel?

A. Yes, sir.

Q. What are their names and where are they located? A. I am manager of the Arlington Hotel and the Eastman Hotel in Hot Springs, Arkansas.

Q. The Jefferson Hotel you refer to is the Jefferson Hotel in St.

Louis?

A. Yes, sir.

Q. How long have you been engaged in the hotel business?

A. About twenty-two years—not quite.

Q. During that time have the hotels with which you have been connected had bars in connection with them where liquors were served?

A. Ever since I have had charge of the new Arlington, which has been from the 25th day of March, 1893, we have had a bar.

Q. Since that time have you yourself purchased any liquors for the hotels with which you are connected?

A. Oh, yes, sir; often.

Q. Have you general supervision of the purchases of liquors made

for the three hotels under your management?

A. Well, in a general way, but we have buyers now for the houses. Of course, in buying large quantities they submit the price and things to me first. Take it in our Hot Springs hotel, Mr. Corrington, the assistant manager, looks after that.

Q. Are you acquainted with the Old Crow whisky of W. A. Gaines

& Company?

A. Yes, sir; very well.

244 Q. How long have you been acquainted with that brand of whisky?

A. I guess ten or twelve years.

Q. Have you handled any of it yourself?

A. I have bought a good deal of it.

Q. Has that whisky been sold at all of your hotels?

A. I think it has been sold at all three of them. In fact, in all probability, it has. I know it has been sold at the Arlington and the Jefferson, and I think we carry that also at the Eastman.

Q. During that time have you ever known or heard of an Old Crow whisky produced or claimed to be produced by A. M. Hellman

& Company of St. Louis?

A. No, sir.

Cross-examination by Judge Klein:

Q. Do you know the firm of Hellman & Company of St. Louis?

A. No, sir.

Q. Never heard of it?

A. I can't say, judge, I think I have heard of the name, but I don't know.

Q. Never dealt with them?

A. Not directly. I have not myself. My agents may have.

Q. To your knowledge?

A. Well, I wouldn't want to say we have never dealt with them because Mr. Tellman or Mr. Corrington may have purchased goods, he is the purchasing agent of the Jefferson.

Q. What is his first name?

A. John D.

Q. What is Mr. Corrington's first name?

A. J. W .- Joseph.

Q. Mr. Hay, do you do any rectifying now?

A. Yes, sir, we do some rectifying.

Q. Where?

A. Up there.

Q. At the Jefferson Hotel?

A. Yes, sir. We have a rectifying license for it.

Q. And the Old Crow whisky that you have purchased you say is W. A. Gaines & Company's Old Crow?

A. Yes, sir. The only Old Crow we handle.

Q. Have you bought it bottled in bond or in barrels?
A. We have bought it in barrels and in bond.

Q. That is, you mean you have bought it in barrels and it was bottled in bond?

A. No, sir, we didn't have any Old Crow in bond. We have handled bottled Old Crow.

Q. Who handles Old Crow here?

A. Nicholson and W. H. Lee & Company.

Q. Anybody else?

A. I can't tell you, judge. I don't know whether we have any other brands or not. I know we have those two.

Q. What is the object of rectification, Mr. Hay?

A. Well, I am not posted enough on that. Mr. Tellman does that.

Q. He attends to that?

A. Yes, sir. I am not a rectifier myself.

Q. How long have you had this rectifier's license?

A. Several months. I can't tell you exactly when they took it out. I think since last July.

Q. How did you come to take it out?

A. We were advised to take it out.

Q. By whom-by the Revenue officers?

A. Yes, sir.

Q. Now, your knowledge of whisky and the different kinds of whiskies has been acquired, you say, since the Eastman Hotel was opened?

A. No, the Arlington Hotel. Q. On March 25th, 1893?

A. Yes, sir, 1893.

Q. And before that time you paid no attention to whisky at all?

A. No, not at all.

Q. And you didn't know the different kinds of Old Crow that were on the market?

A. I didn't know anything about it previous to that.

Q. Do you know now that there are any other Old Crows on the market besides W. A. Gaines & Company's?

A. I have always looked on Gaines & Company as the original dis-

tillers of Old Crow.

Q. You don't know that they are the original distillers of Old Crow?

A. No, I say I have always looked on them as the original distillers.

Q. What do the words "Old Crow" signify to you when you 246 see them now, Mr. Hay?

A. I always think of Gaines & Company.

Q. Is that all?

- A. I think it's Gaines & Company's whisky. Q. Now, do you bottle any Old Crow yourself?
- A. Yes, sir, we bottle our own Old Crow and it's Gaines & Company's.

Q. You bottle it?

A. Yes, sir, we bought fifty barrels of it.

Q. And now for what purpose do you bottle it?

A. To sell.

Q. To sell in the bottles?

A. No, over the bar.

 Q. You put no labels on it?
 A. Yes, sir, I believe we bottle some and put labels on it, "Gaines' Old Crow." Q. But you don't bottle it to sell except as over the bar as drinks?

A. No, sir.

- Q. In other words, you are not engaged in the wholesale and retail liquor business?
- A. We are in the retail liquor business, but not in the wholesale. Q. Now, in bottling the Old Crow that you have bottled, do you sometimes diminish the proof?

A. Yes, sir, we bring it down to ninety-five.

Q. Do you sometimes get it as low as ninety from Gaines & Com-

A. Somewhere about one hundred and thirteen—about one hundred when we got it, but we have had it three years and it has increased in proof.

Q. How much has it increased in proof?

A. I don't know. I know what we have now is about one hundred and thirteen. That's what Mr. Tellman told me.

Q. What year was it made in?

A. It's ten years old.

Q. Well, was it made in 1895?

A. Well, when we bought it, judge, two years ago this coming March, it was sold to us as eight-year-old whisky. That would make it 1895.

Q. It was sold to you two years ago as eight-year-old?

A. Yes, sir. It had already passed eight summers.

Q. Who sold you that Old Crow? 247

A. The Union Trust Company. It came from the Billy Lee estate.

Q. For the estate of W. H. Lee & Company?

A. Yes, sir.
Q. Now, when you bottle that you reduce the proof?

A. Yes, sir.

Q. Do you do that with the consent-

A. Yes, sir, that's the reason we took out a rectifier's license, so we could do it.

Q. And do you do that with the knowledge and consent of W. A. Gaines & Company?

A. I don't know whether we do or not.

Q. Do you have any understanding with them of any kind to handle it that way?

A. No, we never had an understanding with Gaines at all.

Q. You don't? A. No, sir.

Q. You have had no direct dealings with Gaines & Company at all?

A. No, sir; ours comes direct from Union Trust Company.

Q. The Union Trust Company and them alone? A. Yes, sir.

Q. Now then, merely adding pure water to whisky isn't rectifying it?

A. That's what we call it.

Q. You don't require any license for that, do you?

A. Well, we were advised by the Revenue officers to do so, and we took it out.

Q. Wasn't it because you were putting a little something else in the whisky to flavor it?

A. No, sir, we don't do anything of that kind to my knowledge. Q. Well, you don't know what takes place in your rectifying room?

A. Yes, sir, because Mr. Tellman would tell me anything he would do. He knows that I want that whisky kept just as good as he can possibly keep it, and wouldn't want to do anything to deteriorate it.

Q. If you were putting a little flavoring in it that wouldn't deterio-

rate the whisky?

A. It would change the flavor of the whisky.

248 Q. Well, flavors can be improved?

A. Well, those that like Gaines & Company's Old Crow

whisky don't want the flavor changed.

Q. Now, Mr. Hay, have you ever drunk enough of Gaines & Company's Old Crow at different times to discover the fact that there is a wide difference in the flavor of different vintages?

A. No, sir, I drink so little whisky you could fool me on it.

Q. You are like myself, you don't know the difference between rve and bourbon?

A. Yes, sir, I do. I know the difference and I don't like the flavor

Q. Now, then, have you, since the purchase of these fifty barrels from the Union Trust Company two years ago, purchased any other

Old Crow from W. A. Gaines & Company?

A. Yes, sir; I teld you we handled their Old Crow, but whom Mr. Tellman has purchased from I wouldn't say. I purchased this lot myself. What whiskies were purchased since the house has been opened have been purchased by Mr. Tellman.

Q. You mean the Jefferson?

A. Yes, sir.

Q. When was that opened?A. The eighth day of April, 1904. Q. That's hardly two years ago?

A. No, not quite two years.

Q. Now, Mr. Hay, you don't know of any other Old Crow that has been bought for the Jefferson Hotel excepting this fifty barrels?

A. I know, judge, they have bought some bottled goods since then, but whom they bought it from I don't know.

Q. Old Crow?

Yes, sir, all kinds of bottled goods.

Q. Do you know a gentleman named Harry E. Blood?

A. Yes, sir.

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Q. He resides at your hotel?

A. Yes, sir.

Q. Have you purchased any whisky from him?

A. Mr. Tellman may have purchased some.

Q. Have you had any talk about your testimony here? A. He asked me to come down here.

Q. This gentleman?

A. Yes, sir.

Q. Did he ask you any questions in regard to Old Crow?

A. He asked me whom I considered distillers of Old Crow. told him W. A. Gaines & Company.

Q. That is the only person you know that distills Old Crow?

A. That's what I always considered. Q. When you say "always" you-

- A. I confine myself from when I commenced to handle whisky,
- Q. And whether at that time, if there were other Old Crow whiskies marketed, you don't know?

A. No, sir.

Q. And whether, since that time, any have been you wouldn't say?

A. No, sir.

Q. And you wouldn't say they have not been?

A. No, sir, I wouldn't say.

Q. Now, did you personally have a conversation with this revenue officer that advised you to take out this rectifier's license?

A. No. sir.

Q. Who had the conversation with bim?

A. Mr. Tellman.

Q. Now the whiskies that you have bought as Old Crow have generally been whiskies bottled by Billy Lee?

A. No, we have handled Nicholson's with Lee's.

Q. Nicholson's Old Crow?

A. Yes, sir, and Billy Lee's.

Q. Do you handle Nicholson's Old Crow in Hot Springs or Billy Lee's?

A. We handle Billy Lee's, but I don't remember of handling Nicholson's.

Q. You don't remember of handling Nicholson's? A. No, sir; but I remember of handling Billy Lee.

Q. Your acquaintance—your original acquaintance with Old Crow is connected with Billy Lee?

A. No; my original acquaintance came through Gaines & Com-

pany.

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Q. How is that?

A. We always carried Gaines & Company's Old Crow whisky at Hot Springs bought from Gaines & Company from their New York house.

Q. Paris, Allen & Company?

A. Yes, sir; from Mr. Lounsdale.

Q. Now, was it in barrels that you bought it?

A. In bottles.

Q. Now, Mr. Hay, are you sure now that you bought any Old Crow—any bottled Old Crow from Paris, Allen & Company prior to 1893?

A. I can't tell you. I never made any date of anything of that kind, but I remember Mr. Lounsdale soliciting my business in Hot Springs. It may have been since 1897; I know it was after 1897, because we took hold of the Eastman Hotel that fall, and he used to chase me down from the Arlington to the Eastman to get orders.

Q. But you don't know you got any bottled Old Crow prior to

that?

A. No.

Q. Did you ever look at any barrels of whisky that you bought prior to that time?

A. Look at them in what way?

Q. So you could tell what was on them?

A. I could read the labels on them, and the stamping on the heads of them.

Q. What kind of stamping on the heads of them?

A. I couldn't tell you. Q. What kind of labels?

A. The only kind I know of was burned in the wood.

Q. What kind was that?

A. I couldn't tell you.

Q. You run the hotel end?

A. Yes, sir. Mr. Tellman does the buying. He has been with me

nine years, and after the first year I turned the liquor business over to him, when I found I could have confidence in him I turned it all over to him. He buys all the liquors except when we buy in large quantities; then I take it up myself.

Q. How old is Mr. Tellman? A. About my age; maybe older.

Q. You don't know, now, Mr. Hay, what the reason was, why you

were advised to take out a rectifier's license?

A. Mr. Tellman said that the agent said for him to reduce the proof of whisky he ought to have a rectifier's license if he wanted to keep out of trouble. That is the only reason that we just spent \$150.00, to keep out of trouble.

Q. You have, in point of fact-

A. I didn't want to be called down to the office there. I was stuck on one bottle of whisky and I didn't want to be stuck on another one.

Q. In point of fact, you do reduce the proof of Old Crow?

A. Yes, sir; to make it palatable.

Q. You have to reduce it?

A. Yes, sir.

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Q. A fellow wouldn't want to drink 113-proof whisky?

A. I have not found them.

Q. You think in two years whisky increases in proof 8 per cent?
A. I don't say that. It was above a hundred when we bought it.
We had to pay by the proof gallon when we bought it. It was above a hundred, and the last conversation I had with Mr. Tellman he said that it was still higher than when we bought it.

Q. So you add a little water for the benefit of the drinker?

A. Yes, sir; and profit.

Q. Now, tell me this, Mr. Hay—different kinds of whisky or different brands you have noticed have different flavors?

A. Yes, sir.

Q. And do you sometimes add a little something to change or heighten the flavor?

A. No, sir; I know what you mean, but we don't do it—burned

sugar, you mean.

Q. Nor a little prune juice?

A. No, sir.

Q. You just give the fellow plain whisky with a little addition of water?

A. Yes, sir; that's all.

LYMAN T. HAY.

Subscribed and sworn to before me, on this 14th day of December, A. D. 1905.

THOS. W. CORLEY, Notary Public, City of St. Louis, Missouri. 252

Certificate.

In the Circuit Court of the United States, Eastern Division of the Eastern Judicial District of Missouri.

No. 5096. In Equity.

W. A. Gaines & Company, Complainant,

VS.

MAX KAHN, Administrator with the Will Annexed of Abraham Hellman, Deceased, and Moritz Hellman, Defendants.

I, Thomas W. Corley, Notary Public in and for the city of St. Louis, State of Missouri, do hereby certify that on the [way] indicated in the foregoing deposition at Rooms 400-404 Tobin Building, southeast corner Eighth & Locust streets in the City of St. Louis, State of Missouri, I was attended by James L. Hopkins, Esq., of counsel for complainant, and Judge Jacob Klein and L. E. Smith, Esq., of counsel for defendants, and by the witness who was of sound mind and lawful age, who, having been by me theretofore first carefully examined and cautioned to testify the truth, the whole truth and nothing but the truth in the above entitled cause, gave his testimony, which was taken down in the presence of the said witness and from his statements by me in shorthand and afterwards by me transcribed according to agreement of counsel herein, and the said witness having read over his deposition subscribed the same and swore to the same in my presence.

I further certify that the said depositions were taken under and

pursuant to the sixty seventh rule in equity as amended,

I further certify that notifications of the time and place of taking said depositions was made out and served upon defendant's counsel as appears from said notice and proof of service, which are

hereunto annexed.

And I do further certify that I am not of counsel nor attorney for either party in said deposition and caption named, nor in any way interested in the event of the cause named in said caption.

In testimony whereof, I have hereunto set my hand and seal this 14th day of December, in the year of our Lord, one thousand nine hundred and five, and of the independence of the United States the one hundred and twenty-ninth. My commission as Notary Public Expires Feb'y 23, 1908.

[SEAL.] THOS. W. CORLEY,

Notary Public, City of St. Louis, State of Missouri.

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And afterwards, to-wit: on December 29th, 1905, the following depositions on behalf of complainant were filed in said cause, which said depositions are in words and figures as follows, to-wit:

In the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.

No. 5096. In Equity.

W. A. GAINES & Co., Complainant,

MAX KAHN, Administrator with the Will Annexed of Abraham M. Hellman, Deceased, and Moritz Hellman, Defendants.

Depositions on behalf of complainant taken before Charles E. Weller, Notary Public and Special Examiner at the office of James L. Hopkins, No. 400 Tobin Building, St. Louis, Missouri, on Tuesday, December 19th, 1905, at the hour of 11.00 o'clock in the forenoon, under the provisions of the stipulation as to taking testimony herein before entered into between the parties and now on file in this case:

#### 254 Appearances:

For Complainant, James L. Hopkins, Esq.

For Defendants, Luther Ely Smith, Esq. (Klein & Hough).

Witness: David Nicholson.

DAVID NICHOLSON, a witness produced, sworn and examined on the part of the complainant, testified as follows:

## Direct examination by Mr. Hopkins:

Q. 1. What is your full name?

A. David Nicholson.

Q. 2. What is your age? A. Fifty-four.

Q. 3. You reside in the city of St. Louis?

Q. 4. What is your occupation?

A. Grocer and liquor merchant.

Q. 5. What is the name of your business house? A. David Nicholson.

Q. 6. How long has that house been engaged in business in the city of St. Louis?

A. Since 1843.

Q. 7. During how much of that time have you been connected with that house in the city of St. Louis?

A. Since 1867.

Q. 8. Since 1867 has the house of David Nicholson handled liquors?

A. It has.

Q. 9. Are you acquainted with W. A. Gaines & Co. of Frankfort County, Ky.?

A. Simply in a business way.

Q. 10. Are you acquainted with the Old Crow whisky of W. A. Gaines & Co.?

A. Yes.

Q. 11. How long have you known that brand of whisky?

A. Well, I should say about twenty-five years.

Q. 12. Does the house of David Nicholson bottle the Old Crow whisky of W. A. Gaines & Co.?

A. It does.

Q. 13. Is this the label under which that bottling is done?

A. Yes.

Note.—The label identified by the witness is offered in evidence as "Complainant's Exhibit Nicholson Label." 255 Said label is in words and figures as follows:

COMPLAINANT'S EXHIBIT "NICHOLSON LABEL."

Old Crow
Bourbon Whiskey
Distilled by
W. A. Gaines & Co.
Frankfort, Ky.
Bottled and Guaranteed by
David Nicholson
St. Louis, Mo., U. S. A.

Counsel for the defendants objects to the last two questions, and to the exhibit offered in evidence, for the reason that the label differs from the trade-mark claimed by complainant in its amendel bill, and for the reason that the questions objected to are immaterial and irrelevant to any issue in this case.

Q. 14. Were you acquainted with the firm of A. L. Hellman & Co. of this city?

A. I was.

Q. 15. Were you acquainted with the late Abraham M. Hellman in his lifetime?

A. Yes.

Q. 16. How long were you acquainted with the firm, and with Mr. Hellman?

A. With Mr. Hellman, I think, about twenty years. That is,

Abraham Hellman.

Q. 17. During that time did you ever hear of the firm of A. M. Hellman & Co. asserting any claim to right or title of the trademark "Old Crow" for whisky?

A. Except as their own bottling.

Q. 18. Please explain your last answer.

A. They had a piece of bottled goods on the market which they called Old Crow whisky, but it was supposed to be Gaines' whisky. Gaines was the only man we knew that made Old Crow whisky.

Counsel for defendants object to the answer of the witness and moves that that portion of the answer beginning with the words "it was supposed to be stricken out," for the reason that the same is not responsive to the question asked, that it is not a statement of fact, and it is immaterial and irrelevant to any issue in this case.

Q. 19. Did you ever hear of A. M. Hellman & Co. making any claim that they owned the trade-mark for whisky consisting of the words "Old Crow?"

Counsel for defendant objects to the question, for the reason that it is immaterial and irrelevant what was said or what was claimed; the witness should be required to state the facts as to what was done by the firm of A. M. Hellman & Co.

A. No.

W.

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Q. 20. To what extent has the house of David Nicholson bought, sold and dealt in Old Crow whisky of W. A. Gaines & Co.?

A. I cannot state without my book.

Q. 21. In a general way, state whether their sales has been large or small?

A. A large quantity.

Q 22. And during how long has the house of David Nicholson dealt in that whisky?

A. Oh, off and on for twenty years.

Q. 23. During all that time whose whisky has the word- "Old Crow" indicated to your mind?

A. W. A. Gaines & Co.

Cross-examination by Mr. Smith:

XQ. 1. Are you a rectifier, Mr. Nicholson?

A. No, sir.

X Q. 2. Don't you carry a Government rectifier's license?

A. No, sir.

X Q. 3. Are you engaged now in the bottling of W. A. Gaines & Co. Old Crow whisky?

A. Yes.

X Q. 4. In what shape does that come to your establishment?
A. It is taken out of the bonded warehouse in five and ten barrel lots.

X Q. 5. In what shape do you bottle it? Quart bottles?

A. Quart bottles, pints and half pints and half gallons.

X Q. 6. Do you reduce it in proof?

A. Yes.

X Q. 7. To what proof?
A. Ninety-two and ninety.

X Q. 8. Do you restore the color?

A. No.

X Q. 9. You don't add anything to restore the color?

A. No.

X Q. 10. Neither caramel of burnt sugar?

A. No.

X Q. 11. Then you add nothing whatever except water?

A. Nothing but water.

X Q. 12. And that only to reduce it to 92 proof?

A. Yes.

X Q. 13. As near as you can recall, what was the first year that your firm began to deal in Old Crow whisky of W. A. Gaines & Co.? A. It was previous to 1880.

X Q. 14. How long before 1880 do you think it was?

A. It was two or three years before that; 1887, perhaps.

X Q. 15. It probably has been as far back as 1877, you think? A. 1877, yes.

X Q. 16. What was your course of dealing at that time with reference to the Old Crow whisky of W. A. Gaines & Co.?

A. We bought it for speculation purposes; buying and selling.

X Q. 17. You did not bottle any at that time?

A. No.

X Q. 18. You did not sell any to the retail trade at that time?

A. Not under the name of Old Crow.

X Q. 19. Under what name did you sell it?

A. David Nicholson.

X Q. 20. Did you buy this in five and ten barrel lots at that time.

as is your custom now?

A. We don't buy any five and ten barrel lots now. We bring it out of the bonded warehouse. As it is first made we buy in large supplies and take it out of the bonded warehouse in five and ten barrel lots.

X Q. 21. I understand then that from 1877 and for a few years thereafter you bought whisky from W. A. Gaines & Co.

258 known as Old Crow whisky?

A. I did not say W. A. Gaines & Co. We bought in the market from anybody that was offering where we could sell and make a profit on it.

X Q. 22. How was this whisky marked, if at all, or branded?

A. W. A. Gaines & Co., distillers, Frankfort, Ky., I think, and gave the number of the distillery, and "Old Crow."

X Q. 23. That was branded on the head of the barrel?

A. Yes.

X Q. 24. The words "Old Crow" appeared on the head of the barrel?

A. Yes.

X Q. 25. You say you did sell some of this to the retail trade under

the name of David Nicholson?

A. Not under any name. We sold it by the gallon or half gallon. If a man wanted \$4.00 whisky or \$5.00 whisky, we would give it to him just as the quality would be—probably that and probably something else; but it wasn't classed as anybody's whisky but ours.

X Q. 26. You say you would sell a gallon at a time?

A. Yes.

X Q. 27. Put up in some sort of a package?

A. We would take it out of the wood, that is all.

X Q. 28. And you would put it in a package which the customer brought?

A. Yes; a jug or anything.

X Q. 29. You didn't mark it any way?

X Q. 30. Or brand it in any way?

A. We don't do it today, except what we bottle.

X Q. 31. When did you first begin to bottle under the label which has been offered in evidence by counsel for the complainant?

A. About two years ago.

X Q. 32. Had you ever done any bottling of Old Crow prior to that time?

A. Not that I remember.

X Q. 33. Well, if any had been done by your firm from 1867 on you would have known it, would you not?

A. I would not.

X Q. 34. I understood you to say that you had been familiar with that business from 1867 on?

A. Yes.

X Q. 35. Who has charge of the liquor business at your 259 establishment?

A. The regular liquor man. X Q. 36. What is his name?

A. George Williams.

X Q. 37. How long has he been with you?

A. I think it is three years.

X Q. 38. He has been in charge of you- liquor business during that time?

A. Yes.

X Q. 39. Who was his predecessor?

 A man named Casper Duther. He had been with us about twenty years. He is dead:

X Q. 40. He had been with you for about twenty years?

A. Yes; more than that.

X Q. 41. You do not recall Old Crow whisky prior to about twentyfive years ago, I understood you to say?

A. No, sir.

X Q. 42. And no one connected with the establishment carries a rectifier's license?

A. No, sir.

X Q. 43. Now, how long have you known the firm of A. M. Hellman & Co. or its predecessor, I. & L. M. Hellman?

A. I should say as far back as twenty-five or thirty years. I can say positive twenty years. I knew Mr. Hellman personally very well.

X Q. 44. I think you said that you knew of the firm in 1867 when you began business?

A. As far back as 1870, I think, but I wouldn't be positive on that. X Q. 45. When was it that you first knew of the whisky which they bottled or which they put up known as Old Crow?

A. I don't think I ever saw it.

X Q. 46. When was the first time that you heard of it?

A. I couldn't tell now what time it was, but I know our man bought it.

X Q. 47. Do you think it was soon after?

A. I couldn't tell anything about it.

X Q. 48. What is your best recollection?

A. I can't give you any best recollection. In my business I may hear it stated, but I can't tell when I heard it, and if you ask me if I know I can't tell anything about that.

260 X Q. 49. Do you remember the circumstances under which you knew of this bottling or first heard of it, by Hellman

under the name of Old Crow? A. I do not. I heard it as a business man hears things around town, but I couldn't tell when it was.

X Q. 50. You knew that Hellman sold whisky under the name of Old Crow?

A. I don't know who sold it, but I knew he had it. I never saw

any sold anywhere, so I don't know.

X Q. 51. You have given your best recollection as to the date when you first began to sell Old Crow or deal in Old Crow, yourself or your firm began to deal in it. Won't you search your recollection the best you can and give me the earliest date when you heard of Hellman selling Old Crow?

A. I couldn't do it.

X Q. 52. Well, won't you make an effort to think how far back it was?

A. Well, it is over five years ago, but when I can't tell you.

X Q. 53. Isn't it, in point of fact, shortly after you first knew Mr.

Hellman that you first knew of this bottling of Old Crow?

A. I know since he was on Pine street. Before he moved to Pine street I didn't hear anything about it, because I wasn't very well acquainted with him and didn't do any business with him. We had -a large business with A. M. Hellman & Co. when he moved to Pine

X Q. 54. If I tell you that the firm of I. & L. M. Hellman was at 110 Pine street as far back as 1867 would that refresh your recollec-

 A. No, it would not. I don't know anything about it.
 X Q. 55. Did you do a large trade with that firm in the line of whisky?

A. No; it was imported goods principally.

X Q. 56. Of what nature?

A. Benedict Cordials, ale and beer, bar supplies, like bitters and pineapple.

X Q. 57. But not any American whisky?

A. No: I don't think we ever sold a bottle of the American whiskies, but Scotch whiskies and Irish whiskies, yes.

261 X Q. 58. You say you never saw any package of Hellman's whisky marked "Old Crow?"

A. Not that I know of.

X Q. 59. Do you know whether the trade of I. & L. M. Hellman and the successors, A. M. Hellman & Co., was local principally, or out of town?

A. I couldn't tell you. I knew they had traveling men.

X Q. 60. Do you know where their men travel?

A. No.

X Q. 61. Do you know what sections of the country they catered to?

A. No.

X Q. 62. How old were you when you first went into the firm of David Nicholson?

A. About 18.

X Q. 63. And you have been connected with it ever since?

A. I have.

X Q. 64. When did you first have knowledge of the liquor business of David Nicholson?

A. From the first hour I was in the store. I was selling goods as

salesman from the first.

X Q. 65. So that from the time you went into the store you knew about the liquor business that was carried on in the establishment?

A. I knew we had liquor and knew it was sold there. I didn't know anything about making it up, or the different values, or the government laws, etc.

X Q. 66. You knew of the brands?

A. Oh, yes. In our retail department we don't sell brands. We have our whiskies at the price, \$2.00, \$3.00 or \$4.00, but it is all It may be Old Crow, Spring Hill or Old Hermitage or Nicholson. something else.

X Q. 67. Has that been true from the time that you went into the

store to the present time?

A. Yes. It is only in the last few years that we have sold any barrels.

X Q. 68. During all that time your house has been that of both wholesale and retail liquor dealers?

A. Yes.

X Q. 69. Under what circumstances did you come to en-262 gage in bottling under this label Old Crow whisky?

A. The trade demanded it.

X Q. 70. Did you approach W. A. Gaines & Co. first, or did they approach you in regard to it?

A. Nobody approached me at all.

X Q. 71. Then you merely decided that it would be to your advantage to put whisky that you purchased from W. A. Gaines & Co., made at their Old Crow distillery, up in bottles bearing this label?

A. Yes.

X Q. 72. And you did that without any understanding with Gaines & Co. at all?

A. I don't think they knew I was bottling until a year after I began bottling it.

X Q. 73. Did you ever discuss the matter with Harry E. Blood? A. Yes.

X Q. 74. When did you first discuss it with him?

A. Nearly two years ago.

X Q. 75. Did you make any arrangement with Paris, Allen & Co. ?

A. There was no arrangement to be made.

X Q. 76. How long had you been bottling under this label when

you first discussed the matter with Harry Blood?

A. About a year, I did not discuss the matter with Blood. I never said that. We talked about it, that is all. Just told him I thought of bottling. I was bottling in fact at that time.

X Q. 77. Do you buy your Old Crow whisky of Harry E. Blood? A. Sometimes. He is only the representative of Paris, Allen &

Company.

X Q. 78. Have you any arrangement with either Paris, Allen & Company or W. A. Gaines & Company, as to the advertising on your bottling of Old Crow whisky?

A. No, I would like to, but I can't get it.

X Q. 79. Do they advertise your bottling Old Crow?

A. Yes, and No.

X Q. 80. Answer as to the "yes" first?

A. Well, the thing is so small it is hardly worth mentioning. We were all sitting in the bar-room one day, and we had no sign "Old

Crow" up there, and Blood said to the barkeeper "You get a sign and hang it up there, David Nicholson" and there was a sign put up, and I paid for it, cost \$3.00; that is all there was about it.

X Q. 81. And do you consider that no advertising?

A. No newspaper advertising, because I paid that myself.

X Q. 82. Your bottling of Old Crow is sold in the New York hotels, is it not?

A. Yes.

X Q. 83. You pay for the advertising of that bottling, don't you? A. Well, I went down there myself, and sold it.

X Q. 84. Explain your answer?

A. You ask if I paid for the advertising of the goods sold in New York.

X Q. Yes?

-. I told you I went down there myself and sold it, on my holi-

day trip.

X Q. 85. Hasn't the newspapers ever contained advertisements that your bottling of Old Crow is sold at certain New York Hotels? A. Yes.

X Q. 86. You pay for that advertising do you not?

A. Yes.

X Q. 87. When you made your sales to the New York Hotels did you sell the goods out-right or did you have a percentage upon each sale upon the total amount of the goods that are sold?

A. Sold it out-right.

X Q. 88. Did you ever discuss with A. M. Hellman the bottling of Old Crow whisky?

A. No.

X Q. 89. Did you ever discuss with him the right to use the words "Old Crow" as a trade mark?

A. No, I supposed he was using Gaines' Old Crow, as I always thought Old Crow was only made by Gaines.

Counsel for Defendants moves to strike out the last part of the

answer as not being responsive to the question.

X Q. 90. You did not know then whether the whisky which you understood the firm of A. M. Hellman & Co. were bottling was a blend or straight whiskey, did you?

A. I presumed it was straight whiskey.

264 X Q. 91. But you had no knowledge on the subject?

A. No, I never saw it. How could I have a knowledge I mentioned that before that I never saw the whisky.

X Q. 92. And you never discussed it with any one connected with the firm of A. M. Hellman & Company or I. & L. M. Hellman?

A. No.

X Q. 93. I understand you to say that the words "Old Crow" now means to you whisky made by W. A. Gaines & Company?

A Yes.

X Q. 94. That is your understanding of those words?

A. Yes, just the same as my liquid bread belongs to me, and the Old Crow belongs to Gaines.

X Q. 95. When did you first begin to deal regularly in W. A. Gaines & Company's Old Crow?

A. About 3½ years ago.

X Q. 96. Prior to that time you had dealt in it occasionally?

A. Occasionally.

DAVID NICHOLSON.

Subscribed and sworn to before me this 28th day of September, A. D. 1905.

CHAS. E. WELLER.
Notary Public and Special Examiner.

# Deposition of Herman A. Steinwender.

Herman A. Steinwender, a witness produced on behalf of the complainant, being duly sworn, testified as follows:

# Direct examination by Mr. Hopkins:

Q. 1. State your full name?

A. Herman A. Steinwender. Q. 2. What is your age?

A. I am 65 years old.

Q. 3. Where do you reside?

A. In St. Louis.

Q. 4. How long have you resided in St. Louis?

A. About fifty years.

Q. 5. What is your occupation?

A. I am an importer and wholesale wine and liquor dealer. Q. 6. How long have you been engaged in that business?

A. I have been in that business about forty years.
Q. 7. All of that time in the city of St. Louis?
A. All of that time in the city of St. Louis,

Q. 8. You were formerly connected with the firm of Steinwender & Sellner?

A. Yes, sir.

Q. 9. For how many years? A. About thirty-eight years.

Q. 10. What is the style of your present business?
A. My present firm is H. A. Steinwender & Co.

Q. 11. Are H. A. Steinwender & Co. dealers of the Old Crow whisky of W. A. Gaines & Co.?

A. Yes.

Q. 12. Is this the label used by H. A. Steinwender & Co. in the bottling of that whisky?

A. Yes, sir; that is our label.

Complainant offers in evidence the label identified by the witness and ask- that the same be marked "Complainant's Exhibit H. A. Steinwender & Co. Label."

Said label is in words and figures as follows:

COMPLAINANT'S EXHIBIT "H. A. STEINWENDER & CO. LABEL."

Old Crow Bourbon

W. A. Gaines & Co., Distillers, Woodford Co., Kv.

H. A. S. & Co. Trade Mark

Bottled and Guaranteed by

H. A. Steinwender & Co. St. Louis, Mo.

Counsel for defendants objects to the label offered in evidence for the reason that it differs from and is unlike the words claimed as trade-mark in complainant's amended bill filed berein, and for the further reason that it is immaterial and irrelevant to any issue in the case.

Q. 13. How long have you been engaged in handling W. A. Gaines & Company's Old Crow whisky?

> A. Well, we have handled that whisky about twenty-five years, sure.

266Q. 14. During all that time whose whisky have the words "Old Crow" indicated to your mind?

A. Well, always W. A. Gaines & Co.

Q. 15. Have you, in the houses with which you have been identified, handled this whisky extensively during that time?

A. Yes, sir.

Q. 16. Through what territory have you sold your own bottling of W. A. Gaines & Co.'s Old Crow whisky?

A. The state- of Missouri, Illinois, Iowa, Nebraska, Texas and Colorado; that is about all—that is about as far as we go.

Q. 17. Were you acquainted with the firm of A. M. Hellman &

Co. of this city?

A. Yes, sir.

Q. 18. How long did you know that firm?

A. Well, I know that firm about thirty years.

Q. 19. Did you know its predecessor, the firm of I. & L. M. Hellman?

A. Yes, sir.

Q. 20. During all of that time did you ever hear of either of those firms, A. M. Hellman & Co. or I. & L. M. Hellman, claiming to own the trade-mark for whisky consisting of the words "Old Crow"?

Counsel for defendants objects to the question for the reason that what was claimed or what was said is immaterial. The witness should be required to state the facts, what was done.

A. I never did.

Q. 21. Did the firm with which you are connected have any business dealings with either of those Hellman houses?

A. Never had.

Cross-examination by Mr. Smith:

X Q. 1. Mr. Steinwender, are your firm rectifiers?

A. Yes, sir.

X Q. 2. In what shape do you bottle the Old Crow that you now sell?

A. We bottle it in quarts, pints and half pints.

267 X Q. 3. Do you reduce it in proof?

A. Yes, sir. X Q. 4. How low?

A. Well, it is different, according to the orders of the trade.

X Q. 5. What is the lowest that you reduce it to?

A. Ninety proof.

X Q. 6. Don't you reduce it below 90?

A. No, sir.

X Q. 7. Do you restore the color by caramel?

A. Well, if you go into my business I don't want to give you my business. What I do in my business I don't believe I am up here to say.

X Q. 8. I will put the question in this form? Do you add anything to the Old Crow that you bottle except water?

Objected to as irrelevant and immaterial and having no bearing upon the issues in this case.

A. Well, I don't want to answer that question. Do you think I am going to tell a man what I put in my whisky, or how I am making my goods? That is a trade secret.

X Q. 9. Isn't it a fact, Mr. Steinwender, that you add other substances than water to the whisky which you sell in bottles bearing 268

the label "Old Crow Bourbon, bottled and guaranteed by H. A. Steinwender & Co.?"

A. Well, with your long sentences I don't know what you mean.

You will have to repeat that.

Last question read to witness.

Counsel for complainant notes the same objection.

A. Well, I don't want to answer that.

X Q. 10. We are entitled to have your answer, Mr. Steinwender,

A. Well, all right, then. I don't see that I should tell people what I do in my business. That is my bread and butter. You ask that from me, and I don't think I have to answer that in court. If I have to, of course I will answer it, but I want to find out first whether I have to. There is nothing so bad about it, but that is my bread and

butter. If you want to take that away from me here, all right.

X Q. 11. These bottles that you sold under the label "Old
Crow Bourbon" are not mere bottles containing straight Old

Crow whisky, are they?

Same objection.

A. Well, I ain't going to answer that. I told you I reduced it with water, so of course it ain't straight. What do you mean by straight, anyhow?

X Q. 12. Containing other substances?

A. Well, I am not going to tell you my business, if there is any, unless I have to.

Mr. Smith: I think you have answered the question.

Witness: Very well.

X Q. 13. When was it that you first began to deal in whisky made by W. A. Gaines & Co. and known as Old Crow, as near as you can recollect?

A. About 25 years.

X Q. 14. Did you buy direct from W. A. Gaines & Co.?

A. Yes, sir.

X Q. 15. In what shape did the goods come to you?

A. In barrels, and in cases, bottled.

X Q. 16. How were the bottles—that is, the case goods—marked or branded, if at all?

A. Oh, I don't remember that. They changed their bottling. They have various bottling in all those years. I can't tell you that.

X Q. 17. Do you remember whether or not the bottles were marked at all?

A. Oh, I remember they were marked Old Crow; yes, sir; but if you ask me for the wording on it, I can't tell you that, but they were marked Old Crow—Old Crow Bourbon.

X Q. 18. How were the barrels marked? A. They are marked Old Crow Bourbon.

X Q. 19. With what other words were the barrels marked?

A. Oh, I don't remember all the words. There are a great many words on such barrels. I haven't got the brand before me, else I could read it to you.

X Q. 20. Did you continue from that time on to buy and sell Old Crow whisky?

A. Yes. Oh, some years we bought some and some years we didn't. Off and on we continued to deal in it.

269 X Q. 21. Did you know Mr. A. M. Hellman well in his lifetime?

A. Yes, sir.

X Q. 22. Don't you know, as a matter of fact, that he sold Old Crow whisky?

A. Yes. That is, I heard that he had a brand. I never saw it, and I couldn't swear to it; it is just hearsay, that he had a brand of "Old Crow." That is hearsay.

X Q. 23. When did you first hear that Mr. Steinwender?

A. Oh, I heard that about ten years ago.

X Q. 24. You think you first knew the firm about 30 years ago?

A. Hellman; yes.

X Q. 25. Have you been to that place of business frequently?

A. Not frequently; no, sir.

X Q. 26. When do you think was the first time you ever went to their place of business?

A. Well, I went there about eight years ago, to his office. X Q. 27. Was that the first time you had ever been there?

A. Well, I believe I went down when they were on Pine street, about twenty years ago, once or twice.

X Q. 28. Did you ever see any of their barrels there marked "Old Crow?"

A. No. sir.

X Q. 29. Or "Crow?"

A. No, sir.

X Q. 30. Don't you remember a sign that he had in the office of "Hellman Celebrated Crow Bourbon?"

A. No, I never saw it. X Q. 31. A painted sign? A. No, sir; I never saw it.

X Q. 32. Did you ever discuss with Mr. A. M. Hellman the words "Old Crow" and the right to use them?

A. Never; no, sir.

X Q. 33. Isn't it a fact that not only ten years ago, but twenty or thirty years ago, you knew of their selling whisky known as Old Crow whisky?

A. Well, I don't know that long; no.

X Q. 34. It is only ten years ago?

A. I learned that they got a brand "Old Crow." X Q. 35. How did you learn that fact?

A. From hearsay.

X Q. 36. Who told you? A. Some whisky men.

X Q. 37. Do you remember who it was?

A. No; I can't remember.

X Q. 38. Do you know in what territory Hellman did business?

A. Yes, sir.

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X Q. 39. State what territory it was.

A. I used to meet Hellman's man in Missouri and Kansas.

X Q. 40. Whom do you mean by "Hellman's man?"

A. Hellman's salesman.

X Q. 41. What was his name?

A. His name was Harris.

X Q. 42. You mean Mr. Meyer Harris?

A. I don't know his initials. I believe it was. He was formerly, I believe, a partner, but when I knew him he was a salesman.

X Q. 43. Do you know what brands he carried?

A. No, I don't know what brands he carried. You mean what he sold?

X Q. 44. Yes.

A. Oh, I never paid any attention to it; no.

X Q. 45. Don't you remember that he sold a brand known as Old Crow or Crow?

A. No, I never saw the brands. I don't believe he sold it out in that territory that I know of. I never saw a barrel.

X Q. 46. Did you ever hear him mention it?

A. Never.

X Q. 47. You can't recall all the circumstances under which you came to hear of Hellman selling Old Crow whisky?

A. No; just about like I say. Some ten years ago, some whisky man talked about it, that he shipped out one stamp whisky, Old Crow.

X Q. 48. Do you know whether or not the firm of A. M. Hellman & Co. were rectifiers?

A. Yes: I know they were rectifiers.

X Q. 49. And you understood that the whisky which they were selling as Old Crow whisky was one stamp goods?

A. Yes, sir; that was the say-so of these whisky men to me.
X Q. 50. You can't recall anything else about that conversation?

A. No.

X Q. 51. Or how the conversation arose?

A. No.

X Q. 52. Was anything said at that time about his right to use the words "Old Crow"?

A. No; in fact, this man—that it the way it came up—he was wondering that Mr. Hellman, who was otherwise a very honorable merchant, that he would use such a brand.

X Q. 53. Were you deating in Old Crow at that time yourself?

A. Yes, sir.

X Q. 54. Did you make any investigation as to the truth of this statement that Hellman was selling Old Crow whisky?

A. No, sir.

X Q. 55. Was it not to your interest to see that the words "Old Crow" were used only on goods on which they were entitled to be used?

A. No. We are used to such fraudulent matters, and if you would hunt them all up you would just have to work every day and night.

All our brands, imported goods as well as American brands, we think the public will discriminate.

XQ. 56. You say the reputation of Mr. Hellman up to that time

was good.

A. His reputation was that of an upright merchant. X Q. 57. Was it not always so, up to his death?

A. Always so, up to his death; yes, sir.

X Q. 58. You refer to Mr. A. M. Hellman?

A. A. M. Hellman; yes, sir. X Q. 59. And that has been the reputation of that house, has it not, and its predecessor, I. & L. M. Hellman?

A. Yes, sir.

X Q. 60. Do you remember whether it was Mr. Holman, of Paris, Allen & Co., who told you about Hellman using the words "Old

A. I don't believe it was Mr. Holman; no.

X Q. 61. You can't recall who it was?

A. No; no; but I don't think it was Mr. Holman.

272 X Q. 62. And you don't think that prior to ten years ago you ever heard of Hellman selling any Old Crow whisky?

A. No. sir.

X Q. 63. When was it that you used to meet Mr. Harris in Kansas and Missouri?

A. Oh, that was in the early '80's, in 1882. X Q. 64. You say the words "Old Crow" meant to you whisky made by W. A. Gaines & Co.?

A. Yes, sir.

X Q. 65. That is your understanding of the words "Old Crow"?

A. Yes, sir.

X Q. 66. About three years ago, I understand your testimony to be, you began to bottle under the label "Old Crow Bourbon"?

A. Oh, no. Our old firm bottled that whisky already themselves for about at least ten years—twelve years.

X Q. 67. By your old firm you mean Steinwender & Sellner?

A. Yes, sir.

X Q. 68. What label did they use?

A. We used first a label furnished by W. A. Gaines & Co.

X Q. 69. Do you remember what that label was?

A. Well, it was a yellow label with a great deal of writing on it, about the quality of the whisky.

X Q. 70. What else was on it, besides the writing?

A. I don't know what you mean.

X Q. 71. Were the words "Old Crow" on it?

A. Yes; certainly; "Old Crow Bourbon." Right here W. A. Gaines & Company, distillers, are named on the bottles. The Old Crow people used to furnish the labels to all the bottlers, but they discontinued that.

X Q. 72. When did the Old Crow people begin to furnish labels

to the bottlers?

A. About twenty years ago.

X Q. 73. And when did they discontinue it?

A. Well, that I can't say exactly. I think it must be about eight years ago, but I hate to say exactly.

X Q. 74. Whom do you refer to by "Old Crow" people?

A. Well, W. A. Gaines & Co., and Paris, Allen & Co.

X Q. 75. Did you begin to use this label as soon as your 273 new firm was formed?

A. Not exactly; no. I just had a temporary label. This is a lithograph label, and I had one printed which was different, but is was not exactly like this.

X Q. 76. Did you have any arrangements or understanding with Paris, Allen & Co., or W. A. Gaines & Co. about bottling under this

label?

A. No, sir.

X Q. 77. From whom do you buy your goods—Old Crow?

A. I bought first my Old Crow on the market. When I went into business I just went and bought it on the market through a broker,

X Q. 78. How do you buy it now?

A. I buy it now from Paris, Allen & Co.

X Q. 79. Do you do business through Harry E. Blood?

A. Yes, sir.

X Q. 80. Do you buy exclusively through him?

A. No, not exclusively. We sometimes buy in the open market through brokers. Sometimes I write to the firm of Paris, Allen & Co.

X Q. 81. Aside from the fact that you met Mr. Harris, salesman of the firm of A. M. Hellman & Co. in the states of Missouri and Kansas, you are not familiar with the territory in which they sold goods, are you?

A. Yes; I think I was very familiar with the territory when he and I traveled, because we traveled for at least six or seven years in

the same territory.

X Q. 82. Did you travel in other states with him than Missouri and Kansas?

A. No; that is the only states I met him.

X Q. 83. Do you know what other states he traveled in?

A. No, I do not, but he used to tell me, I believe, that he went down to Arkansas some.

X Q. 84. Louisiana?

A. That I don't know.

X Q. 85. Mississippi? A. I don't know.

X Q. 86. You don't know what other states the firm might have sold goods in?

A. No, sir.

X Q. 87. You are not familiar with their trade except in those two states?

A. That is all.

H. A. STEINWENDER

274 Subscribed and sworn to before be this 30th day of December, A. D. 1905.

> CHAS. E. WELLER. Notary Public and Special Examiner.

## Deposition of Albert C. Sellner.

ALBERT C. SELLNER, a witness produced on behalf of the complainant being duly sworn, testified as follows:

Direct examination by Mr. Hopkins.

## By Mr. Hopkins:

Q. 1. State your full name?

A. Albert C. Sellner.

Q. 2. What is your age?

A. Sixty-five years.

Q. 3. Do you reside in St. Louis?

A. Yes, sir.

Q. 4. How long have you resided in this city?

A. Steadily since 1870.

Q. 5. What is your business?

A. Wholesale liquor business, importing business.

Q. 6. Are you acquainted with the Steinwender & Sellner Mercantile Company in this city?

A. Yes, sir. Q. 7. That is a corporation?

A. Yes, sir.

Q. 8. And what is your connection with that corporation?

A. I am the treasurer and manager.

Q. 9. Prior to the present corporation Steinwender & Sellner Mercantile Company engaging in business, were you a member of the firm of Steinwender & Sellner?

A. Yes, sir.

Q. 10. For how long a time were you a member?

A. Since 1870.

Q. 11. Have you been continuously engaged in the liquor business in this city since 1870?

A. Yes, sir.

Q. 12. How long have you been acquainted with W. A. Gaines & Co., of Frankfort, Ky.?

A. You mean personally acquainted?

Q. 13. No; in a business way?

A. Since about the time we started in business—since 1870. We didn't do any business with them at that time, though.

Q. 14. But you knew of them at that time, however?

A. Yes, sir.

Q. 15. Have you or the company with which you have been connected handled the Old Crow whisky of W. A. 275 Gaines & Co.? If so, how long?

A. Before we formed the corporation, you mean?

Q. 16. In all your companies. My question relates to your own experience in the business.

A. I couldn't say exactly when we did start with the W. A. Ga nes & Co.

Q. 17. About how long ago was it, as nearly as you can recollect?

A. It was at least about fifteen years since we did business to-

gether.

Q. 18. During the past fifteen years have the concerns with which you have been identified, Steinwender & Sellner and the Steinwended & Sellner Mercantile Company, dealt in the Old Crow whisky of W. A. Gaines & Co.?

A. Yes, sir.

Q. 19. Practically all of that time?

A. Well, not regularly.

Q. 20. During that time have you bottled the Old Crow whisky?

A. Yes, sir.

Q. 21. Is the Steinwender & Sellner Mercantile Company now engaged in bottling that whisky?

A. Yes, sir.

Q. 22. Through what territory have the two houses with which you have been connected sold their own bottling of W. A. Gaines & Co. Old Crow whisky?

A. Well, I don't know exactly where we sold W. A. Gaines & Co. bottling Old Crow, but we sold goods in the different states. I don't know whether we sold in all the states or not.

Q. 23. Over how large territory, speaking generally? A. Out west, in Utah and Wyoming and Colorado.

Q. 24. And how far east?

A. Well, we were only going east for the last five or six years now. Not at the time when we started.

Q. 25. No, I am not referring to any time. How far east have you had this trade during the past five or six years?

A. I will say, Indiana and Illinois. We are selling some of this

whisky today in New York.

Q. 26. By "this whisky" do you refer to your bottling of the Old Crow whisky of W. A. Gaines & Co.?

A. To our bottling?

Q. 27. Yes. Is that bottling under this label that I show you?

A. Yes, sir.

Complainant's counsel offers in evidence the label identified by the witness and asks that it be marked "Complainant's Exhibit Steinwender & Sellner Mercantile Company Label."

Said label is in words and figures as follows:

Complainant's Exhibit "Steinwender & Sellner Mercantile Co. Label."

Old Crow Distilled by W. A. Gaines & Co., Woodford County, Ky. Bourbon Whiskey

> Bottled and Guaranteed by Steinwender & Sellner Merc. Co. St. Louis, U. S. A.

Counsel for defendant- objects to the introduction of this label in evidence for the reason that it is unlike the trade-mark claimed in complainant's amended petition, for the reason that it is irrelevant and immaterial to any issue in this case.

Q. 28. Were you acquainted with the late Abraham M. Hellman in his lifetime?

A. Yes, sir.

Q. 29. And the firm of A. M. Hellman & Co. with which he was connected?

A. Yes, sir.

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Q. 30. Did you have any business dealings with that firm?

A. Yes, off and on, in a small way.

- Q.31. During how many years did those business dealings extend?
- A. Well, as to the business dealings I don't know, and if you ask me how long, I can't remember how long we did business together.

Q. 32. How long did you know Hellman personally?

A. I have known Hellman since the last thirty years, at least.

Q. 33. During all the time that you were acquainted with A. M. Hellman and with the business of the house with which he was connected, did you ever hear of any claim made by him or by his house that his house owned the trade-mark for whisky consisting of the words "Old Crow?"

Counsel for defendants object to the question for the reason that it is immaterial what was claimed or said. The witness should be required to state only facts, what was done.

A. Yes, sir.

Q. 34. When did you first hear such a claim made?

A. To my recollection, I think it was about three or four years ago.

Q. 35. Prior to that time, had you ever heard such a claim made?

A. No, sir.

Q. 36. During the time that you have been engaged in business in St. Louis, whose whisky have the words "Old Crow" indicated to your mind?

A. W. A. Gaines & Co., other bottlings at that time and others firms at that time.

Q. 37. Do you mean by that that you knew of any persons producing Old Crow whisky besides W. A. Gaines & Co.?

A. No, sir; only in the bottling business.

Q. 38, You refer to the bottling of W. A. Gaines & Co.'s Old Crow whisky?

A. Wasn't that the previous question? About the bottling? Q. 39. No. The question was whose whisky the words "Old Crow" indicated to your mind, what they meant in your mind?

A. Well, I misunderstood the question, then, a little while ago.

Question 36 read to witness.

A. W. A. Gaines & Co.

#### 278 Cross-examination by Mr. Smith:

X Q. 1. You think it is about thirty years since you first knew Mr. A. M. Hellman?

A. I think it is about that long.

X Q. 2. How soon after you came to St. Louis did you become acquainted with him?

A. About five years.

X Q. 3. What were the circumstances under which you met him?

A. I met him as I would other merchants around me.

X Q. 4. Did you know of the firm of I. & L. M. Hellman before

you met Mr. Abraham M. Hellman?

A. No, I don't think I knew the firm before. The first acquaintance I made with him, I knew he was connected with the firm at that time.

XQ. 5. But you did not know the firm before that?

A. No. sir.

X Q. 6. Did you know what brand that firm used?

A. No, sir.

X Q. 7. When did you first have dealing with that firm?

A. I can't say what year.

X Q. 8. As near as you can recall?

A. Well, it would be only guess work if I should say it.

X Q. 9. Give your best recollection, Mr. Sellner?

A. I couldn't say at all, because my recollection is not so that I can say correctly when we had any dealings with him.

X Q. 10. Was it shortly after you met him that you had dealings with him?

A. Well, I don't remember.

X Q. 11. Did you ever go to his place of business?

A. Yes, sir.

X Q. 12. Did you go there frequently?

A. Several times.

X Q. 13. When, as near as you can recall, was the first time that you went there?

A. About eighteen years ago.

X Q. 14. Do you think you had had any dealings with him prior to that time?

A. I don't remember.

279 X Q. 15. Did you see any signs or advertisements of brands in his office when you went to the place of business 8 or 10 years ago?

A. I saw some signs, yes, sir.

X Q. 16. Do you recall now what those signs were?

A. No, sir.

X Q. 17. Do you recollect whether or not there was an "Old Crow" or "Crow Bourbon" sign?

A. I paid no attention to signs at all.

X Q. 18. There might have been such a sign there and you wouldn't have noticed it?

A. Didn't see it.

X Q. 19. Do you know in what territory he sold his goods?

A. No, sir; I can't say.

X Q. 20. You don't know whether his trade was local or out of town?

A. It was principally out of town, I think.

X Q. 21. You have no idea what brands his salesmen carried?

A. No, sir.

X Q. 22. When is the first time that you ever heard that his firm was dealing in a brand called "Crow," or "Old Crow"?

A. I never heard that.

X Q. 23. When did you first hear of the word "Crow," or "Old Crow," used in connection with his firm?

A. About 4 or 5 years ago.

X Q. 24. Under what circumstances did you learn that fact?

A. Mr. Hellman personally told me.

X Q. 25. Was that the first information you had on the subject?

A. Yes, sir.

X Q. 26. You never saw any of the goods that were branded or marked "Crow," or "Old Crow"?

A. No, sir, not to my recollection.

X Q. 27. Where did this conversation take place which you allude to between Mr. Hellman and yourself?

A. I can't remember the place. It might have been on the street or it might have been in mine or in his office.

X Q. 28. What did he tell you at that time?

A. He told me that he was in trouble with W. A. Gaines & Company on account of his bottling Old Crow.

280 X Q. 29. Was that all that was said?

A. He said that he claimed the priority of the brand.

X Q. 30. Was anything else said at that time by Mr. Hellman?

A. He said that he could prove it.

X Q. 31. This was Mr. Abraham M. Hellman that you are referring to?

A. Yes, sir, the one who died about a year ago.

X Q. 32. Does your firm carry a rectifier's license, Mr. Sellner?

A. Yes, sir.

X Q. 33. How do you bottle the goods that you send out under the label which has been offered in evidence?

A. I don't understand your question right, how we bottle it.

It is the same as anybody else bottles goods.

X Q. 34. Do you bottle it direct from the two-stamp package that comes from the warehouse?

A. No. sir.

X Q. 35. What change, if any, do you make?

Objected to as immaterial.

A. We dump our whisky.

X Q. 36. What do you do to it in the dump?

A. We have the gauger restamp it under the government regulation.

X Q. 37. The gauger doesn't restamp the bottles, does he?

A. He has nothing to do with the bottles at all.

X Q. 38. The gauger only restamps the barrels or wooden packages?

A. The barrels, after we are through with the dumping, and possibly reducing the whisky.

X Q. 39. To what proofs do you reduce it?

A. Well, I don't know that that has got any connection with this at all. It is giving our secrets away. I don't think that comes into this connection at all.

X Q. 40. To what proof do you reduce the whisky that you bottle and sell under the label that has been offered in evidence?

A. Ninety proof.

X Q. 41. Is that the lowest number that you reduce it to? A. Yes, sir.

X Q. 42. What proof is it when you dump it?

A. It depends on how it shows up, how the gauger after his inspection finds it.

281 X Q. 43. Well, as a rule what proof is it when you dump

A. We can't tell. One barrel is higher proof than another, sometimes.

X Q. 44. Does W. A. Gaines & Company know that you reduce the proof?

A. Yes, sir.

X Q. 45. Do you add anything to the goods before bottling other than water?

Objected to as immaterial.

A. Before bottling it?

X Q. 46. Yes?

Counsel for complainant advises the witness that he may decline to answer the question.

Witness: I will answer, if you want me to. I will give you the whole story.

X Q. 47. That is what we want, Mr. Sellner.

Counsel for defendants objects to the advice given to the witness by counsel for complainant.

Cross question No. 45 read to witness.

A. You mean before reducing it? No, sir.

X Q. 48. No, sir? I will put the question again. Do you put anything into this Old Crow whisky that you get from W. A. Gaines & Company except water?

A. Yes, sir,

X Q. 49. What do you put in it?

A. We put in some coloring matter, that is all.

X Q. 50. Caramel or burnt sugar?

A. Coloring matter.

X Q. 51. Do you add any flavor?

A. No, sir.

X Q. 52. Do you add any prune juice?

A. No, sir.

X Q. 53. Nothing except coloring matter and water?

A. That is all.

X Q. 54. Do W. A. Gaines & Company know that you add coloring matter?

A. Yes, sir.

X Q. 55. How long have they known that? A. I don't remember. About a year, I guess.

X Q. 56. How long have you bottled in this manner that you have described W. A. Gaines & Company's Old Crow whisky?

A. About within a year, I guess.

282 X Q. 57. Is this label of your own device? Or do you get it from W. A. Gaines & Company?

A. It is my own device.

X Q. 58. Did you have any understanding with W. A. Gaines & Company, or Paris, Allen & Company when you began to bottle in this manner?

A. No, sir.

X Q. 59. Do you know Harry E. Blood?

A. Yes, sir.

X Q. 60. Did you ever discuss with him the fact that you added coloring matter to Old Crow whisky bottled by you?

A. No, sir.

X Q. 61. Did you ever discuss with him the fact that you reduced the proof?

A. Yes, sir.

X Q. 62. Do you add water and coloring matter also to the Old Crow that you put up in barrels?

A. No, sir. What do you mean, that we put up in barrels?

X Q. 63. That you put up in barrels?

A. Not unless it is reduced under our own stamps, you know,

after it is dumped.

X Q. 64. When the gauger restamps a package for you that has been dumped and reduced what stamps does he put on the package?

A. A rectifier's stamp.

X Q. 65. And after such a package has been restamped by the gauger with the rectifier's stamp do you then add coloring matter in some cases?

A. No, sir; before.

X Q. 66. Before the stamp is affixed?

A. In the process of rectification we put that in.

X Q. 67. Mr. Sellner, how much Old Crow whisky of W. A. Gaines & Company do you handle in a year?

A. I can't say. I have got no record with me.

X Q. 68. Approximately?

A. I couldn't say without referring to my books.

X Q. 69. In round numbers how much do you handle during the year? Give an estimate?

A. You mean in this way?

X Q. 70. Yes, sir?

A. I don't remember. I could tell exactly if I had my books before me.

283 X Q..71. I don't want to trouble you to do down and come back again, if you will give me your best estimate, I will let that go in the record?

A. About ten barrels a month now.

X Q. 72. You mean that you dump about ten barrels a month, reduce it and add caramel to restore the color?

A. Yes, sir.

X Q. 73. You stated in your direct testimony that you became acquainted with the firm of W. A. Gaines & Co. about 1870. How did you come to know about it, then?

A. No, I said we started in 1870, and we knew about the firm

about five years later.

X Q. 74. Then you first knew about the firm in about the year 1875?

A. Yes, sir.

X Q. 75. How did you come to know about it at that time?

A. Because we were in business.

X Q. 76. Did you buy goods of them then?

A. I don't remember whether we bought any goods at that time or not.

X Q. 77. When do you think you first bought goods from them?

A. I don't know, can't remember.

X Q. 78. Was it as long ago as 15 years back?

A. Yes, sir.

X Q. 79. Do you remember how, if at all, the packages were marked or branded that you bought from W. A. Gaines & Company at that time?

A. Yes, sir. X Q. 80. How?

A. "W. A. Gaines & Co., Distillers, Frankfort, Ky." I think the 8th district. I don't remember about that. I couldn't remember whether is was the 7th or 8th; I am not sure about that now. That

has nothing to do with the brand, anyway. That is only the government regulation.

X Q. 81. Did you buy any bottled goods that time from them?

A. No, sir.

X Q. 82. When did you first begin to deal regularly in Old Crow of W. A. Gaines & Company?

A. I can't say that we ever dealt regularly, because we handled other goods. We had no special business with Old Crow. X Q. 83. You did not keep Old Crow regularly in stock

284 then?

A. No, sir.

X Q. 84. You keep it in stock now, do you not?

A. Yes, sir.

X Q. 85. How long since you began keeping it regularly in stock?

A. Well, for several years.

X Q. 86. You do a large business in W. A. Gaines & Company Old Crow now, do you not?

A. No, sir; I don't consider it very large, at all. X Q. 87. You do not consider it very large?

A. No, not our business with them.

X Q. 88. When you first began business in St. Louis was there any other Crow brand that you knew of at that time dealt in in this market?

A. I never heard of any.

X Q. 89. Didn't various firms here sell Old Crow whisky under their own name?

A. Not that I know.

X Q. 90. I believe you said that the words "Old Crow" indicate whisky made by W. A. Gaines & Company?

A. Yes, sir.

X Q. 91. That is what those words mean to you?

A. Yes, sir.

X Q. 92. And you are certain that there was no other Old Crow whisky sold in this market at any time since you have been in business here?

A. Never heard of it; not sold at Old Crow that I know of. ALBERT C. SELLNER.

Subscribed and sworn to before me this 28th day of December, A. D. 1905.

CHAS. E. WELLER, Notary and Special Examiner.

#### Deposition of John T. McMahon.

JOHN T. McMahon, a witness produced on behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr. Hopkins:

Q. 1. State your full name?

A. John T. McMahon.

Q. 2. What is your age?

A. 46 years.

Q. 3. You reside in the city of St. Louis?

A. Yes, sir.

Q. 4. Where is your place of business? A. 724 Olive street.

Q. 5. How long have you resided in St. Louis?

A. Two years.

Q. 6. Prior to that time where did you reside?

A. In Kansas City.

Q. 7. In what business are you engaged?

A. Liquor business; retail.

Q. 8. In this city?

A. Yes, sir.

Q. 9. Prior to that time were you engaged in the same business in Kansas City?

A. Yes, sir.

Q. 10. That is Kansas City, Missouri?

A. Yes, sir.

Q. 11. How long have you been engaged in the liquor business in the state of Missouri?

A. 20 years.

Q. 12. During that time have you been acquainted with the Old Crow whisky of W. A. Gaines & Company?

A. Yes, sir.

Q. 13. During that time whose whisky has been indicated to your mind by the name "Old Crow?"

A. Gaines'. Gaines' Old Crow is all that I ever knew. Q. 14. Have you handled that whisky in your business?

A. Yes, sir.

Q. 15. Have you ever known of any other Old Crow whisky except that of W. A. Gaines & Company?

A. No, sir.

Cross-examination by Mr. Smith:

X Q. 1. Do you know the firm of I. & L. M. Hellman or A. M. Hellman & Company of this city?

A. No. sir.

X Q. 2. Never did business with them at all?

A. No, sir.

X Q. 3. Never knew Abraham M. Hellman in his lifetime?

A. No, sir.

X Q. 4. You know nothing about their business or where they sell their goods?

A. No, sir.

X Q. 5. Nor what brands they carry?

A. No, sir; I never knew that firm. I just heard of them, but I never met any of them.

286 X Q. 6. Have you ever been in the wholesale liquor business?

A. I was a stockholder in the Billy Lee Company. William H. Lee & Company.

X Q. 7. How long have you known Billy Lee's Old Crow?

A. About 3 years or so.

X Q. 8. When did you first know of the words "Old Crow" used

in connection with whisky?

A. Well, I have heard of a great many Old Crows, that is, different names, but they all had Gaines on the label, Gaines' Old Crow. That is the way we bottled our whisky.

XQ.9. When you say "we bottle- our whisky," who do you mean?

A. Lee & Company.

X Q. 10. In what year did you first know that the words "Old Crow" were associated with a particular brand of whisky?

A. Oh, I bottled Old Crow myself a good many years ago.

X Q. 11. How long ago?

A. Well, it has been a good many years. It has been, I judge, 10 years; something like 10.

X Q. 12. In Kansas City?

A. Yes, sir.

X Q. 13. Was that the first you knew of the Old Crow whisky? A. Oh, I had handled Old Crow before that time in case goods,

Bought it from the different jobbers.

X Q. 14. Do you know the firm Morrin-Powers Mercantile Co., of Kansas City?

A. Yes, sir.

X Q. 15. Did you ever get any Old Crow of them?

A. No, not that I know of. I have done business with them ever since they have been in this business.

X Q. 16. What firms have you purchased Old Crow from?

A. Well, Nicholson, I think, is back as far as I can remember. I don't know whether it was his bottle or not, but I bought Old Crow whisky from him for several years past.

X Q. 17. In bottles?

A. Yes, sir.

X Q. 18. Whom else has sold Old Crow whisky to you?

A. Steinwender & Sellner, and Herman Λ. Steinwender also.

287 X Q. 19. Any one else?

A. No, I don't remember of any.

X Q. 20. Did you ever get any direct from Paris-Allen & Company?

A. No, I never got any direct from them.

X Q. 21. When you bottled Old Crow yourself you were merely a retailer and not a wholesaler?

A. Yes, sir.

X Q. 22. Did you then carry a rectifier's license?

A. No. I never did.

X Q. 23. When you bottled it did you bottle it straight or add anything to it?

A. I bottled it out of demijohns in the bottles and labeled it myself.

X Q. 24. How did you label it?

A. Labeled it "Old Crow." "Gaines' Old Crow." X Q. 25. And where did you buy the demijohns?

A. Well, I couldn't say. I bought them at some stores in Kansas City. I didn't buy the demijohns from whisky houses. I didn't buy any whisky in demijohns.

X Q. 26. You bottled from two-stamp packages? A. I don't remember what the packages were.

X Q. 27. You bottled from the barrel?

A. Yes, sir.

X Q. 28. And you don't recall from whom you bought the barrels? A. No.

X Q. 29. Are you handling Old Crow now?

A. Yes, I am handling Old Crow now.

X Q. 30. From whom do you buy Old Crow?

A. Well, I buy it from four or five different people.

X Q. 31. Name them, will you?

A. Lee's Old Crow, Steinwender & Sellner's Old Crow, Nicholson's Old Crow, and H. A. Steinwender's Old Crow. I have got those all now on my shelves.

X Q. 32. All bottled goods?

A. Yes, sir.

X Q. 33. Do you sell any bottled in bond Old Crow?

A. No.

X Q. 34. Have you ever sold any bottled in bond Old Crow?

A. I don't know that I ever have.

X Q. 35. Do you know whether the Old Crow that you are now selling is superior to the bottled in bond Old Crow?

A. That I don't know anything about, as to the superiority.

This is reduced whisky, you know. It is not straight, it is reduced. Bottle- in bond is 100 proof, and this is all less than that.

X Q. 36. Do you know what proof this is that you are selling now?

A. No, I don't exactly, but they tell you when they sell it that it is 95 or 96, some say 98, and some less than 96, I don't know. You just take a salesman's word for whatever the proof of it is when you buy it.

X Q. 37. You have no knowledge whatever of the Hellman Distilling Company, or A. M. Hellman & Company, or I. & L. M. Hell-

man?

A. No.

X Q. 38. And have not had?

A. No.

X Q. 39. Whatever brands they may have handled, any of those firms, you know nothing about?

A. No.

JOHN T. McMAHON.

Subscribed and sworn to before me this 28th day of December, A. D. 1905.

CHAS. E. WELLER, Notary and Special Examiner.

## Deposition of Louis Idler.

Louis Idler, a witness produced on behalf of the complainant, being duly sworn, testified as follows:

Direct examination by Mr. Hopkins:

Q. 1. State your full name?

A. Louis Idler.

Q. 2. What is your age?

A. 43. O. 3. You r

Q. 3. You reside in the city of St. Louis?

A. Yes, sir.

Q. 4. What is your occupation?
A. Grocer. Groceries and liquors.

Q. 5. You are connected with the A. Moll Grocery Company? A. Yes, sir; I am secretary and treasurer of that company.

Q. 6. How long have you been connected with that business?

A. For 20 years.

Q. 7. Prior to the present concern, what was the name in which the business was conducted?

A. A. Moll.

Q. 8. The A. Moll Grocery Company is a corporation?

A. A corporation.

Q. 9. And the business of A. Moll was succeeded by the corporation?

A. It was succeeded by the corporation, yes, sir.

Q.10. Are you acquainted with the Old Crow whisky of W. A. Gaines & Co., and if so how long have you been acquainted with it?

A. Well, ever since I have been with A. Moll. That is 20 years now.

Q. 12. Has your corporation and its predecessors bottled the Old Crow whisky of W. A. Gaines & Company, and if so how long?

A. They have bottled it ever since I have been with the concern, 20 years. Of course they have bottled it previous to that, but I only testify since I have been with them, that is 20 years, they have bottled the Old Crow whisky.

Q. 13. Will you produce a specimen of the label used by the A. Moll Grocery Company that you used on the bottles of the W. A.

Gaines & Company Old Crow whisky?

A. Yes, sir.

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Witness produces said label.

Complainant's counsel offers in evidence the label produced by the witness and asks that the same be marked "Complainant's Exhibit A. Moll Grocery Company Label."

Said label is, in words and figures, as follows, to-wit:

COMPLAINANT'S EXHIBIT A. MOLL GROCERY CO. LABEL.

Old Crow
Hand Made Sour Mash
Kentucky's
Fire Doubled
Old Crow
Copper
Whiskey

290 Counsel for defendants objects to the label offered in evidence for the reason that it is unlike and different from the trade mark claimed in complainant's amended bill, and is immaterial and irrelevant to any issue in this case.

Q. 14. In addition to the body label which you use in this bottling you also have a label, have you not, that indicates the package number from which the bottle was filled?

A. Yes, sir. That is a system of my own, of course, that I have established.

Q. 15. I will ask you to produce a specimen of one of those labels, also, if you please,

Witness produces said label, and counsel for complainant asks that the same be attached and marked "Complainant's Exhibit A, Moll Grocery Company Label, No. 2,"

Said label, together with a small circular label produced by witness, is in words and figures, as follows, to-wit:

This Whisky was taken from Package marked:

W. A. Gaines & Co., Distillers, 7th District, Ky. Bottled by A. Moll Grocery Co.,

Cask No.

St. Louis, Mo.

COMPLAINANT'S EXHIBIT A. MOLL GROCERY LABEL No. 2.

Bottled From Original Packages As Heceived From U. S. Bonded Warehouse

Coursel for defendants objects to the two labels last offered in evidence for the reason that they are immaterial and irreleven to any issues in this case, and are unlike and have an compection with the trade-mark claimed by complainant in its amended bill.

Q. 16. During all of this period that you have referred to, whose whisky has the name Old Crow meant to your mind?

A. W. A. Gaines & Company.

Q. 17. Were you acquainted with the late Abraham M. Hellman in his lifetime?

A. Yes, sir.

Q. 18. And with the firm of A. M. Hellman & Co.?

Q. 19. Prior to the time when this controversy arose between W. A. Gaines & Co. and A. M. Hellman & Co., some two years, had you ever heard of any claim made by A. M. Hellman & Co. that that company owned the trade mark for whisky consisting of the words "Old Crow?"

Counsel for defendant objects to the question for the reason that what was claimed or what was said is immaterial and irrelevant. The witness should be required to state that was done and what were the facts in regard to the trade-mark.

A. No, sir, I never heard of A. M. Hellman using the name of Old Crow previous to the time of this suit, which I reckon was about two years ago.

Q. 20. Did your house ever have any business dealings with the

house of A. M. Hellman & Co.?

A. Well, yes, I bought several barrels of blend whiskey of them. I think we bought five barrels if I am not mistaken. That is the only dealings we ever had with them.

Cross-examination by Mr. Smith:

X Q. 1. What whisky was that that you bought?

A. It was blend.

X Q. 2. Did it go by any particular name?

A. No. sir.

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X Q. 3. How long have you known the firm of A. M. Hellman & Co. ?

A. Well, I have known the firm for about ten years. X Q. 4. You did not know of it prior to ten years ago?

A. No, sir.

X Q. 5. Do you know what territory their trade principally occu-Dies?

A. Well, only from hearsay.

X Q. 6. Do you know whether it was local or out of town?

A. Out of town, in the southern states.

X Q. 7. Do you know what states it goes to? A. I think it is all in Texas. So I am informed.

X Q. 8. When did you first hear of the words "Old Crow" being used in connection with any whisky put up by Hellman?

A. Why, at the time this suit was brought, something like about

two years neo:

X 0. 9. Had you never heard of such use of the words "Old Grow" by Hellman prior to that time?

A. No. str. X Q. 10. Is your corporation engaged in business of rectifying?

A. No. sir,

X Q. 11. Do von carry a rectifier's license?

A. No. sir.

X Q. 12. Does any one connected with your establishment carry a rectifier's license?

A. No. sir.

X Q. 13. Have you ever had any difficulty with W. A. Gaines & Co., or with the use of the words "Old Crow?"

A. No, sir, not to my knowledge.

X Q. 14. Didn't you at one time have a controversy with that company as to your use of the words "Old Crow?"

A. No, sir, not to my knowledge, we didn't have any controversy

about "Old Crow,"

X Q. 15. What was it that you had difficulty about?

A. Well, we had difficulty with the Hennesey brandy at one time. X Q. 16. But not as to "Old Crow?"

A. No, sir, not to my knowledge,

X Q. 17. How do you sell the Old Crow goods that you now handle? In what form of mckage?

A. Full quart measure, full quart bottle, flint bottle.

X Q. 18. Do you sell in any other package out of quart bottles? A. We sell it in bulk,

2973 X Q. 19. In barrels?

A. Yes, sir, in barrels, and sell it by the gallon,

X Q. 20. Jugs?

A. Jugs, yes, sir, X Q. 21. Demijohns?

A. Yes, sir.

X Q. 22. How are the barrels marked?

A. They are marked "W. A. Gaines & Co., Distillers."

X Q. 23. Anything else?

A. Well, of course the district of Kentucky, where it is made.

X Q. 24. Is that all?

A. Well, the date, of course, of the whisky when it is made, the month and the year.

X Q. 25. Those are the marks on the barrels that you sell?

A. Yes, sir.

X Q. 26. How are the jugs and demijohns marked?

A. They are not marked. X Q. 27. Not marked at all?

A. No. sir.

X Q. 28. They bear no label or brand of any kind?

A. No, sir: the only thing they bear is a tag, one of these tags that have wire on them, and, of course, the order goes into the liquor department and these tags are written out by the eashier. stance, if the order calls for one gallon of Old Crow whisky, \$4.00 or \$5,00, she writes out a tag, and this tag, after the contents is emptied into the jug, this tag is tied on to the jug. That is the only thing we have:

\$\ Q. 20. How are the bottles marked? A. Phey have the label, The Old Crow label,

X Q. 30. The form of label which you attach to your deposition?

A. Yes, sir.

X Q. 31. Do you reduce the proof before you bottle the goods?

A. Yes, sir; 95 proof.

X Q. 32. About what proof is it before you reduce it?

A. Well, it runs from 105, 106 and 108, depends upon the age considerably and where it is stored.

X Q. 33. What do you mean by your statement that it depends

upon where it is stored?

A. Well, we have a different system now. Under the old system in the warehouses the barrels that are stored under the roof 294 naturally gained a higher proof than the barrels on the floor, because the heat naturally goes up. If you store a hundred barrels of whisky and store them all high you will find there will be a difference of five or six in proof between the top barrel and the bottom barrel.

X Q. 34. In other words, the greater the amount of heat the

greater the goods are aged?

A. Yes, sir, and the greater the proof.

X Q. 35. Do W. A. Gaines & Co. know that you reduce the proof? A. I don't know whether they do or not. We have that privilege under our wholesale liquors dealer's license.

X Q. 36, You sell both at wholesale and retail?

A. Yes, sir.

X Q. 37. Do you sell both local and out of town?

A. Yes, sir,

X Q. 38. After you have reduced the proof to 95 do you restore the color?

A. No, sir; no, sir.

X Q. 39. Don't you add caramel or burnt sugar to restore the color?

A. No, sir; we would come in conflict with the United States

Revenue Department if we did that.

X Q. 40. Have you ever had any difficulty with the Revenue department over adding coloring matter?

A. We did at one time. That has been seven or eight years ago. X Q. 41. Was that in regard to adding coloring matter to Old Crow?

A. No, it was a private brand that we had of Bob Pepper which was distilled by the Union Distilling Company of Cincinnati, and although they claimed that there was coloring matter in it we proved to them that there was not. We took a sample of it down to the revenue office.

X Q. 42. Have you ever, during the time that you have been connected with your firm or corporation added coloring matter to Old

Crow whisher?

A. Not to my knowledge, no sir. Never added any coloring at

395 X Q. 43. Do you have direct supervision of the liquor de-

A. I have, yes, sir. I buy all the liquor,

XQ, 44. Who does the reducing?

A. My assistant in the liquor department in the presence of the revenue agent.

X Q. 45. What is the name of your assistant?

A. Emil Zimmer.

X Q. 46. How long has he been your assistant?

A. Well, he has been the assistant now for about three years.

X Q. 47. Who was his predecessor? Λ. His predecessor was Eugene Ringle.

X Q. 48. How long was he your assistant?

Λ. Oh, about eight years, I guess.
X Q. 49. Who preceded him?

A. Well, Mr. Miller, but he died. He has been dead now about twelve years, I guess.

X Q. 50. How long was Miller your assistant?

A. Well, Miller was not my assistant at that time. I was not doing the buying.

X Q. 51. How long was Miller in charge of the reducing and

bottling?

A. Miller was in charge of that department from the time that I came and started to work for A. Moll, from the time that I took hold of it.

X Q. 52. Was the firm of A. Moll & Company engaged in the handling of W. A. Gaines & Co. Old Crow whisky when you first became connected with it?

A. Yes, sir.

X Q. 53. Did they keep it in stock at that time?

A. Yes, sir.

X Q. 54. From whom did you make your purchases then?

A. Well, I couldn't say from whom we made our purchases at that time, because I didn't do the buying.

X Q. 55. How long ago did you begin to do the buying for the company?

A. Well, it must be 12 or 13 years.

X Q. 56. From whom have you made purchases during that time?

A. I have made purchases direct from the distillery and also through brokers in Cincinnati.

296 X Q. 57. When you say "From the distillery," do you mean from W. A. Gaines & Company?

A. Yes, sir.

X Q. 58. Have you ever bought any locally here in St. Louis? A. No. sir, we buy everything in bond.

X Q. 59. You buy the warehouse receipts?

A. The warehouse receipts, yes, sir.

X Q. 60. And they deliver as you need it?

A. As I need it. Ever since I have done the buying I have bought warehouse receipts.

X Q. 61. Have you ever handled any bottles in bond of Old Crow?

A. No, sir.

X Q. 62. You don't know anything about the bottled in bond Old Crow?

A. No, sir.

X Q. 63. You don't know what its merits or demerits are?

A. No, sir, I don't know anything about it.

X Q. 64. Do you know the brands that A. M. Hellman & Co. have dealt in during the last 20 years?

A. No, sir.

X Q. 65. You know nothing about their business at all?

A. I know nothing about their business, no sir. I have never been in their store.

X Q. 66. They might have had 20 different brands and you wouldn't have known of them?

A. None of them.

X Q. 67. You know nothing about the line of their trade except that you understand in general that it is in the southern states?

A. Yes, sir; that is what I understood.

X Q. 68. Your sole business dealings with the firm consisted in the purchase of a few barrels of blended goods?

A. Yes, sir; that is all the dealings I ever had with them.

X Q. 69. Do you know anything about the bottling of Old Crow by H. A. Steinwender & Company?

A. No, sir; I only know that he bottled Old Crow.

X Q. 70. You don't know anything about the formula which he uses in bottling?

A. No, sir.

297 X Q. 71. What was the purpose of this second label which you mentioned in your direct examination, containing a number?

A. Well, we have a square label that we put on the back of the bottle, giving the number of the package in which this whisky is drawn or bottled, and our name signed to it.

X Q. 72. That is the serial number which appears upon the

warehouse receipts?

A. Yes, or the package number, rather. That is merely an idea of my own, that is all. I don't know whether it amounts to anything or not. It is an idea that I framed myself.

X Q. 73. You add nothing but water to the whisky?

A. That is all; yes, sir. It is reduced in the presence of the United States gauger.

X Q. 74. You never have added any flavoring?

A. No, sir.

X Q. 75. Or prune juice, or anything else?

A. No, sir; our business is open to inspection at any time, and any revenue man or any one else can see it. I know what the consequences would be if we were caught, and for that reason we don't want to do anything that is underhanded.

By Mr. Hopkins:

Q. What is your place of business—the A. Moll Grocery Company?

A. No. 614-618 Franklin Avenue.

Subscribed and sworn to before me this 28th day of December. A. D., 1905.

CHAS, E. WELLER, Notary and Special Examiner.

## Deposition of Patrick J. Carmody.

Patrick J. Carmody, a witness produced on behalf of the complainant, being duly sworn, testified as follows:

Direct examination by Mr. Hopkins:

Q. 1. State your full name? A. Patrick Joseph Carmody. Q. 2. What is your age?

A. I am 70 years old next Saturday.

298 Q. 3. You reside in the city of St. Louis? A. Yes, sir; I am man and boy here for 48 years.

Q. 4. In what business are you engaged?

A. Principally in the liquor business in that time, about 40 years in the liquor business.

Q. 5. All of that time in St. Louis?

A. Not all of the time. For 20 years I have been in business

Q. 6. You have been in business elsewhere?

 A. Yes, sir; in Moberly, Missouri, about 13 years.
 Q. 7. How long have you been acquainted with the Old Crow whisky of W. A. Gaines & Company?

A. I should say about 30 years.

Q. S. During that time whose whisky has the name Old Crow

indicated to your mind?

A. Well, I have never known any except Gaines & Company, W. A. Gaines & Company, I believe it is. It was understood that they were the legitimate makers of that goods. I never handled the goods myself, but I have known those who have handled it, and I never knew of any one having the Old Crow except W. A. Gaines & Son, or W. A. Gaines & Co., I don't know which it is.

Counsel for defendants object to the answer of the witness in so far as he uses the word "Legitimate," and moves that it be stricken out.

Q. 9. Have you been acquainted with the firm of A. M. Hell-

man & Co. of this city?

A. I can't say that I have. I have seen their traveling man in Moberly, and it seems to me I bought a bill of goods from them once. that is my recollection, and the goods were returned to them; that is my recollection.

Q. 10. Do you know of any claim ever being made by that con-

cern of owning the trade-mark "Old Crow" for whisky?

Counsel for defendants objects to the question, for the reason that it is immaterial and irrelevant what was said or claimed. The witness should be required to state only facts, and what was done.

A. No, sir.

299 Cross-examination by Mr. Smith:

X Q. 1. Captain, during all this time you have been in the retail liquor business, have you?

A. Yes, sir.

X Q. 2. Never in the wholesale?

A. Yes, sir.

X Q. 3. When and where?

A. At No. 213 and 215 North Fifth street.

X Q. 4. How long have you been in the wholesale liquor business? A. About two years.

X Q. 5. During what years?

A. I think that was about 1890 or 1891. I think along in there. I came here in 1885, and that was about five or six years after coming here. It didn't pay me and I quit it.

X Q. 6. You stated you were in business in Moberly for 13 years?

A. Yes, sir.

X Q. 7. Was that before you came to St. Louis at all?

A. Oh, no. 1 came to St. Louis in 1858. Next month will be 48 years. I steamboated in those days. I didn't engage in the whisky business in St. Louis until 20 years ago.

X Q. 8. You were in Moberly in business 13 years?

A. Yes, sir.

X Q. 9. Where were you in business the other seven years of the 40 years?

A. Oh, I was in Buffalo, New York, and all over the country, Illinois.

X Q. 10. In the liquor business?

A. Yes, in the liquor business in Illinois in 1868 in the fall, and until the present time I haven't been out of the business, I don't think, more than three months altogether, possibly for 36 or 38 years altogether.

X Q. 11. Except for the one transaction that you had with the salesman of the A. M. Hellman & Company in Moberly, are you

familiar with the trade of that firm?

A. Not at all.

X Q. 12. You know nothing about it?

A. I don't know a single person in the firm.

X Q. 13. Except for that one incident?

A. No. sir.

300 X Q. 14. You don't know in what territory they sell goods?
A. No, I do not.

X Q. 15. You don't know what brand they sell?

A. No, sir.

X Q. 16. Do you remember what brand it was that you bought at this time that you refer to?

A. I couldn't possibly tell you. This was in 1875. I went into business in 1873, and it was either in 1874 or 1875.

X Q. 17. Do you remember the name of the salesman that sold you these goods?

A. It was A. Hellman, a brother of A. M., I think. I think the old firm was A. M. or L. M.

X Q. 18. At that time the firm was I. & L. M. Hellman, and afterwards it became A. M. Hellman & Company?

A. Yes, those men are all dead, are they? X Q. 19. A. M. Hellman died a year ago?

A. This was a little fellow, short, with curly kinky hair.

X Q. 20. Do you remember whether it was Moritz Hellman? A. I couldn't say, he was a little dark-haired fellow, though. I

is a brother of the Hellmans.

X Q. 21. Do you think you would know him if you saw him now? A. I think I would.

X Q. 22. Have you ever been to their place of business in St. Louis?

A. I don't remember. I don't know where their place of business is.

X Q. 23. You were never at their place of business when it was at 112 Pine street?

A. Not to my recollection, no.

X Q. 24. During the time that you were a wholesale liquor dealer did you handle any of the goods of W. A. Gaines & Company?

A. No, sir; I never handled the goods at all.

X Q. 25. Do you handle their goods now as a retailer?

A. No, sir.

X Q. 26. When and where have you handled their goods?

A. I told you I never handled them.

X Q. 27. I understood you to say only occasionally?

A. Not to my knowledge have I ever handled any. I have handled Sprilhill, and Sherwood rye; I have been handling those goods since 1874. They are two favorite whiskeys of my own and I don't handle anything else.

X Q. 29. Do you know of the firm of William H. Lee & Com-

pany?

A. Yes, sir.

X Q. 30. Did you know William H. Lee in his lifetime?

A. Yes, sir, very well.

X Q. 31. How long have you known of Billy Lee's Old Crow?

A. Since I came to town, about 20 years.

X Q. 32. How long ago was that?

A. About 1886.

X Q. 33. Did you ever know them before that time?

A. Lee's Old Crow?

X Q. 34. Yes?

A. I don't think I did. I don't remember.

X Q. 35. How did you first come to know of the brand Old Crow whisky?

A. By seeing it in different saloons that I drank in around through town here since going into business here.

X Q. 36. As near as you can recall how long ago is it?

A. The whisky has been offered to me for sale years and years ago, but I never bought those goods to my recollection. I don't think

I ever bought a barrel of Crow in my life. I don't remember that I did.

X Q. 37. What is the earliest date that you can positively state that you know of the words "Old Crow" being used in connection with whisky made by W. A. Gaines & Company?

A. In bottle or wood? X Q. 38. Either one?

A. Well, I have known of Gaines' Old Crow since I engaged in the whisky business in Moberly in 1873, I knew of it.

X Q. 39. Is that the earliest date that you can remember? A. That is the earliest date I possibly could remember.

X Q. 40. How did you come to know of it in 1873?

A. Traveling men selling it through the country, seeing samples of it.

X Q. 41. Do you remember the name of any traveling man who sold it at that time?

A. All the leading houses in St. Louis dealt in that whisky.

X Q. 42. Name some of them?

A. David Nicholson did; Steinwender & Sellner did.

X Q. 43. As early as 1873?

A. Yes, I am pretty sure it was.

X Q. 44. Do you remember the names of their salesmen who offered it?

A. I don't know whether Charlie Pearsall was living at that time or not.

X Q. 45. Did they offer it as bottled goods, or in bulk?

A. Oh, no, I never saw it sold in bottle goods until I came to St. Louis.

X Q. 46. Were they offering it in two-stamp packages?

A. Straight bulk goods, yes, sir. I never saw Gaines' Crow in one-stamp packages. That couldn't be before the duty went on it. The two-stamp goods went into existence about 1864, I think. If I remember right.

X Q. 47. Do you say that this was all offered in two-stamp pack-

ages?

A. Well, it was all offered by sample as being straight goods, and being straight goods it must have two stamps.

X Q. 48. You didn't see any of the packages themselves?

A. No, sir; because I never bought any that I remember. I have seen a great many packages of Old Crow whisky, you understand, but I never bought any.

X Q. 49. You mean in other people's places of business?

A. Yes, sir; I saw it in Hellery's, on Third street, he handled it there, Phil Hellery.

X Q. 50. How long ago?

A. Oh, Phil has been handling it for 20 years. You can buy Old Crow from anybody, all the principal dealers will sell you in bond or sell you certificates.

X Q. 51. You say you never saw any bottled Old Crow until you

came to St. Louis?

A. No, sir; not to my recollection.

X Q. 52. Whose bottling did you see then?

A. That was Gaines' goods, or Lee's goods, I can't tell you now positively how long Gaines has been bottling, but I have seen it since I have been in St. Louis.

X Q. 53. Did you see any bottle in bond by William H. Lee &

Company?

A. No, sir, I never saw the bottle in bond. I never was in his bottling house.

X Q. 54. You saw William H. Lee & Company's Old Crow?

A. Yes, sir.

X Q. 55. You have seen that goods in bottles, have you not?

A. Yes, sir.

X Q. 56. How long have you seen it?

A. Lee's Old Crow?

X Q. 57. Yes, in bottles?

A. I have seen that almost since I have been in town.

X Q. 58. You don't know whether the bottled goods that you saw was straight Old Crow or whether it had been reduced or had other

things added to it, do you?

A. Well, I may be rather a little particular on that subject. I never thought that Lee's Old Crow was straight goods. I never thought so, and I pretended to be a pretty good judge of whisky, but I never thought it was straight goods. That is my opinion.

X Q. 59. How long since you have had that opinion?

A. Since I first bought goods of Lee. I bought 100 or 200 barrels from his firm about 8 or 9 years ago, but never bought any Crow from him, but I know he had what is known as a dump house down there where they dump the spirits and whisky, and always from my standpoint, and from my judgment of whisky, I have always claimed that it was a blend or compound, more of a compound than a blend, because spirits is a compound, and old whisky and new whisky are blend.

X Q. 60. You say that 8 or 9 years ago you first came to the conclusion that the Old Crow whisky put up by William H. Lee & Co. was a blend?

A. I have always thought so from the first I knew of it.

X Q. 61. That was back as far as 1886?

A. I say so far as I came in contact with it.

304 X Q. 62. I want to get at the date when you first came in contact with it.

X Q. 62. I want to get the date when you first came in contact, with it?

A. I couldn't positively tell you about that. It is within the last 20 years.

X Q. 63. Do you know the bottling of Old Crow by Nicholson?

A. I know it when I see it, yes, sir. X Q. 64. Have you ever tasted that?

A. I don't believe I ever saw a bottle sold at the bar or drank a drop of it in my life.

X Q. 65. You don't know whether it is straight or blend?

A. I couldn't say.

X Q. 66. Do you know as to the bottling of Old Crow by Steinwender & Sellner?

A. I know they bottle it. I never used it and never tried it, so I couldn't tell you.

X Q. 67. Do you know the bottling of H. A. Steinwender & Co.?

A. I never saw the bottling of it.

X Q. 68. Do you know the bottling by the Griesedick Distilling Company?

A. No, sir; I never saw any of it.

X Q. 69. Do you know of the bottling of Old Crow by the A. Moll Grocer Company?

A. Never saw it.

X Q. 70. Do you know of any other bottling than that of W. H. Lee & Co.?

A. That is the only Old Crow bottling that I can positively state that I ever drank and tried and passed an opinion on.

X Q. 71. Was there any other Old Crow whether from bottles or other packages that you tried and passed an opinion on?

A. Oh, yes, yes; I have looked at Mr. Hellery's whisky several

times.

X Q. 72. Is that put up by him, or soid under original packages?

A. I think it was received by him there at the time I knew him to be handling it extensively, he used to buy five or ten barrels direct from the distillery.

X Q. 73. Did he sell it in packages? A. He sold it over his bar, I guess.

X Q. 74. He was a retailer?

A. Yes, sir.

X Q. 75. You don't recall any other wholesale dealers?

A. Oh, I never took any interest in it at all, because I never handled the whisky, and while I might go in a bar and drink in some places, I never took enought interest in it to pass an opinion on it, except as to Lee's, and I was satisfied in my mind that that was a compound of spirits; that is my opinion. It may not be worth much, but that is my opinion. I think I can teil straight whisky.

X Q. 76. How did you come to notice that whisky?

A. Because it had such a run here I thought I would look into it a little bit. It had a big sale here.

X Q. 77. That was soon after you came to St. Louis in 1886?

A. Yes, sir.

X Q. 78. I think I asked you whether or not you knew of the brands that A. M. Hellman & Company carried?

A. No. I can't remember.

X Q. 79. You don't know anything about their business at all?

A. No, I couldn't remember. My business dealings has been with just three houses in St. Louis, with Nicholson, and Steinwender & Sellner, and Billy Lee. I always bought straight whisk-ys from him. The last deal that we had I bought 100 barrels from him of Waterfield & Frazier's goods.

X Q. 80. Do you know of any other brand of Old Crow than you have mentioned?

A. Oh, I see it almost everywhere on the shelves, but I never paid

any attention to it.

X Q. 81. You don't know whether any of these brands that you have seen on the shelves were whisk-ys other than W. A. Gaines & Company or not?

A. I couldn't say. I didn't pay much attention to it.

P. J. CARMODY.

Subscribed and sworn to before me this 28th day of December, 1905.

CHAS. E. WELLER, Notary Public and Special Examiner.

At this point by consent the further taking of depositions was adjourned until tomorrow December 19, at 10:30 A. M.

St. Louis, December 19th, 1905,

Parties met pursuant to adjournment as above stated at 10:30 A. M., present as before.

Counsel for complainant offers in evidence a certified copy of the certificate of Trade-Mark Registration of the United States 306 Patent office, numbered 42919, issued to W. A. Gaines & Company, June 28th, 1904, the same to be marked "Complainant's Exhibit Certificate of Trade-Mark Registration," which is accordingly done.

Counsel for defendants objects to the exhibit offered in evidence by counsel for complainant, for the reason that the same shows that the application was filed and the registration entered of record after the matters and things involved in this suit arose, and for the further reason that the same is not the best evidence, but is secondary evidence of the matters set forth therein, and for the further reason that complainant's alleged cause of action is based upon the common law trade-mark, and no title is attempted to be derived in the amended bill from any registration in the United States Patent office.

## Deposition of John A. Specht.

John A. Specht, a witness produced on behalf of the complainant, being duly sworn, testified as follows:

Direct examination by Mr. Hopkins:

Q. 1. What is your full name?

A. John A. Specht.

Q. 2. What is your age?

A. 48 years.

Q. 3. You reside in the city of St. Louis?

A. Yes, sir.

Q. 4. How long have you resided here?

A. Four years. This is my fifth year.

Q. 5. Prior to that time where did you reside?

A. Chicago.

Q. 6. In what business are you engaged?

A. Restaurant and saloon business.

Q. 7. How long have you been engaged in that business?

A. Since 1891. That is, for myself.

Q. 8. Prior to that time were you in any way connected with the liquor business?

A. I was, along in the '70's. And then I guit and I went in busi-

ness in 1891 for myself.

Q. 9. Are you acquainted with the Old Crow whisky of W. A. Gaines & Co.?

A. Yes, sir, I have bought a lot of it.

Q. 10. How long have you been acquainted with it?

A. Oh, 20 years, I guess.

307 Q. 11. During that time whose whisky has been indicated to your mind by the name "Old Crow?"

A. W. A. Gaines & Co.

Q. 12. Did you ever hear of any claim of ownership of the trademark "Old Crow" for whisky made by a firm named A. M. Hellman & Co. of St. Louis?

Counsel for defendants objects to the question, for the reason that it is immaterial what was said or claimed with reference to the alleged trade-mark "Old Crow," and for the further reason that the witness should be required to state only facts and what was actually done with reference to the same.

A. You mean in regard to this concern here, other than W. A. Gaines?

Q. 13. Yes, sir.

A. No, I never heard of it.Q. 14. Where is your place of business located?

A. No. 114 North Fourth street, St. Louis.

Cross-examination by Mr. Smith:

X Q. 1. What was your place of business in Chicago, Mr. Specht? A. I had two. I had one at 185 Monroe street, and another at 123 Dearborn street.

X Q. 2. What did you do at those two places?

A. I sold that out; I had another place in Milwaukee, and sold that out.

X Q. 3. What sort of business did you carry on?

A. Saloon.

X Q. 4. No, restaurant?

A. At one of them I ran a restaurant.

X Q. 5. Have you ever been a wholesale liquor dealer?

A. No.

X Q. 6. Have you ever carried a rectifier's license?

A. No.

X Q. 7. Is there any one connected with your establishment that carries a rectifier's license?

A. No.

X Q. 8. You say you have dealt in Old Crow yourself?

A. Yes, sir. That is, I have bought it, bought it in bond and out of bond.

X Q. 9. Are you handling it now? A. Yes, sir. 308

X Q. 10. In what shape do you buy it?

A. Two bonds; two-stamp whisky, X Q. 11. It comes to you in barrel lots?

A. In barrels, X Q. 12. Do you bottle it yourself?

A. No.

X Q. 13. Do you sell it direct from the barrel?

A. Yes, sir; I sell it from the barrel. Put it in the bottles and sell it over the bar.

X Q. 14. But you don't sell it in bottles?

A. I do sell in bottles; I think it is bottled by Nicholson or Steinwender, or Sellner. I buy most of it from Nicholson,

X Q. 15. Do you sell any Billy Lee's Old Crow?

A. I did, I don't sell any now, X Q. 16, When did you stop selling it? A. I have it now, if a man calls for it; but I don't buy it in quantities.

X Q. 17. When did you stop buying it in quantities?

A. Just as soon as the public stopped; according as customers called for it.

X Q. 18. Did you know Abraham M. Hellman in his lifetime?

A. No.

X Q. 19. Did you know the firm of A. M. Hellman & Company?

A. No.

X Q. 20. Or its predecessor, I. & L. M. Hellmani?

A. No.

X Q. 21. Did you ever have any business dealings with any of them?

A. Non

X Q. 22. You know nothing about their trade?

A. New

X Q. 23. Or in what territory they sell goods?

A. No.

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X Q. 24. You know nothing about the brands?

A. Never heard of it.

X Q. 25. They might have had a dozen different brands and you wouldn't know what those brands were?

A. I don't know anything of them, so I wouldn't know. X Q. 26. Where were you in business in 1870, in connection with liquor?

A. I was tending bar.

X Q. 27. Where was that?

A. At the Palmer House in Chicago, the year it opened, and at the Chicago Club.

X Q. 28. You say since 1891 you have been in the restaurant business or saloon business?

A. Yes, sir.

X Q. 29. And for 20 years you have known about W. A. Gaines & Company's Old Crow?

A. Yes, sir; I never was without it.

X Q. 30. Under what circumstances did you first become ac-

quainted with this W. A. Gaines' Old Crow?

A. Oh, I don't know. You know how it is with a man working around. When I was tending bar in the '70's I suppose it was on the market, but I didn't know anything about that end of it, only when it was given to me, but when I went in business for myself I knew of it because it had a great run in Milwaukee, where I was in business. I had one of the leading places there, the Marble Hall, a well known house, had a retail place there 40 years, and didn't have anything but Old Crow. We had a great reputation there, and I always handled it.

X Q. 31. That was in the '80's?

A. In 1891.

X Q. 32. Your acquaintance with the conditions in St. Louis dates back only four or five years?

A. Four years.

X Q, 33, The Old Crow which you buy from Steinwender & Sellner, and Nicholson, is in bottles, is it not?

A. Oh, yes, yes,

X Q. 34. Do you know whether it is straight whisky or a blend?

A. I don't know anything about that,

X Q, 35. You never tested it? A. Well, if I didn't I wouldn't know.

X Q. 36. Then you don't consider yourself a sufficient judge to distinguish between the two?

A. Not mot

X Q. 37. You couldn't tell the difference between the blend and the straight whisky?

A. Well, I don't know. It would depend probably upon the condition. Whatever they do with it I don't know. I buy it for Old Crow and sell it for Old Crow, that is all.

X Q. 38. You don't know what its proof is or what they

put into it, if anything?

A. No, I buy it for straight whisky, and I know that Nieholson hasn't got a rectifier's license, but is a good straight house, that is all I know about it. He has that reputation.

X Q. 39. You know that Steinwender & Sellner have a rectifier's

license?

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A. That I don't know. I heard it said that they had, but I don't know.

X Q. 40. Did you ever buy any from H. A. Steinwender & Co.?

A. A very little.

X Q. 41. You have bought some?

A. I believe I bought a case of it.

X Q. 42. Do you know that that firm has a rectifier's license?

A. That I don't know.

X Q. 43. Whether H. A. Steinwender & Co. or Steinwender & Sellner add anything to the whisky, you don't know?

A. I don't know.

X Q. 44. You get it in bottles?

A. Yes, sir.

JNO, A. SPECHT.

Subscribed and sworn to before me this 28th day of December, A. D. 1905.

> CHAS, E. WELLER, Notary Public and Special Examiner,

Deposition of James II. McTague,

James H. McTague, a witness produced on behalf of the Complainant, being duly sworn, testified as follows:

Direct examination by Mr. Hopkins:

Q. 1. State you-full name?

A. James H. McTague,

Q. 2. What is your age, Mr. McTague?

A. Lam 47,

Q. 3. You reside in St. Louis?

A. Yes, sir.

Q. 4. How long have you resided in St. Louis?

A. Nine years.

Q. 5. In what business are you engaged?

A. In cutering.

311 Q. 6. You have a restaurant in the Century Building in this city?

A. Yes, sir.

Q. 7. How long have you conducted that restaurant?

A. Eight years.

Q. S. Prior to that time were you engaged in the same business?

A. Yes, sir. Q. 9. Where?

A. At 112 or 114 North Fourth Street.

Q. 10. The place where John Specht is now?

A. Yes, sir.

Q. 11. How long did you conduct that place?

A. Well, I conducted that two years, and one year I was up here in the Century Building.

Q. 12. You continued to run it one year after you opened your restaurant in the Century Building?

A. Yes, sir.

Q. 13, Prior to your conducting your restaurant on Fourth Street in this city, where were you located?

A. At Omaha, Nebraska.

Q. 14. Were you in the same business there?

A. Yes, sir.

Q. 15. How long?

A. Well, in different locations about eleven years.

Q. 16. During all the time from your first establishment in Omaha down to the present have you been engaged in handling liquors in connection with the restaurant business?

A. Yes, sir.

Q. 17. Are you acquainted with the Old Crow whisky of W. A. Gaines & Co.?

A. Yes, sir.

Q. 18. How long have you been acquainted with that whisky?

A. Well, I have been acquainted with it all that time, and I have been acquainted with it longer than that, in former years. My record in dealing with it directly or indirectly would easily date back in 1876.

Q. 19. You have been familiar with the Old Crow whisky since

that time?

A. Well, I am not so positive of that. What I mean is the period
 I spoke of here, I have a faint recollection of, but since my

 Omaha period in 1885 it is twenty years.

Q. 20. During this past twenty years whose whisky have

the words Old Crow indicated to your mind?

A. Well, you mean who the distillers are?

Q. 21, Yes, sir.

A. W. A. Gaines & Co., I have always known,

Q. 22. Do you now handle and sell Old Crow whisky in connection

with the restaurant business?

- A. Yes, sir; the whisky is known as Old Crow, and is now being handled as bottled goods. It is put up by the different concerns in town, and the name W. A. Gaines; I don't know that that appears, and I couldn't say without looking at the label, but it is known as Steinwender's Old Crow, Nicholson's Old Crow and Gaines' Old Crow.
- Q. 23. Did you ever know of the firm of A. M. Hellman & Co. of St. Louis?
- A. I know Mr. Hellman is in the wholesule inquor business, but I don't know the style of the concern.
- Q. 24. Did you ever know of any claim of ownership of the trade-mark "Old Crow" as a trade-mark for whisky being made by the Hellman House?

Counsel for the defendants objects to the question the the ground that what was claimed or may have been said with reference to the words "Old Crow" as a trade-mark is immaterial and irrelevant. The witness should be required to state only what was actually done and what the facts were in reference to the said words.

A. No, I have not.

Cross-examination by Mr. Smith:

X Q. 1. Mr. McTague, you state that you handle and sell different bottlings of Old Crow?

A. Yes, sir.

X Q. 2. How did these bottlings of Old Crow differ, the one from the other?

A. Well, I don't know how they do differ, Mr. Smith, only they are put up by the different wholesale commission houses and they as reputable concerns, as I understand it, handle nothing but the Old Crow, and they have to get permission from W. A.

Gaines & Co. to bottle their goods.

X Q. 3. Are you a judge of whiskies yourself?

A. No, I am not, Mr. Smith; no; I don't know that I am. I know good whisky, I think, and I think I know bad whisky, but I am not a judge of whisky.

X Q. 4. Could you tell the difference between Steinwender &

Sellner's Old Crow and David Nicholson's Old Crow?

A. No, I don't know that I could.

X Q. 5. Do you have customers who call for David Nicholson's Old Crow and others who call for Steinwender's Old Crow?

A. Yes, sir.

X Q. 6. And you have others who call for Steinwender & Sellner Old Crow and others who call for W. H. Lee's Old Crow?

A. Yes, sir.

X Q. 7. And you buy these different bottlings in order to supply that demand?

A. Yes, sir.

X Q. 8. As far as your trade goes then, there is a distinction between these different bottlings?

A. Well, there is in the demand, in the call for them, you under-

stand. Some are called for more than others.

X Q. 9. You don't know whether there is a difference in flavor or not?

A. That I don't know.

X Q. 10. Or a difference in proof?

A. No.

X Q. 11. But you do know that different customers require different bottlings?

A. They call for different bottlings; yes, sir.

X Q. 12. And you purchase accordingly in order to supply that demand?

A. Yes, sir.

X Q. 13. Do you purchase any goods direct from W. A. Gaines or Paris, Allen & Co.?

A. No, I do not.

X Q. 14. Do you purchase any Old Crow except from the four houses you mention?

A. No.

X Q. 15. How long have you been making purchases of these four houses in the manner that you have indicated?

A. Well, ever since I have been here we have purchased the Old Crow from the Lee people, and the other whiskies have not presented themselves until the last year or so; the David Nicholson, Steinwender & Sellner and H. A. Steinwender, those three were on the market here. I don't think it is more than a year or a year and a half since the other concern commenced with these whiskies that came on the market. At least I have no knowledge of it.

X Q. 16. Do you know the bottling of the Old Crow known

as Griesedeck Distilling Company Old Crow?

A. No, I don't know that.

X Q. 17. You could not of your own knowledge, then, state wherein Nicholson Old Crow differs from Steinwender's or where Steinwender's differs from Billy Lee or where Billy Lee differs from Steinwenders & Sellner?

A. No.

X Q. 18. Do you have direct supervision of the purchases of

your house of liquor?

A. Well, in a way, yes. Our line of goods are regular, and whenever we get out we just order by telephone. Our goods come in original packages and are handled in that way. They are ordered by the store-room man usually, but I usually start those things.

X Q. 19. Who is your store-room man?

A. Oberkamp, I think it is.

X Q. 20. Do you know his first name?

A. No, I do not.

X Q. 21. How long has he been your store-room man?

A. About a month.

X Q. 22. Who is his predecessor?

A. A young man we have over there named Parks.

X Q. 23. Do you know his first name?

A. No, I do not.

X Q. 24. During your experience in Omaha did you handle Old Crow?

A. Some, not much.

X Q. 25. From whom did you make your purchases?

A. I think the Old Crow that I handled there I made the purchases from a concern in St. Joe, if I remember correctly—Ferdinand.

X Q. 26. Ferdinand Weisheimer & Sons?

A. I think so. That is long ago, and I am not pust positive. I remember the package, being a round package and their names being on the bottle. I believe that was bottled at the distillery. I think they claimed that. That is some time ago.

X Q. 27. You don't know whether that in fact was straight

whiskey or blend?

A. No; any more than I believe it was bottled at the distillery by W. A. Gaines & Company, and of course you would naturally suppose that that would be nearer straight than anything else.

X Q. 28. You don't know as to this bottling that you are handling now in St. Louis, whether it is straight goods or blend?

A. No, I don't know.

X Q. 29. Have you during the twenty years that you speak of ever carried a rectifier's license?

A. No.

X Q. 30. Has any one in your employ or associated with you carried a rectifier's license?

A. No.

X Q. 31. Have you ever dealt in liquors by wholesale?

A. Only as general manager of the St. Louis Catering Company, when I was general manager.

X Q. 32. That would refer to purchases at wholesale?

A. Yes, sir; no rectifying license of any kind.

X Q. 33. You say the words "Old Crow" on a package would indicate to you that the whiskey was distilled by W. A. Gaines & Co.?

A. That is what I understand.

X Q. 34. That is the significance of those words to you?

A. Yes, sir.

X Q. 35. Have you during your experience in St. Louis purchased whisky in barrels, Old Crow whisky?

A. No.

X Q. 36. Do you know anything about the territory in which the firm of A. M. Hellman & Co. sells goods?

A. No. I don't know anything about them.

X Q. 37. Do you know anything about their trade at all?

A. No.

X Q. 38. Do you know anything about the brands they carry? A. No.

316 X Q. 39. Do you remember which Hellman it was that you say you met?

A. It was a short gentleman with a dark mustache.

X Q. 40. Charles Hellman?

A. That I couldn't tell you, Mr. Smith.

X Q. 41. Do you know where the place of business of the firm s?

A. No. I imagine that it is down-town somewhere near Main Street. It seems to me I have seen their card somewhere.

X Q. 42. You didn't know the predecessor of this firm, I. & L.

M. Hellman?

A. No, not unless it is the man that I spoke of. I don't know

whether it is this one or the other one.

X Q. 43. In fact, your sole knowledge of the two firms, I. & L. M. Hellman and A. M. Hellman & Company, is the fact that you were introduced to a gentleman named Hellman?

A. Yes; I know he was in the wholesale liquor business.

X Q. 44. And that is, as I understand, all of your knowledge in regard to the firm of A. M. Hellman & Co., on their business?

A. Yes, sir.

X Q. 45. Whatever whiskies the firm carries you don't know?

A. No; I don't know anything about that.

JAMES H. McTAGUE.

Subscribed and sworn to before me this 28th day of December, A. D. 1905.

CHAS. E. WELLER, Notary Public and Special Examiner.

## Deposition of George J. Knapp.

George J. Knapp, as witness produced on behalf of the complainant, being duly sworn, testified as follows:

Direct examination by Mr. Hopkins:

Q. 1. State your full name.

A. George J. Knapp.

Q. 2. What is your age?

A. 33.

Q. 3. Where do you reside?

A. St. Louis.

Q. 4. How long have you resided in St. Louis?
A. Eleven years.

317 Q. 5. What is your occupation?

A. Well, I am bar manager. I am Mr. Lippe's manager of the bar.

Q. 6. Where is the bar that you refer to?

A. In the Chemical Building on Eighth and Olive.

Q. 7. In this city?

A. In St. Louis; yes, sir.

Q. 8. How long have you been the manager of that bar?

A. I have been for eight years. I was away a year and a half or two years, about, and then returned, and since then I have been manager of it.

Q. 9. Prior to your employment with Lippe were you engaged in

the liquor business in this city?

A. I was. I was for six months at the Lindell; previous to that for two years I was down at the Planters Hotel. That is my history in St. Louis.

Q. 10. Prior to coming to St. Louis had you been engaged in the

liquor business elsewhere?

A. I was in the same business at Detroit for three years.

Q. 11. At what place?

A. I was at Gies' six months; I was in Put-in-Bay, Ohio, three or four months, and previous to that I was two years in Cincinnati. That runs back about fifteen or seventeen years, all told.

Q. 12. You have been in the liquor business continuously during

that time in the places you have mentioned?

A. All of that time; yes, sir.

Q. 13. Are you acquainted with the Old Crow whisky of W. A. Gaines & Company?

A. Yes, sir; wherever I have been I have handled their goods. Q. 14. How long have you been acquainted with W. A. Gaines & Company Old Crow whisky?

A. Ever since I am in the business. I will say about sixteen

or seventeen years.

Q.15. During that time whose whisky has the words "Old Crow" indicated to your mind?

A. I never heard of any Crow but Gaines' Crow.

Q. 16. Have you been acquainted with the firm of A. M. Hellman & Company of this city?

A. Some three years ago we bought one article, Kudros, from

them. That is all I know of them.

318 Q. 17. Did you ever know of any claim made by A. M. Hellman & Co. of owning the trade-mark for whisky consisting of the words "Old Crow?"

Counsel for defendant objects to the question on the ground that it is immaterial and irrelevant what was claimed or what was said with reference to the words "Old Crow" as a trade-mark. The witness should be required to state only facts of what was actually done with reference to the use of said words.

A. No.

Cross-examination by Mr. Smith:

X Q. 1. Do you handle Old Crow at the present time at Lippe's? A. We do.

X Q. 2. Do you buy the Old Crow yourself that you use?

A. Yes, sir; I have ordered it and sometimes Mr. Lippe orders it,

X Q. 3. From whom do you buy it?

—. We buy it from Billy H. Lee, Lee's label, Steinwender & Sellner, Herman A. Steinwender & Company, David Nicholson and Bonded Old Crow. Those are the kind of Old Crow that we handle.

X Q. 4. Why do you buy all those different bottlings?

A. Well, the trade demands it. Some want one brand and some another.

X Q. 5. Is there a difference in bottling?

A. Well, I am not judge enough to say. People that drink it may be able to tell; I don't know.

X Q. 6. Don't you drink?

A. I seldom drink whisky, and couldn't tell a good whisky from a bad one.

X Q. 7. You have been in the business for seventeen years, I understand?

A. Yes, sir.

X Q. 8. Don't you consider that you are qualified to judge of the difference between these different bottled goods?

A. No, not at all. I don't know as I would know all the different

whiskies we have got behind the bar.

319 X Q. 9. But you do have customers who demand, some Billy Lee's Old Crow, some Steinwender & Sellner Old Crow, some Herman A. Steinwender & Company's Old Crow, and others David Nicholson's Old Crow, and others bottled in bond Old Crow. That is correct, is it not?

A. Yes. sir.

X Q. 10. You make your purchases according to the demand of your trade?

A. Exactly.

X Q. 11. Can you state which one of these bottlings you have the greatest demand for?

A. Well, at the present time I think it is H. A. Steinwender, just

XQ. 12. How long has that been the most popular brand of Old

A. I should think for the last two, three or four months.

XQ. 13. What was the most popular Old Crow before that?

A. William H. Lee & Co. bottling.

X Q. 14. How long has that been the most popular? A. For a number of years, four or five years, perhaps. XQ. 15. What was the most popular before that?

A. Well, that I don't know. There was a bottling at one time that had a run, distillery bottling with a green label. That is not selling here now, at least it is not in demand here.

XQ. 16. A distillery green label?

A. Yes, sir; I haven't seen that but once or twice in St. Louis. Lee really put that brand on the market here; that is how it got its popularity in St. Louis. Old Crow was in demand on account of his personal popularity.

XQ. 17. You know whether or not when you get bottling from H. A. Steinwender & Company or from Lee, whether they are

straight goods or blend?

A. I couldn't say.

X Q. 16. Can you yourself distinguish between straight whisky and a blend?

A. No, I could not.

XQ. 19. But there is a decided preference on the part of your trade, some for one brand and some for another of Old Crow? 320 A. Exactly; we know all the brands that come; they are in demand, four or five of them.

X Q. 20. Some of your customers may insist upon Steinwender &

Sellner when they call for Old Crow?

A. Yes, sir.

X Q. 21. And some insist upon Billy Lee?

A. Yes, sir.

X Q. 22. And some insist upon H. A. Steinwender?

A. That is right.

X Q. 23. And some insist upon David Nicholson's Old Crow? A. Yes, sir.

XQ. 24. And others insist upon bottled in bond Old Crow? A. Yes, sir.

X Q. 25. Do you buy bottled in bond Old Crow from Steinwender & Sellner?

A. No; we bought from Nicholson.

XQ. 26. You bought the bottled in bond from Nicholson? A. Yes, sir; in cases. We bought it as we needed it at times.

XQ. 27. Were you ever in the place of business of A. M. Hellman & Company of this city?

A. I never was; no.

X Q. 28. Do you know any of the firm?

A. No, not personally.

X O. 29. Whom did you do business with when you bought this Kudros?

A. I don't know the gentleman's name. Mr. Lippe bought it The gentleman came around often and asked to sell it himself. and a few years ago there was some demand for it, and we bought I don't know how much, but probably a case or two, and we have got a bottle of it now on hand.

X Q. 30. Do you know anything about the territory in which the

firm of A. L. Hellman & Co. sells their goods?

A. I haven't the slightest idea.

X Q. 31. Do you know anything at all about their trade?

A. No. I do not.

X O. 32. Do you know anything about the brands that they carry, except this Kudros?

321 A. No. I don't know, or any other liquor man: I don't know anything about it.

X O. 33. Do you know anything about their predecessors, I. & L. M. Hellman?

A. No.

X Q. 34. During the four years before you went with Mr. Lippe. while in these other cities, Cincinnati, Detroit and Put-in-Bay, did vou handle Old Crow then?

A. I handled Old Crow in Cincinnati and Detroit. I don't re-

member handling it in Put-in-Bay.

X Q. 35. From whom did you make your purchases?

A. I couldn't say. That was when I was quite young in the busi-We had Old Crow ness, and I didn't know how it was bought there. in the place where I was in Cincinnati; a framed picture of a black crow advertising it.

X Q. 36. You don't know from whom those purchases of Old

Crow were made?

A. No; no, that was back something like 1888 or 1889 when I first got into the business.

X Q. 37. Do you know in what kind of packages it came to you?

A. That was bulk goods.

X Q. 83. It came to you in barrels?

A. Yes, sir.

X Q. 39. Do you remember whether or not the barrels contained marks or brands or lettering?

A. I couldn't say that. I know they were hand goods of the standard brand.

X Q. 40. What was the name of the establishment which you were with in Cincinnati?

A. That was Mrs. Spencer. It is in her name. The place of business was her husband's when he was alive, and after he died it was still run in her name.

X Q. 41. Where was that located?

A. It was at that time No. 22 W. Pearl Street. The numbers have been changed since then. I couldn't say what the number is now.

X Q. 42. Is that house still going?

A. I couldn't say. I haven't been there for eight or nine years. It was there then. 322

X Q. 43. Is this place in Detroit still going? A. Yes, sir.

X Q. 44. Giess'?

A. Yes, sir.

X Q. 45. Where is it located?

A. No. 10, 12 or 14 Monroe Avenue.

X Q. 46. During the time you were at the Planters' House did you handle Old Crow?

A. They had a Crow there that they called Private Stock, with "Old Crow" on. That was bought in bulk and bottled themselves.

X Q. 47. Did they bottle it straight, or did they reduce it?

A. I couldn't say.

X Q. 48. Who was their liquor man at that time who attended to the bottling?

A. His name was David Lauber.

X Q. 49. Was he the manager of that department?

A. Yes, sir.

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X Q. 50. Do you know whether or not they carry rectifier's license?

A. I couldn't say that.

X Q. 51. Do any of these places where you have worked or any one connected with them carry a rectifier's license?

A. Not to my knowledge. Not any rectifying license that I know of.

X Q. 52. You don't know what brands the firm of A. L. Hellman & Company carry?

A. No, I don't know. They never sold us to my knowledge, so I

don't know anything about it.

X Q. 53. You have absolutely no knowledge of their business at

A. None whatever.

X Q. 54. You say the words "Old Crow" indicate to you on a package of whisky that the whisky contained in the package was made by W. A. Gaines & Company?

A. Yes, sir; I never knew any other distillery making Old Crow

or calling their whiskies Old Crow.

X Q. 55. That is your understanding?

A. That is my general impression. If there is, I don't know.

XQ. 56. If there was any other you don't know anything about it? A. If there was I don't know anything about it, no. I take 323 it for granted if the- was any Old Crow it was made by Gaines & Company.

GEO. J. KNAPP.

Subscribed and sworn to before me this 28th day of December, A. D. 1905.

> CHAS. E. WELLER, Notary Public and Special Examiner.

## Deposition of Frank R. Clayton.

Frank R. Clayton, a witness produced on behalf of the complainant, being duly sworn, testified as follows:

Direct examination by Mr. Hopkins:

- Q. 1. State your full name.
- A. Frank R. Clayton.
- Q. 2. What is your age?
- A. Thirty-three.
- Q. 3. Where do you reside?
- A. At No. 4032 Shenandoah Avenue, St. Louis.
- Q. 4. What is your occupation?
- A. I am an inspector in the Thiel Detective Service Company.
- Q. 5. As such inspector for the Thiel Detective Service Company A. Yes, sir. – engaged in detective work?
- Q. 6. How long have you had that connection with the Thiel Detective Service Company?
- A. With the exception of two years when I was deputy sheriff I have been with them twelve years.
  - Q. 7. During what years were you deputy sheriff, and where?
  - A. In 1888 and 1889 at the Four Courts, St. Louis.
- Q. 8. Prior to your connection with the Thiel Detective Agency in which business were you engaged?
  - A. I was in the contracting business with my father.
  - Q. 9. In the city of St. Louis?
  - A. Yes, sir.
  - Q. 10. How long have you resided in the city of St. Louis?
  - A. Thirty-two years.
- Q. 11. Are you acquainted with the Old Crow whisky of W. A. Gaines & Company?
  - A. Yes, sir.
    - Q. 12. How long have you been acquainted with it?
- 324 A. 15 years.
- Q. 13. In what parts of the United States have you seen the Old Crow whisky of W. A. Gaines & Company?
- A. Every state except three west of the Mississippi River. Nearly all of the Central States, four of the Northern States and all of the Southern States.
- Q. 14. What are those three states west of the Mississippi in which you have not seen Gaines' Old Crow whisky?
  - A. Utah, Idaho and Nevada.
- Q. 15. Have you done any detective work for W. A. Gaines & Co.?
  - A. Yes, sir.
  - Q. 16. In what territory have you done such detective work?
  - A. All the territory that I have just mentioned.
- Q. 17. I believe you stated that this observation of yours of W. A. Gaines & Company Old Crow whisky had extended over all the Southern States?

A. Yes, sir.

Q. 18. Have you ever seen the Old Crow whisky of A. M. Hellman & Co., and if so, where?

A. I have seen it once in St. Louis.

Q. 19. Aat what place?

A. At Judge & Dolph's there in competition with the well-known bottling of W. A. Gaines & Company Old Crow whisky, and it was advertised in their circulars as Old Crow whisky bottled by Hellman.

Counsel for defendants moves to strike out the portion of the answer beginning with the words "There in competition with the well-known bottling of W. A. Gaines & Company," for the reason that the same is not responsive to the question put by counsel for complainant, and it is immaterial and irrelevant to any issue in this case, and for the further reason that it is a conclusion of the witness.

Q. 20. What kind of an establishment is it which you have referred to as Judge & Dolph?

A. It is supposed to be a retail and wholesale drug house.

Q. 21. Where is it located?

A. On Olive Street between Sixth and Seventh.

Q. 22. In the city of St. Louis?

A. Yes, sir.

Q. 23. When was it that you saw the Old Crow whisky of A. M. Hellman & Company displayed there?

A. During the holidays of last year.

325Q. 24. 1904?

A. Yes, sir.

Q. 25. During the month of December, 1904?

A. I think so; yes, sir.

Q. 26. Did you see any of W. A. Gaines & Company Old Crow whisky on sale at the same time and place?

A. Yes, sir.

Q. 27. What bottling of W. A. Gaines & Company Old Crow

whisky did you see at that time and place?

A. Bottled in bond Old Crow whisky of W. A. Gaines & Co., William H. Lee & Company Old Crow and David Nicholson's Old Crow. That is about all I can remember besides Hellman.

Q. 28. At that time and place did you secure a copy of the cir-

cular to which you have referred?

A. Yes, sir.

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Q. 29. Have you the copy of that circular with you? A. Yes, sir.

Counsel for complainant offers the circular in evidence with particular reference to the duplicated lists which is entitled "Bourbon whiskies," and in said list the particular portion offered by counsel for complainant is as follows:

Old Crow, bottled by W. H. Lee & Co., quarts	 \$1.23
Old Crow, bottled by D. Nicholson, quarts	 1.23
Old Crow bottled by Hellman quarts	1 92

Old Crow, bottled by Judge & Dolph, quarts...... 1.23

Which said circular counsel for complainant requests to be marked "Complainant's Exhibit Judge & Dolph's price list," which is ac-

cordingly done.

Counsel for defendants objects to the parts of such advertisement offered in evidence and the particular section to which attention has been called by counsel for complainant, for the reason that the same is incompetent and in no ways binding upon these defendants or either of them, as being secondary evidence, and for the further reason that it is immaterial and irrelevant to any issue in this case.

Q. 30. I hand you a pamphlet marked "2nd Edition Toasts and Cocktails" of Judge & Dolph Drug Company, 515 Olive
 326 Street, St. Louis, U. S. A.," and ask you when and where you first saw this pamphlet?

A. I got this pamphlet at Judge & Dolph's Drug Company today

about 1:30 p. m.

Counsel for complainant offers the phamphlet referred to and identified by the witness in evidence with particular reference to the entries upon page 17 thereof under the title "Bourbon Whiskies," the particular items offered in evidence being as follows:

Old Crow, W. A. Gaines, bottled in bond, 2 4-10

And asks that the same be marked "Complainant's Exhibit, Judge

& Dolph No. 2," which is accordingly done.

Counsel for defendants objects to the exhibit offered in evidence by counsel for complainant and to the items to which particular attention has been called, for the reason that the same are incompetent, they are secondary evidence, and for the further reason that they are irrelevant and immaterial to any issue in this case.

Q. 31. At the time of your visit to the place of business of Judge & Dolph in December, 1904, did you see the complainant's Old Crow whisky as bottled by W. H. Lee & Co. and by David Nicholson displayed for sale?

A. Yes, sir.

Q. 32. Where was it with reference to the so-called Hellman bottling of Old Crow?

A. They were all lined up together on the Show Case on the top of the Show Case.

Q. 33. Displayed side by side?

A. Yes, sir.

Q. 34. To what extent have you visited the places of business of the wholesale liquor dealers of the United States in the territory to which you have referred?

A. I visited nearly every wholesale liquor house in all the states and cities and said states that I have referred to before.

327 Q. 35. Is that true of the Southern States?

A. Yes, sir.

Q. 36. Is it true of the state of Louisiana?

A. Yes, sir.

Q. 37. Is it true of the cities of Shreveport and New Orleans in that state?

A. Yes, sir.

Q. 38. Is it true of the state of Texas?

A. Yes, sir.

Q. 39. Of what cities in that state?

A. Galveston, Houston, Dallas, San Antonio, Fort Smith, Palestine, Dennison, Waco, Austin, Temple, Longview and El Paso.

That is about all.

Q. 40. During all of the travels and investigations have you ever seen the Old Crow whisky of Hellman & Co. displayed for sale at any other place than at the place of business of the Judge & Dolph Co. in St. Louis?

A. I never did.

Cross-examination by Mr. Smith:

X Q. 1. Mr. Clayton, I understand you to say that you have been familiar with the whisky of W. A. Gaines & Co., known as Old Crow, for the past fifteen years?

A. Yes, sir. X Q. 2. Under what circumstances did you first become acquainted

with that whisky?

A. I remember when I was working for Colonel Henry Flad, president of the Board of Public Improvement, about fifteen years ago. I had taken out some drawing of some plats or something out to his house on Channing Avenue and Morgan Street, and while I was in there the express wagon came up with a demijohn of whisky and the Colonel called my attention to it and said it was the finest whisky he could possibly get, and that it cost him \$10.00 a gallon and was Old Crow whisky, made by W. A. Gaines & Company of Frankfort, Ky. He called my attention to it at the time and gave me a drink of it.

X Q. 3. Was the package marked?

A. Well, I don't know about that. I didn't examine it.

328 X Q. 4. All your knowledge of the distiller that made this whisky that Colonel Flad called your attention to was Colonel Flad's statement?

A. Yes, sir; that is the first time I ever heard of W. A. Gaines & Co. Old Crow whisky. That is the reason I mentioned that fact.

X Q. 5. You don't know of your own knowledge where that whisky came from?

A. Oh, no; not at all.

Counsel for defendants moves to strike out the testimony of this witness as to the conversation with Colonel Flad and in regard to this whisky, for the reason that the same is hearsay testimony and is incompetent.

X Q. 6. When was the next that you heard of this whisky?

A. After that whenever I took a drink of whisky I made a particular point to drink that whisky, upon his recommendation, and have been using it ever since.

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X Q. 7. Did you take a drink shortly after that?

A. Yes, sir; I have been a continuous drinker right along ever since.

X Q. 8. What was your age at that time?

A. Well, I am 33 now. I must have been 18 years of age then.

— Q. 9. What was your occupation at that time?

A. I was working for the Colonel in the Board of Public Improvements.

— Q. 10. In the employ of the city?

A. Yes. Well, no; I was not; I was in his employ. I was studying to be a civil engineer under him at the time and he paid me out of his own money.

X Q. 11. How long did you continue to be employed by him?

A. Until he was made superintendent of the Mississippi River Improvement Commission.

X Q. 12. How long afterwards?

A. About two years.

X Q. 13. What did you do then?

A. I went to work for the Thiele Detective Company.

X Q. 14. After your experience that you refer to at Colonel Flad's house on Channing Avenue, at what places did you drink whisky that you understood was the whisky of W. A. Gaines & Co.?

A. Oh, I have drunk whisky at all the downtown saloons.

X Q. 15. Name some of them?

A. I couldn't name all of them at this time. I drank at Bart Ready's and at Carmody's.

X Q. 16. Give their locations?

A. Ready's place is not in existence. You mean at that time?

X Q. 17. Yes, sir.

A. Pat Carmody used to be on Seventh Street below here, between Olive and Pine.

X Q. 18. Where was Bart Ready at that time?

A. Well, that was some years later; he used to be in the Union Trust Building, now the Missouri Lincoln Trust Building.

X Q. 19. Where else did you drink at that time?

A. Well, the saloons opposite the City Hall there. I don't remember the names of them now.

X Q. 20. Jim Cronin's?

A. No; Jim Cronin is opposite the new City Hall. At the time that I worked at the City Hall it was in the old building.

X Q. 21. Can you give the names of any other place- where you found this whisky?

A. Oh, later on at Hughey Patterson, some eight years ago.

X Q. 22. Where is that located?

A. He used to run Jester's saloon on Pine between Ninth and Tenth.

X Q. 23. Where else?

A. And Jim Hall's. He used to be at 412½ Olive. He is out of business now.

X Q. 24. When was it that you drank there?

A. Oh, that is seven or eight years ago. Eight or nine years ago.

X Q. 25. Can you mention any others that you drank at fifteen years ago?

A. Yes; I drank at the Southerr, Hotel, the old Planters Hotel, the

Lindell Hotel, all of them.

X Q. 26. And any other that you can name?

A. No; I don't think I can. I don't remember the names of them. X Q. 27. How frequently did you take a drink of this whisky?

A. Oh, well, that is hard to tell. I was never a very hard drinker.
I would take probably a drink a day, and maybe would go
sometimes a week without taking a drink.

X Q. 28. Do you know what bottling of Old Crow they had

at these different places?

A. That was early; all the bottlings of the distillery known as the Gold Label bottling at that time. Distillery bottling.

X Q. 29. Did you examine the bottles at these different places?

A. No; I never examined them.

X Q. 30. How do you know they were Gold Label if you did not examine the bottles?

A. Well, I could see the label. I could remember that, you know.

X Q. 31. Did you take any of the Nicholson bottling?

A. I don't remember whether I ever saw any of their bottling that far back.

X Q. 32. Did you take any of the Billy Lee's Old Crow? A. No; there was no Billy Lee's Old Crow at that time.

X Q. 33. When was the first that you knew of Billy Lee's Old Crow?

A. Oh, that is some four or five years ago, five or six years ago, if I remember it, that it got to be popular, you understand. It may have been on the market before that, but from the time it began to be popular around St. Louis, it dates back four or five years ago.

X Q. 34. When was the first that you knew of Steinwender & Sell-

ner's Old Crow?

A. That is quite recent, also. That is within the last two, three or four years that I heard of it.

X Q. 35. When was the first you knew of Nicholson's Old Crow?

A. Well, that dates back about the same length of time, five or six years. That is to my knowledge.

X Q. 36. Have you drank Nicholson's Old Crow?

A. Yes, sir.

X Q. 37. Have you drank Steinwender & Sellner's Old Crow?

A. Yes, sir.

X Q. 38. Have you drank H. A. Steinwender & Company's Old Crow?

A. Yes, sir.

331 X Q. 39. You have drank David Nicholson's Old Crow? A. Yes, sir.

X Q. 40. Have you ever drank the Griesedeck Distilling Co.'s Old Crow?

A. No, I don't think I ever drank any of that bottling. X Q. 41. Have you drank bottled in bond Old Crow?

A. Yes, sir.

X Q. 42. How do these different bottlings differ, one from the other?

A. Well, I don't know anything about that. I am not a judge of whisky.

X Q. 43. You have been drinking Old Crow for fifteen years?

A. I have.

X Q. 44. Don't you notice any difference between them?

A. There is a great deal of difference sometimes; yes, sir, in the drinks; but I am not able to tell you how they differ.

X Q. 45. Which of these different bottlings do you prefer?

A. I prefer the bottled in bond goods.

X Q. 46. How does it differ from the private bottling?

A. Well, it is a higher proof, and then it is a straight Bourbon whisky; it has not been reduced.

X Q. 47. Is not Steinwender & Sellner the straight Bourbon

whisky?

A. I guess it is, as far as I know, but it is not as high proof as the bottled in bond goods.

X Q. 48. Does it differ in any other respect from the bottled in

bond goods?

A. Not that I know of; no, sir.

X Q. 49. Do you know how David Nicholson's bottling of Old Crow differs from bottled in bond goods?

A. In no other way except it is a lower proof. It is not quite so

strong as the bottled in bond.

X Q. 50. But you do not yourself pretend to be a judge of whisky

A. Oh, not for a minute; no, sir.

X Q. 51. Although you have drank Old Crow for fifteen years?

A. Yes, sir.

X Q. 52. But you can tell if there is a difference between these different bottlings?

A. I can tell so far, that it is not as strong as the other; yes, I know that.

332 X Q. 53. Do you know as a matter of fact that the retail trade demands these different bottlings?

A. No, sir; I don't know that of my own knowledge. I see that they have them; a good many saloons have the different bottlings. I don't know that they demand them.

X Q. 54. They do keep them on sale?

A. They majority of the best saloons keep up all these popular

bottlings that I have mentioned.

X Q. 55, In the traveling that you did with reference to this brand of Old Crow, visiting the different states that you mentioned, what different bottlings of Old Crow did you observe?

A. Well, it depended altogether on the territory where I was at

the time.

X Q. 56. Well, take San Francisco?

A. San Francisco has a bottling out there known as the Yellow Label of C. W. Craig & Co.'s bottling of Old Crow, together with

the bottled in bond Old Crow and the distillery bottling of Old Crow. X Q. 57. Did you find any other bottling out there?

A. Yes, sir; I have seen other bottlings.

X Q. 58. Mention them, please?

A. I have seen other bottlings of Old Crow out there, but there were no names on them that I remember of now. Just simply stock label.

X Q. 59. Do you know by whose houses they were bottled?

A. If I had my books here I could tell you all the houses that I bought it at. I don't happen to have those books here now. I can mention some places in San Francisco.

X Q. 60. Mention those that you can recall.

A. No, I can't, either. I can't mention the names now. I have them in all my books, though.

X Q. 61. You can't mention the names in San Francisco?

A. No, I cannot now.

X Q. 62. Did you test any of the goods that you bought at these places?

A. No, sir, I did not.

X Q. 63. The goods that were in the stock labels?

A. No, sir; I did not.

333 X Q. 64. What different bottlings did you find in New Orleans?

A. I only found bottled in bond goods in New Orleans.

X Q. 65. No private bottlings at all?

A. No, sir; none at all.

X Q. 66. What did you find in Galveston?

A. In Galveston I only found bottled in bond goods.

X Q. 67. Did you go to Chicago?

A. Yes, sir.

X Q. 68. What different bottlings did you find there? A. I found a great many different bottlings in Chicago.

X Q. 69. Mention those that you found.

A. Well, I found Old Crow bottled by Despres & Company and F. Herman Distilling Co., I think it is, and the Great Western Wine Co., I think is the name of another one, and Morris, May & Company, Moore & Brothers, and Hasterlick.

X Q. 70. Do you know the location of those places?

A. I don't remember the locations now. I can tell you what streets they are on, but not the numbers.

X Q. 71. Let us have the streets.

A. Des Pres and Herman are on Van Buren Street. Morris, May & Co. are on Dearborn Street. Hasterlick is on La Salle; I am not sure about that. And Manheimer & Co., I think, they are on La Salle Street, also, if am not mistaken.

X Q. 71. What others did you find in Chicago?

A. There are lots of them, but that is all I can remember now, Mr. Smith. If I had my book I could give you all.

X Q. 72. Are all of those houses which you mention wholesale liquor dealers?

A. Yes, sir.

X Q. 73. Are they also rectifiers?

A. Well, I don't know that. Some of them are.

X Q. 74. Which of those that you mentioned are rectifiers?

A. Well, I couldn't tell you that.

X Q. 75. But you do know that some of them are rectifiers?

A. Yes, sir.

X Q. 76. Did you make any test or have any tests made of the goods bottled by these different houses under the name of 334 Old Crow?

A. I made no test of them other than buying them.

X Q. 77. You bought bottling- of Old Crow at each of these places that you have mentioned?

A. Yes, sir.

X Q. 78, What did you do with the goods which you bought? A. I shipped the goods here to St. Louis to Mr. Hopkins, from Chicago.

X Q. 79. Where else did you buy bottlings of Old Crow?

A. I bought bottlings of Old Crow in every one of the cities in all the states that I have mentioned previously except New Orleans. I did not buy any there, nor I didn't buy any in Galveston, and none in Mobile.

X Q. 80. Did you buy any in Cincinnati?

A. Yes, sir.

X Q. 81. What different bottlings of Old Crow did you buy there? A. I bought bottled Old Crow at Gerson & Seligman's,

X Q. 82. Give the location.

A. That is on Central Avenue; I don't remember the number. And then I bought some at Edgewood Distilling Co. That is all I can remember in Cincinnati.

X Q. 83. What sort of label did these two houses have?

A. They had stock labels.

X Q. 84. Did you buy any in San Francisco?

A. Yes, sir.

X Q. 85. From who did you buy there?

A. I bought from Steinbeck & Company, Eugene Donnelly, and Wolfsshon, I believe is the name, and another place, I bought some of Mathew Quinn. That is about all I can remember in Kansas City.

X Q. 86. Did you go to New York?

A. No, sir.

X Q. 87. Did you go to any of the Eastern States?

A. No. sir.

X Q. 88. Did you go to Detroit?

A. No, sir.

X Q. 89. Did you go to Cleveland?

A. No, sir.

X Q. 90. Did you go to Columbus?

A. No, sir.

X Q. 91. Did you go to Omaha?

A. No, sir.

335 X Q. 92. What places in Nebraska did you go to?

A. No place in Nebraska.

X Q. 93. What places in Minnesota.

A. St. Paul and Minneapolis.

X Q. 94. What bottlings of Old Crow did you get there?

A. I have bought a number there; George Benz & Sons, P. J. Bowlin Liquor Company, I think that is all I can remember in St. Paul.

X Q. 95. Was that their own bottling?

A. Yes, sir; they said it was bottled by them. X Q. 96. What sort of a label did they use?

A. Stock label.

X Q. 97. What places in Wisconsin did you go to?

A. No place in Wisconsin. X Q. 98. In Michigan?

A. Grand Rapids. That is about all. Yes, I did go to Wisconsin. I went to Milwaukee.

X Q. 99. What bottling of old Crow did you get there?

A. I can't recall any of the names of those places. I bought some there.

X Q. 100. Private bottling? A. Yes, some; similar bottling. X Q. 101. What sort of labels?

A. Stock labels.

X Q. 102. Did you go to any other places in Ohio than Cincinnati?

A. No. sir.

X Q. 103. Did you got to Kentucky?

A. No, sir.

X Q. 104. Did you go to Tennesee?

A. Yes, sir.

X Q. 105. What places? A. Memphis and Nashville.

X Q. 106. What bottling of Old Crow did you buy there?

A. In Nashville I bought of Berry De Mobile & Company. is all in Nashville, and in Memphis I can't remember a single one. I bought considerable there, though.

X Q. 107. Private bottling? A. Yes, sir.

X Q. 108. Stock label?

A. Yes, sir.

336 X Q. 109. Did you go to any places in Alabama? A. Yes, sir.

X Q. 110. What points?

A. Birmingham and Mobile.

X Q. 111. Did you get any Old Crow there?

A. I got some in Birmingham; yes, sir. X Q. 112. Name the house and location, if you can.

A. I had the name on the end of my tongue, but I can't think of it now. I think it is Meyer, Marx & Co. They are on First Avenue between Eighteenth and Nineteenth.

X Q. 113. Did you buy any in Georgia?

A. Yes, sir.

X Q. 114. Name the places and houses, please?

A. Atlanta, of a man named Friedman. I don't know whether Friedman Brothers or Just Friedman. Anyhow, it is quite a big drug house there; I think it is on Peachtree Street. I am not sure about that. That is the best of my recollection.

X Q. 115. Is that all in Georgia?

A. All I can remember. X Q. 116. In Florida?

A. Jacksonville.

X Q. 117. Name the houses.

A. I don't remember a single one. I bought some on Bay Street.

X Q. 118. Any other part of Florida?

A. No. sir.

X Q. 119. South Carolina?

A. No, sir; South Carolina, I believe is a temperance state, and they don't sell any in South Carolina, I don't think.

X Q. 120. North Carolina?

A. When I mentioned the Southern States I included those in the Eastern States, South Carolina, North Carolina and Virginia, I called those Eastern States.

X Q. 121. You didn't go to any of those?

A. No. sir.

X Q. 122. Did you go to Mississippi?

A. In Mississippi they don't sell any, either.

X Q. 123. You did not visit any of the places there?

A. No, sir.

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X Q. 124. Did you go to Arkansas?

A. I went to Arkansas, but didn't buy any whisky.
X Q. 125. Did you find any Old Crow down there?

A. Yes, sir. Those are bottled in bond goods.

X Q. 126. Where did you find them?

A. Well, I couldn't recall that. I didn't pay enough attention to it, only I didn't find any other bottling except the bottling in bond. I didn't pay much attention to that. That was in Little Rock.

X Q. 127. Any other points in Louisiana except Shreveport and

New Orleans?

A. No, sir.

X Q. 128. Did you go to Kansas? A. No, sir; no point in Kansas.

X Q. 129. Did you go to Colorado?

A. Yes, sir.

X Q. 130. What purchases did you make in Colorado and where?
A. I made purchases at Denver; I think his name is George Bar-

A. I made purchases at Denver; I think his name is George Barrett, in Denver, Levy, Lewin & Co., Max Levy and other places with long names that these parties are proprietors of under other names; Columbia Distilling Company.

X Q. 131. Did you buy any private bottlings at all of these places?

A. Yes, sir.

X Q. 132. Stock labels?

A. Yes, sir; and in Leadville I bought from Joe Golob there; in Pueblo, I bought from Max Levy there; I think that is the name; it

was some Levy, anyway. At Trinidad I don't know who I bought from. That is all I bought there.

X Q. 133. Were they private bottlings at these places?

A. Yes, sir.

X Q. 134. Did you go to Montana?

A. Yes, sir.

X Q. 135. To what points?

A. I went to Helena, Butte and Great Falls. At Helena I bought from Stromberg, Mullen & Co., I think they are in Butte; I can't recall any at the other places.

X Q. 136. Did you go to North Dakota?

A. Not in North Dakota. I bought some in South Dakota, Deadwood and Lead.

X Q. 137. What houses did you buy of there?
A. I don't recall what houses.

X Q. 138. Did you go to Washington? 338

A. Yes, sir; I went to Spokane, to Seattle and Everett.

X Q. 139. Can you give the names of the houses?

A. At Spokane the only one I can remember is Jue Durkin & Co. I believe it is Joe; Durkin is the last name.

X Q. 140. Is that all that you recall in Washington?

A. I bought more there, but I can't recall the names of them. And in Seattle I bought of Van something; I can't recall the last name, but it began with Van.

X Q. 141. Did you go to Oregon?

A. I went to Portland, Oregon; yes, sir.

X Q. 142. Name the houses there.

A. I can't recall them.

X Q. 143. Any others in California except what you have mentioned in San Francisco?

A. No, sir; none others. Yes; there was, too. I bought in Oakland across the Bay from San Francisco.

X Q. 144. Name the houses.

A. I can't remember.

X Q. 145. Did you go to Arizona?

A. Yes, sir.

X Q. 146: Name the place.

A. Phœnix, Prescott, Tucson. In Phœnix I bought from Nelczer Brothers. That is all I can remember.

X Q. 147. Did you go to New Mexico?

A. Yes, sir.

X Q. 148. Name the place and party.

A. At Albuquerque, I bought from Meyer, Abels, & Co., Bischichi & Giomi and Merne & Eakin. That is all I can remember there.

X Q. 149. Did you go to Oklahoma?

A. No, sir.

X Q. 150. Did you go to Indian Territory?

A. No, sir.

X Q. 151. What houses do you recall in Texas?

A. I ought to remember every one of them, but I can't think of them right now. I can't recall a single one right now.

X Q. 152. You state that you visited Houston, San Antonio, Palestine, Waco, Longview and El Paso?

A. I didn't buy whisky in all those towns.

X Q. 153. In what towns did you buy whisky?

339 A. I bought in El Paso and San Antonio and Longview.
That is about all that I bought anything in.

X Q. 154. Can you mention any of the houses that you bought of in Texas?

A. No. I cannot.

X Q. 155. How long ago was it that you made this expedition?

A. It is about a year ago, a little over.

X Q. 156. How long did it take you to complete the trip?

A. You mean all over this territory?

X Q. 157. Yes, sir.

A. Just about a year. Pretty near a year. About nine months, X Q. 158. Are all these houses which you have mentioned wholesale liquor dealers?

A. Yes, sir; they are all of them wholesale.

X Q. 159. Can you mention whether or not they are all rectifiers?

A. No, sir; I could not.

X Q. 160. Do you know which ones are rectifiers?

A. No, sir.

X Q. 161. Do you know that some of them are rectifiers?

A. Yes, sir.

X Q. 162. You wouldn't be able to tell me now which are and which are not?

A. No. sir.

X Q. 163. Do you know whether or not the goods which you bought under these labels from the different houses were straight goods or blended goods?

A. I don't know a thing about it.

X Q. 164. Did you talk with the different proprietors on the subject, as to whether they were straight or blended goods?

A. No, sir; not in that way.

X Q. 165. How did you talk with them?

A. In making a purchase, if the bottled goods wasn't where I could see it I would ask them if they had any good Old Crow whisky bottled. If they said they had I would ask to see it and the price of it, and if it wasn't bottled in bond goods or the recognized distillery bottling goods I would purchase it without any further question.

X Q. 166. That was true in each instance?

A. Well, there was some instances where they didn't have the goods all ready bottled, and I would ask them if they could bottle me some good Old Crow whisky, and in a number of cases they did bottle what they called good Old Crow whisky.

X Q. 167. In those cases did you have any further conversation

with them?

A. Not to amount to anything; only on general topics. They might ask me where I was in business or something like that; but

nothing with regard to the quality of the whisky or anything of that kind.

X Q. 168. Did you visit retail places in these different cities?

A. In some cases I did, where they were very large places. You see there are some large saloons that had a wine cellar of their own and bottled their own goods.

X Q. 169. Did you visit any saloons that did not do their own

bottling?

A. No, I don't think I did. I don't recall any.

X Q. 170. Name some of the saloons that you visited in the dif-

ferent places.

A. Well, I visited Bob Kern's saloon in San Francisco and Tom Johnson's saloon in Denver and Ferguson's saloon in San Francisco. I think his name was Tom Ferguson. He had an old black crow hopping around in the window.

X Q. 171. Any other saloons that you recall?

A. Yes; Mr. Jim Durkin's saloon in Spokane. I don't know whether his name was Jim or George, but it was Durkin, anyhow, and old Pop Sullivan in San Francisco, and all the hotel bars, I guess; the first-class hotels in every one of these cities that I went to.

X Q. 172. Was there any other saloons that you recall visiting

that you have not mentioned?

A. Oh, yes; there was a number of saloons I visited.

X Q. 173. In what cities?

A. Well, I don't recall that. Do you refer to saloons that I went to for the purpose of buying Old Crow whisky?

X Q. 174. That is what I intend by my question.

A. Well, there wasn't any saloons that I went to for that purpose that I remember except those that I have mentioned.

341 X Q. 175. You don't think that you visited any other retail places in other cities than what you have mentioned.

A. Not outside of St. Louis. No, I don't think I have.

X Q. 176. You did not visit any retail place in Missouri outside of St. Louis?

A. No. sir.

X Q. 177. Or in Illinois?

A. I don't think I did in Illinois; no, sir.

X Q. 178. Or in Ohio?

A. No. sir.

X Q. 179. Or Tennessee?

A. No, sir.

X Q. 180. Or Colorado?

A. Yes, sir; Johnson's saloon that I mentioned. I don't think that I went to any others.

X Q. 181. Or in Texas?

A. Yes, I did, too. In Texas there was a saloon that I don't know the name of, but it is in San Antonio. It is right next to the Crystal Palace, in San Antonio, but I don't know what the name is now.

X Q. 182. Did you buy any there?

A. I did.

X Q. 183. What bottling was it?

A. The bottling of the Edgewood Distilling Company in Cincinnati.

X Q. 184. Did you visit any retail places in Minnesota?

A. No, sir.

X Q. 185. In Louisiana? A. No, sir; I did not.

X Q. 186. In Arkansas?

A. No, sir.

X Q. 187. In Mississippi?

A. No. sir.

X Q. 188. How did you get the list of places to which to go in

these different cities?

A. Whenever I would get to a city I took a directory and looked up the wholesale liquor dealers in the directory and took the list from there.

X Q. 189. And did you visit the wholesale liquor dealers in those

cities?

A. Yes, sir, all except C. W. Craig & Co., in Chicago. I didn't visit his place except to call and shake hands with him and say "How do you do."

X Q. 190. Do you know whether or not Craig bottles Old Crow

straight or whether it is a blend?

A. I don't know what he bottles of my own knowledge.

X Q. 191. Did you visit all the wholesale places in Galveston?

A. Yes, sir.

X Q. 192. Did you visit Japhet & Co.?

A. I don't recall the names. I didn't buy anything there, and I don't recall the names.

X Q. 193. Did you visit them all in Houston?

A. Yes, sir.

X Q. 194. Do you remember Japhet & Company being in either Houston or Galveston?

A. The name is very familiar to me. I think he was in one of the

two places.

X Q. 195. And is it your recollection that you visited all the wholesale houses in all those different states?

A. Yes, sir.

X Q. 196. How did you determine what wholesale houses to visit?

A. I determined that a great deal on the location of the house, the appearance of it, whether it was a first-class place. Sometimes I looked in Dun's or Bradstreet's to find out of they were responsible people.

X Q. 197. You did not pretend to go through the list of retail

houses in these different places?

A. Oh, no; not at all.

X Q. 198. You got your suggestion from Bradstreet or Dun, or from some other source and from seeing the house as you happen to pass by on the street?

A. Yes, sir.

X Q. 199. What the retail houses sold in these different places you don't know except in so far as you visited them?

A. No. sir.

X Q. 200. Did you know the firm of I. & L. M. Hellman when it was in business?

A. I never knew them before this suit was brought.

X Q. 201. You never knew the firm of A. M. Hellman & Co. before this suit was brought?

A. No, sir, I knew they were in business here in St. Louis.

X Q. 202. Did you know anything yourself, or did you know anything at all up to the time this suit was brought in regard 343 to the character of their trade or in what territory they sold goods?

A. No, sir.

X Q. 204. Did you or have you known at any time up to the filing of this suit anything in regard to the brands which they carry?

A. No, sir.

X Q. 205. They might have carried and sold any number of brands that you knew nothing about?

A. The fact that I didn't know anything about it—

X Q. 206. Just answer my question?

A. Yes, they may have had a hundred brands, and it is possible

that I wouldn't have known anything about it.

X Q. 207. Were you employed to go to the State of Kentucky and to Frankfort, in Woodford county, to look up some evidence in this case?

A. Yes, sir.

X Q. 208. When did you go over for that purpose to Kentucky?

A. I went over there a number of times.

X Q. 209. When was the first time that you went over?

A. A year and a half or two years ago.

X Q. 210. Mention the other trips that you made over there?

A. They are all of them later, subsequent to that, X Q. 211. How many, all told, did you make?

A. Four trips, I think. Three or four.

X Q. 212. Did you interview the witnesses and secure their attendance at the taking of the depositions in the city of Frankfort in this case in September of this year?

A. Yes, sir.

X Q. 213. And you previously interviewed all those witnesses who testified at that time?

A. Not all of them, no, sir.

X Q. 214. What ones had you not interviewed before, to the best

of your recollection?

A. Well, I know who they are, but I don't know their names. Mr. Gorman, of W. A. Gaines & Co., I hadn't interviewed him nor that big fellow whose father was a distiller, I don't know the name-Whittington, I hadn't interviewed him. I think those are the only two

that I had not interviewed.

344 X Q. 215. You were present in Frankfort during the taking of all these depositions in September of the present year?

A. Yes, sir.

X Q. 216. What arrangement, if any, did you have with the witnesses to secure their attendance at the taking of these depositions?

A. I had no other arrangement with them except their word, to

attend.

X Q. 217. Did you have any arrangements with them as to their expenses?

A. I told them I would pay their expenses, yes, sir.

X Q. 218. Did you pay their expenses?

A. I did.

X Q. 219. What did you include in the item of expense for each witness?

A. Well, some of them rode in their own buggies, and in that case I included the feed for their horses over there, and paid their board. If they had to use the livery I paid for the livery rig, and if they came on the railroad I paid their railroad fare and their board, that is all.

X Q. 220. Was there any expenses with those who resided in the

city of Frankfort?

A. No, sir; none whatever.

X Q. 221. During your stay in Frankfort did you visit the place of business of W. A. Gaines & Co.?

A. Yes, sir.

X Q. 222. Did you go through their establishment?

A. I did not.

X Q. 223. Did you go to the distillery?

A. No, sir.

X Q. 224. Did you see the entrance to the place of business of W. A. Gaines & Co. on the alley in the city of Frankfort?

A. My recollection is that you and I had a conversation about

that question before. I didn't see it; no, sir.

X Q. 225. You didn't go down the alley and point out where their place of business which fronts on Main street has an entrance from the alley?

A. No, sir; I did not.

X Q. 226. Do you know that there is such an entrance?

A. Only from what you told me.

345 Mr. Smith: I think you are mistaken as to having a conversation with me in regard to it?

A. Well, I may be mistaken, but that is my best recollection.

X Q. 227. You did not go down that alley at all?

A. No, sir; I did not.

X Q. 228. You don't know of your own knowledge whether or not there is a sign "J. P. Williams, Rectifier and Wholesale Liquor Dealer" over the entrance from the alley?

A. No. sir: I do not.

X Q. 229. Do you know that the place of business of W. A. Gaines & Company and the Kentucky Distillery's Warehouse Company is in the same building and is on the Main street in the city of Frankfort?

A. No, sir.

X Q. 230. And it is a point about midway between the Capitol Hotel and the office of General Lyndsey, where these depositions were taken?

A. Yes, sir.

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X Q. 231. The different bottlings of Old Crow whisky that you purchased in these different cities under Stock Labels may or may not have been distilled by W. A. Gaines & Company as far as you know?

A. Yes, sir.

X Q. 232. When you state that you have been familiar with the whisky known as Old Crow during the past 15 years, you do not wish to be understood as stating that you have any knowledge except what you may have derived through your employment in this suit or what you may have derived in quenching your thirst in St. Louis, during that time? Is that correct?

A. Yes, sir. X Q. 233. There may have been Old Crow whisky distilled by other distillers and sold in other places or under other circumstances and you would not have known it?

A. Unless it was sold in St. Louis previous to the time I went out of St. Louis, I would not necessarily have known anything of it.

X Q. 234. When you say "Previous to the time I went out of St. Louis," you mean when you were employed in this case?

A. Yes, sir.

X Q. 235. And your first employment in this case was in the year 1904, wasn't it?

A. No, sir; in 1903.

X Q. 236. About what month?

A. No, I think you are right about that. 1904 is right.

X Q. 137. What month?

A. That was in the spring sometime. I don't recall exactly. 346

X Q. 238. You have referred in your direct testimony to Old Crow whisky that you saw displayed at Judge & Dolph's

store in this city in 1904?

A. Yes, sir; I think it was during the holidays. It may have been after the holidays, in January, but to the best of my recollection it was during the holidays, right after or right before, somewhere along there.

X Q. 239. Did you make any purchases at that time?

A. No, I don't think I did.

X Q. 240. Did you have any conversation with any of the firm of Judge & Dolph with regard to this Old Crow?

A. No, not that I recollect. I don't think so.

X Q. 241. What sort of a label did the Judge & Dolph Old Crow bear?

A. They have a stock label. I did have some conversation, too, now I think of it, about it, with Mr. Joe Bloeser, there, and he told me at the time that they were getting up a new label for their bottling of Old Crow.

X Q. 242. Did he say anything with reference to the character of their bottling, as to whether it was straight goods or blended?

A. No, sir; nothing at all.

X Q. 243. Did you have any conversation with him in reference to Hellman's Old Crow?

A. No. sir.

F. R. CLAYTON.

Subscribed and sworn to before me this 30th day of December. A. D. 1905.

> CHAS. E. WELLER. Notary and Special Examiner.

At this point by consent the further taking of depositions was adjourned until to-morrow morning, December 21st, at 10:30 A. M.

St. Louis, December 21st, 1905.

Parties met pursuant to adjournment, present as before, and taking of depositions was this day resumed as follows:

## Deposition of Austin Carter.

Austin Carter, a witness produced on behalf of the complainant, being duly sworn, testified as follows:

Direct examination by Mr. Hopkins.

Q. 1. State your name in full?

A. Austin Carter.

Q. 2. What is your age? A. Thirty-eight.

347 Q. 3. Where do you reside?

A. I reside at the Lucerne Hotel, on Grand and Pine. 1 have forgotten the number.

Q. 4. Here in the city of St. Louis?

A. Yes, sir.

Q. 5. How long have you resided in this city? A. Seventeen years. I came here in 1887.

Q. 6. What is your occupation?

A. Manager of John W. Howard Liquor Company.

Q. 7. How long have you been connected with the John W. Howard Liquor Company?

A. I have been connected with John W. Howard since I came here, about that length of time.

Q. 8. Are you acquainted with the Old Crow whisky of W. A. Gaines & Company?

A. I know of it, yes, sir.

Q. 9. How long have you known of it?

A. Perhaps 15 years.

Q. 10. During those 15 years whose whisky have the words "Old Crow" indicated to your mind?

A. That of W. A. Gaines & Company.

Cross-examination by Mr. Smith:

X Q. 1. How did you first become acquainted with Old Crow whisky, Mr. Carter?

A. By knowing that it was used on the market.

X Q. 2. How did you first come to associate those words W. A.

Gaines & Company with it?

A. In what way do you mean? W. A. Gaines & Company as distillers of Old Crow? As I say, through knowing that it was on the market and by traveling men, and being talked of at the bar.

X Q. 3. Does your firm deal in Old Crow, W. A. Gaines & Com-

pany?

A. Mr. Howard has for the past five years, I believe.

X Q. 4. Prior to five years ago your firm did not deal in Old Crow or W. A. Gaines?
A. No, sir; not to my knowledge.

X Q. 5. At this time, about 15 years ago, when you first 348 knew of Old Crow, and heard it talked about, did you see any packages marked with it?

A. No, sir; I never had anything to do with that branch of the business. Mr. Howard had charge of that part of it and did all the buying.

X Q. 6. Then your sole knowledge was derived from chance conversations?

A. Yes, sir.

X Q. 7. You have not seen any of the packages?

A. No package, no sir. When I say I haven't seen any, I mean in the last five years.

X Q. 8. You mean prior to that time; not five years ago?

A. Not prior to that time.

X Q. 9. Is your establishment engaged in the wholesale as well as retail business?

A. Not at the present time. Mr. Howard used to be in the wholesale, but he disposed of that branch of the business three or four months ago.

X Q. 10. How long was he engaged in the wholesale business?

A. To the best of my knowledge I think somewhere about 12 vears.

X Q. 11. During all that time you were connected with Mr. Howard?

A. Only in charge of the bar. Not the liquor department. He had charge of that department himself. I had charge of the bar.

X Q. 12. Did you make any purchases yourself?

A. No, sir; not in the liquor line.

X Q. 13. Have you in the last five years made any purchases in

the liquor line?

A. Well, in the last four months. Prior to four months ago I purchased no liquor at all for either John Howard or the John W. Howard Liquor Company. I bought eigars and small goods, but the liquor department he had entire control of.

X Q. 14. Have you in the last two months purchased any Old Crow W. A. Gaines & Company whisky?

A. Yes, sir; one case of goods.

X Q. 15. From whom?

A. From W. H. Lee and David Nicholson. That is, I bought from Nicholson.

X Q. 16. During this period of time that you have been connected with John W. Howard and John W. Howard Liquor Com-

349 pany, have you carried Old Crow in stock?

A. I say about the last five years we have been doing that X Q. 17. What bottling of Old Crow have you sold over the bar?

A. Lee's Old Crow and Nicholson's.

X Q. 18. Did you ever sell any Steinwender & Sellner Old Crow? A. No, sir.

X Q. 19. Or H. A. Steinwender & Co.?

A. No. sir.

X Q. 20. Or bottled in bond Old Crow?

A. No, sir.

X Q. 21. Is there a distinct demand for those two different bottlings, Nicholson's and Lee's Old Crow?

A. Well, at the present time, Nicholson's Old Crow, there is quite

a demand for it.

X Q. 22. Then you have customers who come in and ask for Nicholson's Old Crow and are not satisfied with anything else?

A. Well, I couldn't say that. They ask the question, and I give it

to them.

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X Q. 23. You keep Nicholson's Old Crow in stock because your customers ask for it?

A. Yes, sir.

X Q. 24. And you keep Lee's Old Crow in stock because the customers ask for that by name?

A. Yes, sir.

X Q. 25. Do you know what difference, if any, there is between these two bottlings of Old Crow?

A. I do not.

X Q. 26. Do you know whether they are straight goods or blend?

A. That I am not able to say.

X Q. 27. Have you ever tested them to see for yourself? A. No, sir; as long as the trade is satisfied with it I am.

X Q. 28. During the time that you have been connected with Mr. Howard or his successor, the John W. Howard Liquor Company, has any one connected with that establishment carried a rectifier's license?

A. Mr. Howard had, but how many years I don't know. I know

he had a rectifier's license.

X Q. 29. During the time that Mr. Howard carried a rectifier's license did he put up and sell in packages any Old Crow whisky?

A. He did. X Q. 30. In what packages did he sell it?

A. Quarts and pints, I think.

X Q. 31. From whom did he buy the goods in bulk?

A. I think he obtained it direct, but of my own knowledge I

couldn't say, as he did that part of it himself. I think he bought all his liquors direct from the distillery.

X Q. 32. And in bottling it did he reduce the proof?

A. I think so. That I couldn't swear to, but I think he did that. I know the government officials were there and he had a rectifier's

X Q. 33. Was the color restored by caramel?

A. Well, I think that was done, too. I am not sure. That I wouldn't swear to, because I never did any of it.

X Q. 34. Who had direct supervision of that branch of the bus-

iness?

A. Mr. Howard, himself.

X Q. 35. Did he have any assistance?

A. He had a colored man that used to be his assistant.

X Q. 36. What is his name?

A. Foster.

X Q. 37. What is his first name?

A. Grif. I think that is the name, but I am not sure.

X Q. 38. Do you know where he is now?

A. I think he is employed up there at the old place, yet.

X Q. 39. What is the number of the old place?

A. No. 307 North Garrison. He was there when I went there, and I think the same people retained him since Howard sold out.

X Q. 40. Do you know whether or not this reduction in proof and addition of the coloring matter was done with the knowledge of W. A. Gaines & Company or his agents?

A. That I couldn't say.

X Q. 41. Do you know the firm of A. M. Hellman & Company?

A. I know of them. I wouldn't be positive about that initial either. I know there is a Hellman in the liquor business, but the style of the firm I don't know.

X Q. 42. Did you ever do any business with them?

A. No, sir; Mr. Howard might, but if he did I never knew of it.

351 X Q. 43. So far as you know there was no business dealings?

A. I have no knowledge of the fact, no, sir.

X Q. 44. Do you know anything about the character of their business?

A. I do not.

X Q. 45. Do you know in what territory they sell their goods?

X Q. 46. Have you any knowledge as to what brands they carry in stock and have sold during the past 30 years?

A. No, sir; I have not.

X Q. 47. You say that the words Old Crow as far as your knowledge goes have indicated goods distilled by W. A. Gaines & Company?

A. Yes, sir.

X Q. 48. You first derived that information from general con-

versation, and afterwards your house bought goods which were marked Old Crow?

A. Yes, sir.

X Q. 49. Did you see any of these packages or barrels which Mr. Howard bought that were supposed to contain Old Crow whisky?

A. I never inspected it. They were ordered by John W. Howard Liquor Company, and they took stock and I think one of Steinwender's gaugers came up there and gauged all the goods and took stock, and I didn't inspect the barrels at all, but it was called Old Crow whisky.

X Q. 50. Could you state from your own knowledge what marks

or brands there were on the barrels?

A. No, sir; I never investigated that.

X Q. 51. In the bottling of Old Crow which Mr. Howard formerly carried on did you put any labels on the bottles?

A. I did not. I had nothing to do with that at all.

X Q. 52. Do you know whether any label was put on the bottles? A. Oh, yes, the bottles contained a label and cap, the same as other packages.

X Q. 53. What was on the label?

A. I am not positive now, but I think it was Old Crow, distilled by W. A. Gaines & Company, bottled by the John W. Howard Liquor Company. That was on them to the best of my

knowledge. That may not be the exact wording, but some-352 thing on that order.

X Q. 54. Did you say how long this bottling was carried on by Howard?

A. Of that Old Crow whisky?

X Q. 55. Yes, sir?

A. I think about five years, something like that; I am not sure, but he had been in the bottling business, I think, about 12 years. X Q. 56. Is he still bottling Old Crow?

A. No, sir; he has disposed of that branch of the business, and

is out of it entirely.

X Q. 57. Do you know Harry E. Blood?

A. I do not. X Q. 58. You don't know that he is salesman for Paris, Allen & Company, distributing agents of Old Crow?

A. No, sir; I don't know him at all.

X Q. 59. Do you know the firm of Paris, Allen & Company?

A. No, sir; I do not.

By Mr. Hopkins:

Q. Your place of business is in the Lincoln Trust Company building?

A. Yes, sir.

AUSTIN CARTER.

Subscribed and sworn to before me this 28th day of December, A. D., 1905.

CHARLES E. WELLER, Notary Public and Special Examiner. Certificate.

No. 5096. In Equity.

W. A. GAINES & Co., Complainant,

VS.

MAX KAHN, Administrator with the Will Annexed of Abraham M. Hellman, Deceased, and Moritz Hellman, Defendants.

I. Charles E. Weller, a Notary Public in and for the City of St. Louis, State of Missouri, and acting as Special Examiner herein by consent of the parties, do hereby certify that on the day indicated in the foregoing depositions at Rooms 400-404 Tobin Building, southeast corner Eighth and Locust Streets in the City of St. Louis, State of Missouri, I was attended by James L. Hopkins, Esq., and Alfred A. Eicks, Esq., of Counsel for Complainant and Luther Ely Smith, Esq., of the law firm of Messrs. Klein & Hough of Counsel for Defendants, and by the witnesses who were of sound mind and lawful age, who having been by me theretofore first carefully examined and cautioned to testify the truth, the whole truth, and nothing but the truth in the above entitled cause, gave their testimony, which was taken down in the presence of the respective witnesses and from their statements by me in shorthand, and afterwards transcribed upon the typewriter, and the said witnesses having read over said transcript of the shorthand notes of their respective depositions subscribed the same and swore to the same in my presence on the dates hereinabove stated.

I further certify that the said depositions were taken under and

pursuant to the sixty seventh rule in Equity as amended.

I further certify that said depositions were taken under the provisions of the stipulation as to taking testimony herein before entered into between the parties now on file in this case.

I do further certify that I am not of Counsel nor Attorney for either party in said depositions and caption named, nor in any 354 way interested in the event of the cause named in said

caption.

In testimony whereof I have hereunto set my hand and seal this sixth day of December, in the year of our Lord, One Thousand and nine hundred and five, and of the independence of the United States the one hundred and twenty ninth. My Commission as Notary Public Expires May 9th, 1908.

[SEAL.] CHAS. E. WELLER,
Notary Public, City of St. Louis, Missouri.

And afterwards, to-wit: on the 4th of January, A. D. 1905, the following depositions on behalf of defendant, were filed in said cause, which said depositions are in words and figures as follows, to-wit:

No. 5096.

W. A. Gaines & Co., Complainant,

A. M. HELLMAN and MORITZ HELLMAN, Defendants.

It is hereby stipulated between counsel for complainant and defendants in the above entitled cause that testimony de bene esse may be taken of the following witnesses on the part of the defendant: John O. Urner, Herman Liemke and Martin W. Heron, and such others as may be produced by defendant: that said depositions shall be taken before James R. Gray as Examiner, in the City of St. Louis, at Room 342 Custom House, on the 12th day of December,

355 sitions is not completed on said day, the taking thereof shall be continued from time to time until the same are com-

pleted.

KLEIN & HOUGH.

Solicitors and Counsel for Defendants. HIGDON & LANGAN & HOPKINS, Solicitors and Counsel for Complainant.

No. 5096.

W. A. Gaines & Co., Complainant,

VS.

A. M. HELLMAN and MORITZ HELLMAN, Defendants.

By consent of parties pursuant to stipulation hereto attached, testimony de bene esse on behalf of the defendants in the above entitled cause was commenced before James R. Gray, as Examiner, at his office, Room 342 Custom House Building, St. Louis, Missouri, on this 12th day of December, 1904, at the hour of 2 o'clock P. M.

It was agreed by the parties that all the testimony given under said stipulation should be taken in shorthand and afterwards transcribed on the typewriter, by M. I. Clute, as stenographer.

Present: James L. Hopkins of Counsel for complainant, and

Jacob Klein, of Counsel for Defendants.

John Osborne Urner, a witness of lawful age, being duly produced, sworn and examined, in behalf of the defendants, testified as follows:

Direct examination by Mr. Klein:

Q. What is your full name?

A. John Osborne Urner. Q. What is your age?

A. Nearly sixty-five, will be sixty-five next birthday.

Q. What is your residence?

A. St. Louis.

Q. The number of your house?

A. 3004 Pine Street. 356

Q. What is your present occupation?

A. Bookkeeper for the Gregg Varnish Company.

Q. How long have you been a bookkeeper?

A. There was a while when I didn't keep books, five or six years, but I have been keeping books for forty years.

Q. Did you know the firm of I. & L. M. Hellman?

A. I knew them very well.

Q. Were you ever in the employ of this firm? A. I was.

Q. When did you enter the employ of the firm?

A. January 3rd, 1865. Q. In what capacity?

A. In the capacity of bookkeeper.

Q. Of whom was the firm composed when you entered the employ of the firm?

A. Isaac and L. M. Hellman.

Q. When was the firm dissolved?

A. The firm of I. and L. M. Hellman?

Q. Yes, I presume it was changed——
A. It was changed in 1867. Isaac Hellman died in Aug., 1867. Q. How long did your employment continue with the firm?

A. Twenty-two years.
Q. Then you did not leave the employ of the firm until some time in 1887?

A. Yes, in 1887.

Q. In what capacity were you employed in the beginning?

A. Well, I took the place of bookkeeper, cashier, general office man, shipping clerk, everything connected with the business. wasn't very large when I first went there.

Q. On the death of Isaac Hellman was the business of the firm

continued by any one?

A. Yes, by Lewis M. Hellman under the name of I. & L. M. Hellman.

Q. Was there any party connected with Lewis M. Hellman in the business afterwards?

A. I don't understand.

Q. When, if ever, did Mr. Lewis M. Hellman take any one 357 into partnership with him?

A. He took his brother A. M. Hellman, I don't remember the exact year, some few years after, four, five or six years, I don't remember.

Mr. Hopkins: After what, Mr. Urner? A. After the death of Isaac Hellman.

Q. Will the books here disclose the exact time?

A. Oh, yes.

Q. Mr. Urner, will you please state what this book is? (Showing witness book.)

A. It is a Ledger A of the firm of I. & L. M. Hellman.

Q. It covers what time?

A. Beginning with January 1st, 1871 and running—

Q. Running to what time?

A. Running to about the time the balance was transferred to Ledger B., Jan. 30, 1875.

Q. Was this book kept by you, Mr. Urner?

A. Yes.

Q. Can you state from the entry on page 3 of this ledger at what time Mr. A. M. Hellman became a member of the firm?

A. He became a member of the firm January 1st, 1871.

Q. Who composed the firm at that time?

A. After, at that time, 1871, January 1st, Mr. A. M. Hellman and Mr. L. M. Hellman.

Q. What was the name of the firm at that time?

- A. The name of the firm was I. & L. M. Hellman, they continued the same name.
  - Q. But the firm was composed of Isaac and L. M. Hellman? A. No. L. M. and A. M. Hellman. Isaac died in 1867.

Q. How does this account in the Ledger, page 3, indicates that

A. M. Hellman became a partner-in the firm?

A. I remember the circumstance, as he had that amount of cash when he entered the firm. There must be an entry in a journal or salesbook or something of that kind showing it.

The answer is objected to by counsel for complainant, and counsel for complainant moves to strike out same on the grounds that the entry in the book of accounts referred to, on page 3, does not show any such fact as that concerning which the witness pretends to testify, and upon the further grounds that the book itself is the best evidence as to its entries.

Q. Mr. Urner, from what other books were entries carried into this Ledger?

A. Well, it ought to be a journal or a day book, or something of that sort, I don't know just what it is, showing that the partnership was formed at that time.

Mr. Hopkins: Counsel for complainant moves to strike out the answer upon the grounds that it is not shown that there was no written contract of co-partnership between A. M. Hellman and L. M. Hellman, and if such contract exists it is the best evidence concerning the fact, and upon the further grounds that page 3 of Ledger A, from which witness pretends to testify, does not indicate therein any partnership between A. M. Hellman and L. M. Hellman.

Q. Will you read the heading of the account on page 3 Mr. Urner?

A. (Reading:) "A. M. Hellman, Stock Acc't."
Q. What is meant by the words "Stock Account?"

A. They mean that he owns stock in the concern.

Q. Do those words have any reference to the investment of cash by A. M. Hellman?

Mr. Hopkins: Objected to on the grounds that the entries speak for themselves, and there is no reason apparent why an interpretation of the intent of said entries should be given by defendant, and upon

the further grounds that the book itself has not been offered in evidence so that its entries may speak for themselves.

Q. Did you keep this book, Ledger A, among the other books of the firm?

A. Well, those entries are made in my hand writing.

Q. Upon reference to the book shown you, I ask you 359 whether you can now state the time when Mr. A. M. Hellman became a partner in the concern?

Mr. Hopkins: Objected to by complainant upon the grounds that the book itself has not been introduced in evidence, and that such examination of the witness is not competent until the book itself has been placed in evidence.

A. From these entries in that personal ledger I know that he became a partner in the concern in 1871.

Mr. Hopkins: Counsel for complainant moves to strike out the answer, together with the entire evidence with reference to page 3, Ledger A, upon the grounds that the witness testifies from his own knowledge aside from any entries made in the books at said pages, and upon the further grounds that the books themselves have not been introduced in evidence.

Q. From January 1st, 1871, forwards, how long did the co-partnership of I. & L. M. Hellman continue under that firm name?

A. It continued under that name until the dissolution of the firm by the withdrawal of L. M. Hellman.

Q. Do you remember the time when L. M. Hellman withdrew from the firm?

A. I don't remember the exact time.

Q. Are there any entries in the books which would show that

A. There are none on the books that you have shown.

Q. I show you another book, and ask you to state, Mr. Urner, what this book is?

A. Day book. I think it was used to keep a full record of all kinds of transactions.

Q. Day book of whom?

A. Day book of I. & L. M. Hellman.

Q. Are the entries contained in that book in your hand.

Q. Will you look on page 212 of that book and note whether the entries there contained are in your handwriting? 360

A. They are all in my handwriting.

Mr. Hopkins: The question is objected to on the grounds that the book has not been introduced in evidence and that such examination of the witness is not competent until the book has been placed in evidence itself.

Mr. Klein: Afterwards it will be competent when the books are marked as Exhibits by the Examiner.

Q. Looking at the entries on page 212, Mr. Urner, does it tend to

refresh your memory as to the time when Mr. L. M. Hellman withdrew from the firm?

Mr. Hopkins: This is objected to upon the grounds of the last objection.

A. Yes.

Q. Can you state when it was Mr. L. M. Hellman withdrew from the firm?

Mr. Hopkins: Objected to by counsel for complainant, for the reasons stated before—the books before the witness having not been introduced in evidence.

A. L. M. Hellman withdrew December 31st, 1881.

Q. Do you remember, as a matter of fact, how he withdrew—I mean, was a sale of his interests made?

A. He sold his interests to A. M. Hellman.

Q. You remember that fact?

A. I remember that, yes.

Q. That entry on page 212 relates to this transaction?

A. Yes.

Q. Will you please read the entry that relates to this transaction on page 212?

A. A. M. Hellman to L. M. Hellman, Dr., \$9,878.98. Bonus for three-eighths share of his good will in business, \$5,000; his prospective profit as per balance sheet Dec. 31, '81, \$4,879.98."

Q. Do all the entries on page 212 relate to the withdrawing from partnership and purchase by A. M. Hellman from L. M. Hellman?

Mr. Hopkins: Objected to on the grounds that there is nothing in the record to show what book this witness refers to on page 112.

361 A. No; there are other entries here treating of other matters.

Q. Beginning at the top, which entries relate to the purchase by A. M. Hellman?

Mr. Hopkins: Same objection.

Q. Which one refers to the closing out of the business?

A. Let me think. Yes, these entries in the books refer to the closing out of the business and the purchase by A. M. Hellman from L. M. Hellman.

Q. Do all the entries relate to this?

A. No, not all, there are other transactions recorded on this page.

Q. How many entries there relate to foreign matters?

Mr. Hopkins: Same objection. The entries speak for themselves.

A. All there relate to the closing out of the concern except the two last entries.

Q. The last two entries on the page?

A. Yes.

Q. Mr. Urner, here is another book that I show. What is this book called?

A. That book was called a day book.

Q. Day book of what concern?

A. Day book of I. & L. A. Hellman.

Q. Kept by whom? A. Kept by me.

Q. From what period of time to what period of time?

A. Jan. 3d, 1881, to Jan. 1, 1887.

Q. These entries, from page 1 down to and including the first two entries on page 296, were made by you?

A. So far as I can tell.

Q. But it was a book of the firm, used by you at that time and during the period mentioned?

A. Yes.

Q. After L. M. Hellman sold his interest to A. M. Hellman and during the time you were there, who besides A. M. Hellman composed the firm?

A. Besides A. M. Hellman?

- Q. Was there any other besides A. M. Hellman that composed the firm of I. & L. M. Hellman?
- A. I believe, I think Meyer Harris was interested in some way. He is the only one I remember.
  - Q. When was Meyer Harris first interested?

A. I can't remember, but it was not long after.

Q. How long was he a partner?

A. I can't remember that. He was a partner when I left the concern, and I don't know how long he remained with it.

Q. What became of his interest in the firm?

A. I don't know.

Q. Do you know whether it was purchased by A. M. Hellman or any other person?

A. No; all I know is that he was a partner when I left the concern. After that I had nothing to do with it.

Mr. Klein: I will now offer in evidence the books we have referred to, and request the Commissioner to mark them, respectively, Ledger A, as Defendants' Exhibit No. 1; the day book covering the period from Jan. 3, 1881, to Jan. 1, 1886, and thereafter, as defendants' Exhibit No. 2 (which is accordingly done), and the book referred to by witness—

Mr. Hopkins: Complainant's counsel objects to the introduction of Exhibit No. 2, except as to so much of said book as has been shown by witness as containing entries made in his handwriting, upon the

grounds that same must be ascertained.

- Q. I show you another book, Mr. Urner, and ask you what this book is?
  - A. That is a ledger.
    Q. Ledger of whom?

A. The firm of I. & L. M. Hellman.

Q. For what period of time?

A. That ledger extends from December 31, 1867, to December 31, 1870.

Q. Are the entries contained in that ledger in your handwriting?

A. Yes; all of them.

Q. Do those entries relate to the regular business of the firm?

A. Yes, sir.

Mr. Klein: I offer this book as Defendants' Exhibit No. 3, and ask that same be marked by the Examiner, which is ac-363 cordingly done.

Q. Now, on page 32 of this Ledger, I find an account in the name

of A. M. Hellman. What is that account, Mr. Urner?

A. This is A. M. Hellman's personal account during the year 1870. Simply shows his credits.

Q. Is there any balance shown to his credit there?

A. A balance of \$1,275.

Q. To his credit?

A. To his credit.

Q. And that balance is carried forward into Ledger marked Exhibit No. 1, account of A. M. Hellman Stock Acc't, and credited to him?

A. Yes, sir. Q. That same amount?

A. Same amount.

Q. And that amount shows the state of his credit balance and was transferred into this ledger (Exhibit No. 1), into his stock account, and credited?

A. Yes, sir.

Q. And now when was that done, what was the occasion of transferring the account in that way?

A. It was the beginning of the partnership between A. M. Hell-

man and L. M. Hellman, January 1, 1871.

Q. Now you have stated, Mr. Urner, that you were bookkeeper there, and also shipping clerk.

A. Yes, I was general clerk, did most anything there was to do. Q. When you first went into the employ of the firm where was their place of business?

A. When I first went into the employ of the firm their place of business was at 112 Pine street.

Q. How long did they reman at that place?

A. They were there as long as I remained with the concern. I don't know when they moved. I was there for twenty-two years, with them.

Q. Do you remember whether in the year 1866 or the year 1867 the firm sold any whisky which was designated Crow whisky?

A. Yes.

Q. Where did they get the whisky which they sold as Crow whisky?

A. It was blended in the store and was not bought from 364 any one under the name of Crow. It was blended in the store. Q. Did you have a brand indicating this name of Crow

whisky? A. Yes, they had a brand, J. W. Crow bourbon.

O. How was that brand attached to the package of whisky sold under the name of Crow?

A. It was a fire brand, burned on. It was heated by the rectifier and the brand burned on the head of the barrel.

Q. Of what was the whisky so branded made?

A. Well, I was not the rectifier, I don't know exactly.

Q. Who was it made by?

A. It was made principally by a rectifier named Edward Brennan.

Q. Where is Edward Brennan? A. He is dead.

Q. How long has he been dead?

A. He has been dead for a period of ten years. Q. Was there any one employed as his assistant? A. Yes, he had several assistants at different times.

Q. Do you remember their names?

A. One, that was with us a long time, was named Martin Heron.

Q. He was one of Brennan's assistants?

Å. Yes.
Q. Was he with the firm when you went there?

A. I don't remember whether he was with them when I first went there, at the time I went there, or not.

Q. Do you remember knowing about him soon after?

A. Very soon after I went into the employ of the concern I remember knowing about him.

Q. When orders came for Crow whisky, what was done?

A. When an order came for Crow whisky the rectifier was requested to bring a barrel forward and brand it, and it was shipped to the party for whom it was intended.

Q. What did the rectifier do for the purpose of making Crow

whisky? Can you say?

A. That I could not state, it was what is called a blended bourbon.

Q. What do you mean by that?

365 A. I mean by blended bourbon that neutral spirits was mixed with good whisky to make a compound.

Q. In what proportion?

A. What we called a government compound? Compound whisky, I think we used to call it that.

Q. Do you remember whether the firm, during all the period that you were with them, purchased any whisky as Crow whisky?

A. No.

Q. Well, now, do you mean you don't remember, or that they did not purchase any?

A. No, they didn't purchase any that I can remember. I don't

remember the purchase of any.

Q. Would you remember the brand J. W. Crow, which was used at the time, if you were to see it?

A. I would.

Q. Would you call it this cast brand which I show you? What do you say with regard to that?

A. That is the exact brand that we used.

Q. This is a cast of the brand that was used?

A. Yes. Those same letters in that same style and that same size

Q. And you say the rectifier would heat the iron and burn that brand on the head of the barrel?

A. Yes. I have seen him do that frequently.

Mr. Klein: The cast of the brand is offered in evidence, and the examiner is requested to mark same Defendants' Exhibit No. 4. which is accordingly done.

Q. Do you remember Mr. Urner, whether, during the time that you were there and beginning with that time, there were signs displayed in the office or salesroom of the firm, designating Crow whisky?

A. I do remember, yes, there were such signs.

Q. I show you a sign, Mr. Urner, and ask you if you remember that sign?

A. I remember it.

Q. How far back do you remember this sign, or a sign like it, or a similar one, as being displayed in the office or salesroom of the firm.

A. I can't remember exactly when I first saw one, but it 366 was back in the '60's, sometime in the latter '60's.

Q. Do you know who painted the glass signs that were used by the firm? In the year 1866 or 1867? A. No, I do not.

Q. Do you remember a man by the name of Liemke, a sign painter?

A. I can't call him to mind.

Q. Do you remember a sign painter by the name of Bugel? Do you or do you not remember him by name?

A. I do not remember him.

Q. Will you state what use was made by the firm of signs like this one which I show you here?

A. I can't call to mind anything different than seeing them hang-

ing up in the office.

Q. Do you remember whether they were ever sent out to purchasers of Crow whisky?

A. I can't remember any parties to whom they were ever sent. I

don't remember them.

Q. You have a distinct recollection of seeing this sign, or a sign like it, in the office of the firm?

A. Yes.

Q. Where was the office?

A. 112 Pine street.

Q. Was the sign that you remember seeing the same as this, or was it this sign?

A. Of course, I can remember, the sign I remember seeing was made like that, I can't say whether that is the exact sign.

Q. Had the same words?

A. Had the same words, same general appearance in every respect, same style of characters, same bird on top.

Q. And with the words "Celebrated Crow Bourbon, I. & L. M. Hellman, St. Louis," on it?

A. Yes.
A. This sign, Mr. Urner, has below the line a name—

Q. Does that refresh your memory as to who painted this sign?

A. No, I can't remember. That was something that I didn't have much to do with.

Mr. Klein: I offer this sign in evidence, and ask the Examiner to mark it Defendants' Exhibit No. 5, which is accordingly done.

Q. We have had a photograph made of that sign, which I 367 will show you. Is that a correct photograph of the original sign which I showed you?

A. Yes.

Mr. Klein: I offer this photograph in evidence as Defendants' Exhibit No. 6, and ask the Examiner to so mark it, which is accordingly done.

## Mr. Urner:

Q. I show you a book marked on the outside, Sales Book, with a label with two capitals B's, and will ask you whether you know the hand-writing of L. M. Hellman?

A. Yes, I have seen it frequently in those twenty years.

Q. Are you able to say whether the entries I am now pointing out to you, under date of March 8, 1863, whether they are in the handwriting of L. M. Hellman or not?

A. Yes, they are in his writing.

Q. Do you remember whether this book which I now show you was in the office and among the books of the firm of I. & L. M. Hellman when you came into the employ of the firm?

A. No, I don't remember that book.

Q. But you do know the hand-writing of those entries?

A. Yes.

Mr. Klein: I will offer in evidence this book, and particularly the entries on page 48, with the statement that I will subsequently prove that it is one of the regular books of the firm of I. & L. M. Hellman, and will ask the Examiner to mark same Defendants' Exhibit No. 7, which is accordingly done.

Q. You have no personal knowledge of the transaction referred to in the entry of March 18, 1863?

A. None whatever.

Q. I show you another book, Mr. Urner, marked Day Book, and ask you to examine the same and state whether you recognize the book or not?

A. I recognize the book. Q. What book is it?

A. A book in which we made entries for goods sold and to be sent to the country, or in the city, or anywhere.

368 Q. A book of the firm of I. & L. M. Hellman? A. Yes.

Q. Covering what period of time, Mr. Urner?

A. This book seems to have extended, to have begun on July 19, 1866, and to have extended down to April 26, 1869.

Q. And the book contains entries in your handwriting?
A. There are a number of entries in my handwriting, and a number of entries in other hand-writing.

Q. Do you recognize the entry on page 143 of the Day Book, which has marked on the margin Ent.? Is this Ent. in your handwriting?

A. Yes.

Q. What does this Ent. stand for?

A. It stands for Entered.

Q. Entered where?

A. Entered in some other book. I can't call to mind just what book. It should be either a Ledger or a Journal. Entered in some other book that has that page.

Q. Journal or Day Book?

A. Yes, something of that kind.

Q. Now, do you see this entry to which I have referred? Is any

part of that entry in your hand-writing?

A. Yes, the words, "O. Waldkirch, Baton Rouge, one barrel of Bourbon, \$3.00, one barrel do., \$3.00, and an extension of \$275.00, is in my hand-writing.

Q. Do you recognize the other words, the writing in the balance of the entry, the words "Crow," was it written by you? Who was it

written by?

A. Meyer Harris, in lead pencil.

You recognize that as his hand-writing? Was he connected with the firm at that time in any way?

A. I think that at that time he was a salesman or a clerk in the

store.

Q. What else do you see?

A. One barrel of Bowen, the word Bowen written in pencil.

Q. Whose writing?

A. The same writing, Mr. Harris.

Q. Anything more?

A. Nothing more that I can identify.

369 Q. Will you look at the entry again and see whether it is Bowen or Arnold's, written in in pencil?

A. Yes, it is Arnold's.

Q. The words are written in pencil?

Q. The words Ent. are in lead pencil? "Ent. 275," is written in lead pencil?

A. Yes.

Q. Words "Ent. 275" are in your hand-writing?

Mr. Klein: I now offer in evidence the book last referred to by

witness and ask the Examiner to mark it Defendants' Exhibit No. 8, which is accordingly done.

Q. Mr. Urner, have you any recollection of that transaction?

A. Not of that particular transaction, no.

Q. I now show you another book, and ask you whether you recognize this book?

A. Yes, I do.

Q. Can you designate the book in any way? What is it?

A. It is a Day Book of I. & L. M. Hellman, and contained original entries posted direct to the ledger.

Q. From what period of time to what period of time?

A. From January 12, 1866, to August 18, 1868.

Q. On page 299 of this book, I find the first entry on that page, will you state what it is?

A. It relates to whisky sold to O. Waldkirch, Baton Rouge.

Q. Would you know whether it is the same transaction referred to in the blotter last produced?

A. It is the same.

- Q. Refers to the same transaction?
  A. Refers to the same transaction.
- Q. Refers to the same transaction which is referred to in the blotter on page 143?

A. Yes.

Q. Who made that entry?

A. I made it.

Q. Now, when you wrote the word "Ent." in the blotter on the margin you meant to indicate that the entry had been transferred from the blotter into this Day Book?

A. Yes, that is correct.

Q. Does the entry in the Day Book show what kind of goods went to Mr. Waldirch at that time?

A. They refer to the time the goods went to him.

Q. What time were the goods sent to him?

A. December 28, 1866.

Q. Does it show what kind of goods went to him?

A. Yes, a barrel of Crow Bourbon and a barrel of Arnold. Q. Does it show at what price the Crow Bourbon was sold?

A. Yes, it was sold at \$3,00.

Q. Does it show the price at which the Arnold was sold?

A. Yes, at \$3.00.Q. A gallon?

A. Yes, \$3.00 per gallon, each one.

Q. Do you know, Mr. Urner, what becomes of that account?

A. No, I do not know, I do not remember.

Q. You can not state?

A No. It was charged to him, that is all I remember.

Mr. Klein: I want to offer in evidence this Day Book last referred to by the witness, containing the entry on page 299, as Defendants' Exhibit No. 9, and will ask the Examiner to so mark it, which is accordingly done.

Q. O. Waldkirch, according to your entry, was a merchant at Baton Rouge, La., at that time?

A. Yes.

Q. Now, Mr. Urner, looking at the entry on page 299 of Exhibit 9, you say that it shows one barrel of Crow?

A. Yes.

Q. Can you say, looking at that entry, whether the pencil margin on that entry in Exhibit 8, page 143, was or was not there at the

time when you transferred it to page 299?

- A. It must have been there, because I couldn't have known the amount of the charge unless there had been some name filled in as to what kind of whisky was to be sent, whether it was Crow whisky or some other.
  - Q. It was there in 1866?

A. Yes.

Q. And the fact that the letters Ent. are there in your handwriting, satisfies you, does it not, that you transferred the entry from this book into Exhibit No. 9?

A. Yes, sir.

Q. Will you look on page 373 of the book marked Exhibit 371 No. 9, the third entry on that page, and state whether that is your hand-writing?

A. That is my hand-writing.

Q. To what does that entry relate?

A. It relates to goods sent to W. G. Wear & Co., Memphis, Tenn.

Q. What kind of goods?

A. Five barrels of Magnolia whisky, two barrels of Crow whisky. five cases of another brand.

Q. What is the date of the entry, Mr. Urner?

A. April 20, 1867.

Q. This entry relates to a transaction that occurred at that time?

A. Yes, about that time, I don't know within a day or so. Q. But every case was a business transaction, which you entered

in this book? A. Every entry in this book was a business transaction. All

regular business of the firm. Q. What is the date of the entry immediately before this?

A. That is April 19, 1867.

Q. Are there other entries appearing after that date?

A. Yes, the next date is the 22nd. There are several entries on the 20th, and the next date is the 22nd.

Q. On the same page?

A. On that same page. Yes.

Q. And this entry about Wear & Co., what is the date of it?

 A. The 20th day of April, 1867.
 Q. Now, will you look at page 378 of the same book, Exhibit No. There is an entry against Mendlessohn, S. What is the date

A. The date of this entry is April 25th, 1867. Q. What does this entry relate to, Mr. Urner? A. It relates to the return of a barrel of whisky by O. Waldkirch and the sale of the same barrel of whisky to S. Mendiessohn.

Q. What kind of whisky is designated there?

A. A barrel of Crow bourbon. Q. A barrel of Crow brand?

A Yes

Q. Does that entry now before you relate to the same barrel of Crow whisky sent to O. Waldkirch at Baton Rouge, in December, 1866?

A. I can't say it refers to the same barrel. It refers to a barrel of whisky bought by Mr. Waldkirch from I. & L. M. Hellman.

Q. What do you find to the credit of Q. Waldkirch?

A. I find he is credited with one barrel of Crow brand returned.

Q. Was there a ledger account of the sale to Waldkirch?

A. Yes.

Q. Can you find the page of that ledger account?

A. Page 371 in the ledger. Ledger of 1867.

Q. And the entry there is to the effect that O. Waldkirch is credited with the return of one barrel of Crow bourbon?

A. Yes, sir; with one barrel of Crow bourbon.

Q. At what price?

A. \$3.00.

Q. Same price at which it was sold to him?

Yes.

Q. Do you remember a man by the name of E. L. Charriapin, who had any connection with the firm of I. & L. M. Hellman?

A. He was a salesman for the firm of I. & L. M. Hellman. I knew him personally a little.

Q. Do you remember whether he made sales in Baton Rouge?

A. He did, yes. Quite a number.

Q. Does the mention of his name refresh your memory about

that particular transaction?

A. No, I can't remember that. I don't remember any further than what I see on the record. But the record was correctly kept, I am sure of that.

Q. Will you look on page 429 of Exhibit No. 9, at the second entry on that page, Mr. Urner. What does that entry relate to, Mr. Urner?

A. It relates to a barrel of Crow bourbon sold to S. Mendlessohn at Baton Rouge.

Q. Whose hand-writing is it?

A. Mine.

Q. When was it made.

A. July 13, 1867.

Q. Can you state whether that entry came from any other book?

A. No. I don't remember where I got it from.

Q. State whether or not the entry represents an accurate transaction which occurred about that time?

A. The entry represents a transaction that occurred, the sale of a barrel of whisky to Mendlessohn.

Q. You mean the sale of a barrel of Crow Whisky?

A. Yes, the sale of a barrel of Crow Whisky.

Q. Was the Crow brand referred to in this last entry the same kind of whisky as was referred to as Crow brand in the previous entry?

A. Yes. Q. Will you look on page 462 of Exhibit No. 9, and say whether you find there an entry against D. Bruner? What is that entry, Mr. Urner?

A. It is one barrel of Crow brand, 43 gallons at \$3.25.

Q. What is the date?A. The date is August 9, 1867.

Q. Are you able to state, Mr. Urner, whether the entry is an original one, or is taken from some other book?

A. No, I am not able to state.

- Q. What was the course of business at that time as regards transactions of this kind?
- A. All the business when orders were received and goods sent the orders were received from the country generally, from the salesmen in the country.

Q. You mean salesmen traveling in the country?A. Yes, men traveling in the country.Q. What was done with the order?

A. When an order came into the house it was inspected by a member of the firm and laid on the table, and the rectifier was ordered to get the goods into shape for shipping, and they were sent out.

Q. How was the order to the rectifier given? Do you know? Was there any memorandum made at the time?

A. I don't think anything was written unless it was a long order. If it was only a barrel or two of whisky it was prob-374 ably called out to him, telling him what kind of whisky

to get.

Q. And then-A. He would bring the barrel to the front part of the store to be shipped, marked, etc.

Q. But before he could bring the barrel did he have to do anything

for the production of Crow whisky?

A. Some times it was all ready for shipment, and at other times he may have had to fill it with whisky.

Q. If the barrel were already filled, who filled it?

A. The rectifier, or his assistant.

Q. And you were not acquainted with the formulas or with the quantities of different kinds of stuff which were put into what was known as Crow whisky?

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A. No.

Q. But you know it was what is known as a blend?

A. Well, it was spoken of around the store and always known among ourselves as a blended whisky.

Q. Did you use neutral spirits in the whisky which was made?

A. Yes.

Q. Will you look on page 485 of this Exhibit No. 9, the entry next to the last on that page, and state against whom that entry is made?

A. Bernard & Albrecht, Ottawa; it does not state the state; I

think it is Illinois.

Q. You think it is Illinois?A. The state must have been Illinois.

Q. What is shown there?

A. One barrel of Crow whisky, 41 gallons at \$3.00.

Q. What is the date of the entry? A. September 18, 1867.

Q. Was there a transaction that occurred at that time of which that is a record?

A. Yes, sir.

Q. Can you state whether the barrel of whisky which was sent out on that order was branded J. W. Crow bourbon?

A. Yes, it must have been branded J. W. Crow bourbon. Q. Because you have entered it as Crow brand?

A. It is entered as Crow whisky, it must have been branded J. W. Crow bourbon.

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Q. That was the brand in use?
A. Yes, that was the brand which was used on whatever went out as Crow whisky at that time.

Q. At that time?

A. At that time. Q. Will you look on page 515, Exhibit No. 9, the first entry on that page, to what does that entry relate?

A. D. Brenner, Montgomery City, Mo. I suppose it means.

Q. Any reference to Crow whisky in that entry?

- A. One barrel of whisky, 41½ gallons at \$3.25, and one barrel of Magnolia.
- Q. You said a barrel of whisky, do you mean a barrel of Crow whisky?

A. One barrel of Crow whisky, 41½ gallons, at \$3.25.

Q. Now, is the word Crow joined with the word whisky there?

A. Yes.
Q. So there was a barrel of Crow whisky sold at that time?

A. Yes.

Q. Is the entry in your hand-writing?

A. No, I don't think that is my hand-writing. Q. Do you recognize whose hand-writing it is?

A. No, I do not. I don't remember whose hand-writing that is. It was some one connected with the concern, well, I can't remember that hand-writing.

Q. Still you were there at that time?

A. I was there.

Q. Are there any entries on that page in your hand-writing? A. None I see.

Q. Look on the next page and see if you find any entries in your hand writing?

A. No, I don't see any in my writing there.

Q. Were you acquainted with the hand-writing of A. M. Hellman at that time?

A. I was not very familiar with it, no.
Q. Did you become acquainted with it?

A. I can't say that I ever have.

Q. Was he connected with the concern at that time?

A. I know he was in there in November, 1867. He was a clerk at that time.

376 Q. A clerk?

A. Yes, a clerk at that time,

Q. And you don't know whether this entry is in his hand-writing or not?

Counsel for complainant objects.

Q. What is the date of the entry on page 515?

A. It is November 9, 1867.

Q. Now, will you look on page 518 of Exhibit 9, the second entry on the page. Whom is that entry against?

A. Lohman & Beckstead, Havana.

Q. What state?

A. The state is not stated.

Q. What is the date of the entry? A. Dated November 15th, 1867.

Q. In whose hand-writing is that entry?

A. That I do not know. It looks something like A. M. Hellman's, though I am not sure.

Q. Not sure of the hand-writing?

A. No.

Q. Does it relate to Crow whisky?

A. There was a barrel of Crow whisky in the entry.

Q. At what price?

A. \$3.00.

Q. Look at the entry on page 523, Exhibit 9, the second entry on the page. In whose hand-writing is that entry?

A. Same hand-writing as the previous entry.

Q. Not yours?

A. No.

Q. But you were in the office of the concern at that time?

A. Yes, and I posted the entry into the ledger, according to the figures on the margin.

Q. You say there are figures on the margin showing it was

posted?

A. Yes.

Q. Now, will you go back to page 518, and will you state whether you find anything there to indicate whether or not you posted that entry?

A. I posted that entry also.

Q. Now, will you look at the previous entry on page 515, is there anything there to indicate whether or not you posted that entry?

A. Most anybody could have made those figures.

Q. You say the figures indicate that you made that entry 377 somewhere else?

A. I transferred the entry to some other book, either a

Journal or a Ledger.

Q. How did you keep your books, Mr. Urner, about that time? I mean how many books did you have, and into what books were the entries made? Is this book Exhibit 9, one?

A. That is one. I can't call to mind just the books that were used.

Q. (Pointing to another book.) What was this book?
A. That is a book in which were recorded the transactions of goods sold to parties, customers of the concern.

Q. From day to day?

A. Yes.
Q. In other words, that is a day book?

A. Yes.

Q. Now into what were the transactions carried?

A. Into some other book, a journal-

Q. Is there any page number given in the entry on page 212? A. Yes, this book may have been used as a blotter and refers to the page of the other day book.

Q. Who had control of the books, of the keeping of the books

at that time? Who was in personal charge?

A. I was.

- Q. And the books were kept according to your ideas, were they
- A. Well, according to my ideas, and the ideas of the partners of the concern, we would agree.

Q. The entry on page 523, do you find anything in the entry relating to Crow whisky?

A. M. D. Thatcher, Pueblo.

Q. What is the entry?

A. Four barrels of Crow bourbon at \$2.85 a gallon.

Q. What is the date? A. November 25, 1867.

Q. Do you know the hand-writing of that entry?

A. No, I can't say that I do. It looks to me something like A. M. Hellman's writing at that time.

Q. Look at the entry in Exhibit 9, on page 551, the fifth entry on that page. Against whom is that entry?

A. Albert Ertel, El Paso. This entry relates to a barrel of Crow whisky, etc.

Q. What is the price of the Crow whisky?

A. \$3.00.

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Q. Whose hand-writing is this entry in?

- A. Same hand-writing as the previous entry, but I do not know
- Q. When you say the price was \$3.00, do you mean for a barrel of whisky?
  - A. \$3.00 per gallon.

Q. Will you look at an entry on page 565 of the same Exhibit 9. The last entry on that page?

A. Paul Planter, Evansville.

Q. What is the entry?

A. One hand barrel of Crow whisky.

Q. At how much?

A. At \$2.75.

Q. In whose hand-writing is that entry?

A. Same hand-writing as the previous entry.

Q. Is there anything on the side to indicate that you saw that entry about that time?

A. There is a check mark there showing that the entry was transferred to some other book.

erred to some other book.

Q. Those figures are in your hand-writing?

A. Yes, my hand-writing.

Q. In the regular course of business at what time would you make those figures, and the corresponding entry?

A. Just whenever I got time. A couple of days after, or sometimes it may have been a week.

Q. At any rate, within a short time?

A. Within a short time after the entry was made.

Q. Will you look on page 571 of the same Exhibit No. 9. The last entry but one on this page, does that relate to Crow whisky?

A. Yes, a barrel of Crow brand.

Q. Whose hand-writing is that entry in?

A. I don't know. In the same hand-writing as the previous entry.

Q. Is there anything to indicate, Mr. Urner, that you saw that entry about the time it was made?

A. Yes.

Q. What is there?

Some figures on the margin showing it was transferred to another book.

Q. Made in the same way as referred to in the last answer? A. Yes.

Q. Mr. Urner, do you recognize this gentleman standing before you?

A. I have seen him before.

Q. Do you know him?

A. I know him by sight, yes.

Q. Can you state whether he had any business transactions with the firm at the time you were there?

A. He had business transactions and was there several times, I don't remember—something about signs.

Q. Do you remember whether he was a sign painter who painted those signs?

A. I can't remember if he painted any particular sign, I know he was a sign painter.

Q. Do you know his name?

A. No, I do not.

Q. Would you recognize it if I spoke it?

' A. I could guess his name.

Q. You think it is Liemke?

A. Yes, I saw him in the office frequently.

Q. Is this the same man whom you saw there?

A. Yes.

Q. Look at the entry on page 575 of Exhibit No. 9, last entry but one on the page. Does that relate to Crow whisky, or not?

A. There is an entry here for a half barrel of Crow whisky.

Q. Again- whom?

A. Against A. Heffly, Nebraska City.

Q. In whose hand-writing is that entry?

A. This is the same hand-writing that is in the book previously.

Q. Is there any mark near that entry which indicates that you have seen it before?

A. Yes, the figures on the margin, showing that it was transferred

to another book.

Q. And did you so transfer those figures?

A. I did, yes.

Q. About the time the entry was originally made?

A. About that time, yes.

Q. What is the date of the last entry that you have before you?

A. March 31, 1868.

380 Q. Will you look on page 580 of Exhibit No. 9, the last entry on the page. Does that entry relate to Crow whisky?

A. Three barrels of Crow whisky, yes.

Q. Against whom is that entry?

A. Same name as the previous entry. Q. What is the date of the entry?

A. April 13, 1868.

Q. Is there anything there to indicate that you have seen that entry before?

A. Yes, the figures in the margin, showing that it was transferred

to some other book.

Q. And from that you are satisfied that you did see that entry at about that time?

A. Yes.

Q. Will you look at Exhibit No. 9, page 586, last entry on the page.

A. P. C. Peterson, Lexington, one barrel of Crow whisky.

Q. Aat what price?

A. \$3.00 a gallon.Q. In whose writing?

A. Same writing as the previous entries.

Q. Is there anything outside to indicate that you have seen it before?

A. Yes, the figures on the margin showing that it has been transferred to some other book.

Q. And when were those figures placed there?

A. Shortly after the entry was made.

Q. At the time when you made the transfer?

A. At the time the transfer was made. Shortly after the original entry was made.

Q. What was the date of this entry?

A. April 23, 1868.

Q. Will you look on page 593, Exhibit No. 9, the third item on the page. What is that?

A. Joseph Albrecht, Ottawa.

- Q. Is there any Crow whisky in that?
- A. A barrel of Crow whisky charged at \$3.00.

Q. What is the date?

A. The date is May 5, 1868.

Q. In whose hand-writing is that entry?

A. Same hand-writing as the previous entry.

Q. Is there anything there to indicate that you saw the entry at that time?

A. Nothing except the figures on the margin, showing its transfer to some other book.

Q. Those figures are in your hand-writing?

A. In mine.

Q. Made when?

A. About the time the entry was made, May 6, 1868.

Q. Will you look at the entry in the same Exhibit No. 9, on page 599, last item on the page. Does that entry relate to Crow whisky?

A. Yes, it relates to Crow whisky sent to F. Keller, Independence, Mo. It must be Missouri, but the state is not given, Independence.

Q. What is the price?A. \$3.00 a gallon.

Q. In whose hand-writing is that entry?

A. Same hand-writing as the previous entry.

Q. Is there anything there to indicate your connection with the entry?

A. The figures on the margin showing that the transfer was made to another book.

Q. When did you put those figures there?

A. Shortly after the original entry was made.

Q. What is the date of the entry?

A. 20th, May, 1868.

Q. Will you look at the entry on page 605 of Exhibit No. 9, fifth entry on the page. What does that entry relate to?

A. It relates to a shipment made to A. Heffler, Nebraska City. There are a number of items in the entry.

Q. Is there any Crow whisky?

A. Yes, one barrel of Crow whisky.

Q. At what price?

A. At \$3.00 per gallon.

Q. In whose hand-writing is this entry?

A. Same hand-writing as the previous entries.

Q. Anything connected with the entry to indicate that you have seen it before?

A. Yes, I have written the word "Paid" there.

Q. You wrote that word?

382 A. Yes, I wrote the word Paid, and on the margin showing its transfer to some other book.

Q. When were these figures put there? A. Shortly after the entry was made.

Q. Mr. Urner, with regard to all of these transactions, what can you say was the course of business of the firm as to the designation of the kind of whisky which was to be sent on the orders. How was it designated?

A. Well, generally it was entered on the blotter, whoever entered

it on the blotter-

Q. Was there anything put on the blotter to indicate the kind of whiskey?

A. Yes, the brand was generally put on the blotter, which kind to

send.

Q. Well, about Crow, was the brand put on?

A. The brand of Crow was always put on, so far as I can remember.

Q. What brand was it?

A. J. W. Crow bourbon, Old Bourbon.

Q. Can you state, Mr. Urner, whether during the entire period of time that you were with the firm, what was the course of business of

the firm with regard to the sale of whiskey, of Crow whisky?

A. It was generally sold by salesmen traveling in the country as Crow brand, but in some instances it must have been left to the discretion of the firm as to what brand they would put on the barrel, but in most instances it was explained by the salesman that sent in the order what brand was wanted on the barrel.

Q. And you said the brand put on the barrel was J. W. Crow Bourbon, Old Bourbon? Was the word Old put on in connection

with the word Crow?

A. Well, I can't say exactly. There were not two brands. There was only one brand whatever that may read. I think it is J. W. Crow Old Bourbon. J. W. Crow, Bourbon, surrounding the word Old in the middle.

Q. You don't mean to be understood as saying that the whisky

was largely sold as Old Bourbon?

A. Not this whisky; we did sell Old Bourbon under a regular brand. That was another grade.

Q. But when you spoke of Crow brand, you meant a brand like this one before you?

A. Yes, always.

Q. And that brand was put on the barrel head?

A. Yes, by burning it with an iron brand, that was heated and applied to the head of the barrel.

Q. During what period of time was that the course of business of

the firm?

A. Well, pretty much all the time I was there. I did not see any difference.

Q. Now, Mr. Urner, will you kindly state whether the sales of Crow whisky were frequent or infrequent during the period of time that you were there, during and after the entries that you have spoken of in all of your testimony.

Counsel for complainant objects to the question upon the grounds that the entries in the books speak for themselves, and that it is not for the witness to determine whether or not the sales were frequent.

A. Well, I am hardly able to say what might be called frequent or infrequent. It was one brand of the concern, like many other brands they had. It was sent out whenever they had orders for it. But it am not able to say, it is a question of judgment, whether they were frequent or infrequent.

Q. But it was one of the regular brands of the concern?

A. Yes. sir.

By consent of the parties the further taking of testimony is postponed until tomorrow morning, December 13, at 11 o'clock A. M., at the same place.

Tuesday, Dec. 13, 1904.

Parties present as on vesterday and the further taking of testimony on behalf of defendants was proceeded with as follows:

384 MARTIN W. HERON, a witness of lawful age, being duly produced and sworn, on behalf of said defendants, testified as follows:

Direct examination by Mr. Klein:

- Q. State your full name, your age, residence and occupation?
- A. Martin W. Heron, born July 4, 1850, Memphis, Tenn.

Q. Occupation?

- A. Liquor business.
- Q. How long have you resided in Memphis?

A. About ten or twelve years.

Q. Did you know the firm of I. & L. M. Hellman, in St. Louis?

A. Yes, sir.

Q. Were you ever in their employ?

A. Yes, sir.

Q. State as nearly as you can from what time to what time you were in their employ?

A. I started in the fall of 1865.

Q. And remained with them how long?

A. 1882, I think, or 1883.

Q. When you left their employ where did you go?

A. I went to Newport, Ark.

Q. Did you then go into business at Newport?

A. Yes, sir.

Q. With whom? A. Firm — L. G. McCauley & Co.

Q. Did you purchase an interest in that firm?

A. Yes, sir. Q. Who was your partner in that firm?

A. Gentleman by the name of John Alexander McCauley.

Q. Did you remain in the employ of Hellman? Until about the time you went into partnership with Mr. McCauley?

A. Yes, sir.

Q. What were your duties and in what capacity were you engaged by the firm of I. & L. M. Hellman? The old firm?

A. General useful and assisting the rectifier.

Q. Who was the rectifier when you went into the employ of the firm?

A. A man by the name of Edward Brennan.

Q. Did you become familiar with the brands and marks of the firm under which different kinds of whiskies were sold by them from the time you first went into their employ?

A. Yes, sir.

Q. Will you please state what brands of whiskies were sold by them at that time?

A. There was a brand Morning Dew, Orange Tree, Arnold, and Fuller's Shawnee, Old Crow and Walnut Grove. I think we had a brand by that name.

Q. These brands which you have mentioned, how were the

whiskies so designated made or produced?

A. Those brands were all what you call a blend.

Q. Just state how they were made.

A. I couldn't say exactly how they were made, I say they were a blend.

Q. What do you mean by saying they were blends?

A. Well, sometimes take different grades of whiskey and blend them, mix them together. That is the meaning, I suppose, of blend. All one stamp goods.

Q. If an order was received for Crow or Old Crow whiskey, how

was the order filled?

A. Well, we would take different whiskies and blend them. Q. Did you use neutral spirits as part of the compound?

A. Yes, neutral spirits.

Q. Besides neutral spirits, what else would you put in to make Old Crow whiskey?

A. Some kind of bourbon whiskey.

Q. Do you remember a brand known as the Bowen brand?

A. No, I don't believe I remember that.

- Q. Do you remember in what proportion neutral spirits and bourbon whiskey was used in making Old Crow?
- A. No, I don't remember the quantity. It's been a long time ago.
  Q. Were the barrels or packages in which the Old Crow or
  Crow whiskey were shipped to customers branded in any way
  and if so, how?

A. Yes, sir. It was branded J. W. Old Crow Bourbon.

Q. How was the brand applied?

A. It was heated and burned in on the head of the barrel.

Q. Then the brand itself consisted of an iron lettered?

A. Yes, sir.

Q. Lettered iron which was heated and burned in?

A. Yes ,sir, heated and burnt in on the head of the barrel.

Q. Now was the brand of J. W. Crow Old Bourbon one which was in use by the firm at the time you went into their employ?

A. Yes, sir, it was.

Q. Will you look at this cast which is marked Defendants' Exhibit No. 4, and state whether you recognize this cast in connection with the brand of which you have spoken?

A. I don't know whether I have ever seen this before or not, this

cast, but the brand we used was exactly the same.

Q. The brand you used was exactly the same?

A. Just exactly the same, just that size and same letters.

Q. Was the brand used, and the name Old Crow used in connection with whiskey during all the time you were in their employ?

A. Yes, sir. Q. How long was Edward Brennan the rectifier there? A. I don't know; he was there before I went there.

Q. And was he there when you left? A. He was there when I left, yes, sir.

Q. How much and in what way did you assist him?

A. Different ways. I had often put the brand on the head of the barrel myself, heated it and put it on.

Q. Well, any other way?

A. I would close up the package and get it in shipping order. Very often helped him in drawing the neutral spirits and whiskey from one package to the other.

Q. Did you learn the business of a rectifier? A. Yes, I learned a great deal about it.

387 Q. Who would give the order as to the relative quantity of neutral spirits and bourbon whiskey and as to the kind of bourbon whiskey to be used in making up a package of Old Crow, a

A. Well, whoever would give the order in the office, sometimes one, sometimes another.

Q. Some one from the office?

A. Yes.
Q. I show you a glass sign, marked Defendants' Exhibit No. 5, and ask you whether you remember seeing any signs in the office or store room of the firm of I. & L. M. Hellman like this one?

A. Yes, sir, we had a sign that looked like that.

Q. Where was the sign hung?

A. In the office.

Q. Was it so hung that any one coming into the office would or could see it?

A. Yes, sir; that's what it was hung up for.

Q. Can you remember who made these signs for the firm?

A. Not very well. I think a man by the name of Lempke, it's a long while ago.

Q. Did the firm at that time distribute or send signs like this to their customers?

A. Yes, sir, very often.
Q. What is your recollection as to the time when you first saw a sign like this Exhibit 5?

A. I don't know exactly the time. About the time I went to work there, maybe a week after, I wasn't noticing the signs very

much, but noticed it after I was there a little while. I know it was back in '65.

Q. As early as 1865?A. Yes, in 1865.

Q. Now will you state, Mr. Heron, how frequently the firm sold whiskey as Old Crow whiskey during the time you were in the em-

ploy of the firm?

A. Well, I couldn't say how often they sold it, but to the best of my knowledge there was very seldom a month or a week that some of it didn't go out.

Q. By whom was the Old Crow whiskey sold by the firm made?

A. It was blended right in the house. You could call it 388 blending or compounding right in the house. I think the best way to explain it would be compounding.

Q. When you went into business at Newport, Ark., as a member of the firm of L. G. McCauley & Co., did that firm have any dealings

with the firm of Hellman & Co. in St. Louis?

- A. Yes, sir. Q. Do you remember the time, or about the time, when Isaac Hellman died?
  - A. Yes, sir, I remember about the year.

Q. What year?
A. 1867, that's the best of my knowledge.
Q. Who, if any one, continued the business after his death, and

in what name was it continued?

A. Well, it was I. & L. M. Hellman for a while after his death, and then when they changed it it was A. M. Hellman & Co., to the best of my recollection.

Q. Was the firm of A. M. Hellman & Co. in existence at the time

when you went to Newport to go into business there?

A. Yes, sir.

Q. That was the firm at that time?

A. Yes, sir.

- Q. And have you from that time on, from time to time at intervals, done business with the firm of A. M. Hellman & Co.?
  - A. Yes, we done business with the firm and with other firms also.

Q. You have done some business with this firm? A. Yes, sir.

Q. Can you remember about what time A. M. Hellman came into the store of I. & L. M. Hellman?

A. As a partner? Q. As a clerk?

A. No, I couldn't say exactly, I think it was about '86.

Q. You mean '68, don't you?

A. I really couldn't say. I mean in the '60's. I don't remember the year, but I remember when he came.

Q. And you think it was about-A. I don't know, in the '60's.

Cross-examination by Mr. Hopkins:

Q. What is the name of your present business concern?

A. M. W. Heron.

Q. No company?

Q. You do a general wholesale liquor business?

A. Yes, sir, and retail.

Q. Do you handle Old Crow whiskey?

A. No, sir.

Q. Who was J. W. Crow? A. I really don't know.

Q. Was any person by the name of J. W. Crow a member of the firm of I. & L. M. Hellman at the time you were employed there?

A. No, sir.

Q. Was any person named J. W. Crow employed by the firm at the time you first went there?

A. No, sir, not that I know of.

Q. When you prepared or compounded this so-called Old Crow whiskey for I. & L. M. Hellman, what else would you use besides spirits and whiskey?

A. Wouldn't use anything else that I can remember.

Q. What is your best recollection as to whether or not you added

any coloring matter to that "whiskey?"

A. Yes, we added coloring sometimes, sometimes parties would like whiskey dark and some of them would like it lighter, and the firm done a rectifying and compounding business.

Q. What would you use as your coloring matter when you made

the mixture dark?

A. I don't remember now, what we would use.

Q. Did you ever use any caramel for that purpose?

A. None that I remember.

Q. You won't swear positively that you didn't?

A. I don't remember of ever seeing it used.

Q. Did you ever use any burnt sugar for that purpose?

A. It may have been that; that's what they use.

Q. Did you ever add any prune juice to the compound sold as Old Crow?

A. Never that I can remember.

Q. Did you ever use any bead oil to produce a bead on that compound?

A. Not on that, that I know of.

Q. Bead oil was in common use at that time for that purpose, was it not?

A. In common use for a rectified whiskey. Low proofs.

Q. Well, you used bead oil in some of the blendings which you made while in the employ of I. & L. M. Hellman, did you not?

Mr. Klein: I object to the question as wholly irrelevant and immaterial.

A. I don't remember of seeing bead oil with the exception of the rectified low proof whiskey.

Q. Well, wasn't this so-called Old Crow made by you for I. & L. M. Hellman a law proof rectified whiskey?

A. It was a compound.

Q. What is the difference between a low proof rectified whiskey and a compound, as you understand it?

A. Low proof whiskey is nothing but spirits reduced, different

proofs.

Q. No whiskey in it?

A. Nothing but spirits reduced.

Q. Then what is your understanding of a compound?

A. It's spirit and compound whiskey, blended, or mixed up, compounded is the proper term.

Q. You were never employed as salesman by I. & L. M. Hellman, were you?

A. No.

Q. Did you ever make any sales of whiskey for I. & L. M. Hell-

A. Sometimes in the house.

Q. Did you ever sell any of their so-called Old Crow whiskey?

A. No, I don't believe I ever did.

Q. Was any statement ever made to you by any member of the firm of I. & L. M. Hellman as to whe this person J. W. Crow was whose name they were using upon this whiskey?

A. No.

Q. At the time that you were making this so-called Old Crow whiskey for the Hellman concern, did you know of any other Old 391 Crow whiskey on the market?

A. No, I didn't.

Q. Did vou know of any other Old Crow whiskey at any time while you were in the employ of the Hellman house?

A. No. I don't remember of ever knowing of any other.

Q. Have you known of any other since you have been in business for yourself?

A. Yes, I have heard of it, but have never seen any of it.

Q. Do you remember a Magnolia whiskey being dealt in by the Hellman house while you were with them?

A. No, I don't remember any Magnolia. They had several brands, but it has been so long ago that I don't remember all of them.

Q. What is your best recollection as to whether or not you made for the Hellman concern a Magnolia whiskey while you were in their employ?

A. I don't remember.

Q. What regularly distilled whiskey, if any, did you use as an ingredient in this so-called Old Crow which you made for I. & L. M. Hellman?

A. I don't remember the name of any of it. We used different whiskies; no certain one.

Q. In what month in 1865 did you enter the employ of I. & L. M. Hellman?

A. Really, I couldn't say, to the best of my recollections it was in the fall, maybe October, or November.

Q. Might it have been as late as December?

A. Maybe it was, I don't remember.

Q. Now, I wish you would search your recollection, take all the time that you want to enable you to answer my question accurately, and state the names of all brands of regularly distilled whiskey which you used in making up the so-called Old Crow blend for I. & L. M. Hellman?

A. I don't remember the names of them, just so it was a good fine whiskey, that was all.

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Q. You are sure it was always fine whiskey?
A. Well, a good grade of whiskey. No certain brand, different brands.

Q. I will ask you to state if you can the name of any brand of regularly distilled whiskey which you used in preparing this so-called Old Crow whiskey for I. & L. M. Hellman?

A. I really don't remember the name of any of the brands, Mr. Hopkins. Sometimes it is fine whiskey and they don't have any brand on it, one head blank, very often. One head of the barrel blank, the other has the stamps on it.

Q. Now, the head with the stamps on it is known as the Govern-

ment head, is it not?

A. Yes, sir.

Q. And the name of the distiller appears upon the Government head, together with number, name and location of the distillery?

A. Yes, sir. Q. Now, while in the employ of I. & L. M. Hellman you opened or assisted in opening these barrels of regularly distilled whiskey for the purpose of using their contents in making these compounds, did you not?

A. Yes, sir.

Q. Now, I will ask you to take all the time you desire in formulating your answer and to give the names of all of the distillers whose whiskey you used in making this so-called Old Crow for I. & L. M. Hellman?

A. I don't remember, Mr. Hopkins, who they were. Q. Upon your oath can you name one of them? A. No, I couldn't cali one of them, Mr. Hopkins.

Q. Now, I will ask you to state whether or not you can recollect whether any of the regularly distilled whiskey which you used in making this so-called Old Crow compound for I. & L. M. Hellman came from the distillery of Oscar Pepper in Kentucky?

A. I don't remember, Mr. Hopkins.

Q. You will not swear that it did not come from that source, will you?

393 Mr. Klein: I object to the form of that question; there is nothing here to indicate that the witness is not truthfully answering each question put to him.

A. No, I wouldn't swear that it did or it didn't That's a long while ago.

Q. Now, I will ask you to state whether or not you can recollect whether any of the regularly distilled whiskey which you used in

making that so-called Old-Crow compound for I. & L. M. Hellman came from the distillery of Gaines, Berry & Co., in Kentucky?

A. I don't remember.

Q. So far as you can recoilect now it may or it may not have come from Gaines, Berry & Co., may it not?

Mr. Klein: I object to the form of the question, as assuming a needless conclusion. The possibilities that might have happened are not in issue in this case.

A. I don't remember what distillery it came from; they didn't

use any one certain brand.

Q. Now, how many different brands were used by I. & L. M. Hellman as a basis for this so-called Old Crow whiskey that you assisted in putting up for them?

A. They didn't use any certain brands.
Q. How many different brands did they use at different times while you were in their employ?

A. I don't remember.

Q. Then please explain why you can be so positive that there was more than one brand of regularly distilled whiskey used for that purpose?

A. We used any whiskey, just so it was good whiskey. It didn't

make any difference about the brand.

Q. Do you think that you used as many as a hundred different kinds of straight whisky in making this so-called Old Crow while you were with I. & L. M. Hellman?

A. I have no idea as to that.

Q. During the time that you were in the employ of I. & L. M. Hellman, were you familiar with the brands of whiskey which were being sold in the St. Louis market by dealers other than

I. & L. M. Hellman? 394

A. No. sir, I was not.

Q. I will ask you if this is your signature? (Handing witness paper.)

A. Yes, sir, that is mine. I think it is.

Q. What purports to be your signature appears upon the following affidavit:

STATE OF TENNESSEE,

County of Shelby, 88:

Martin W. Heron, being duly sworn on his oath, states that he is 53 years of age; at present a resident of Memphis, Tennessee; that in the year 1865 he was in the employ of the firm of I. & L. M. Hellman of St. Louis, Missouri, in the capacity of assistant compounder, and that he remained in the employ of I. & L. M. Hellman until 1885; that in the year 1886 and prior thereto, the said firm of I. & L. M. Hellman used a brand called "Crow" brand on a blend or compound manufactured by them, and that they continued to use such brand during the whole of the time that he was in their employ; that during all of that time display glass advertising signs

of the "Crow" brand were distributed by the firm to their customers, and one sign of that kind hung continuously on the wall of the office; that at that time it was the only "Crow" brand of whiskey that was known to the trade in St. Louis.

M. W. HERON.

Subscribed and sworn to before me this 19th day of March, 1904.

[SEAL.]

A. J. McNEAL,

Notage Particular

Notary Public.

My commission expires April, 1907.

I submit the original of that affidavit to you, and ask you whether you can state definitely whether or not the signature M. W. Heron appearing thereon is your signature?

Mr. Klein: I would like to inquire from the counsel whether the insinuation is made that the signature is not genuine, before I interpose my objection?

Counsel for complainant responds that there is no insinuation made other than that contained in the last answer of witness, 395 and that it would appear desirable to have the witness state

definitely whether or not this is his signature and affidavit before counsel for complainant can with propriety cross-examine him as to the contents of the affidavit.

Counsel for defendants objects to this question as well as to any and every other question in relation to the affidavit which has been incorporated into the question last propounded by complainant's counsel for the reasons following:

First. Because the affidavit in question, with other affidavits, were furnished by the defendants to the former counsel of the complainant, Mr. E. S. Robert, at his request, and while negotiations were in progress between the counsel of complainant and the counsel of defendants for a compromise and amicable adjustment of the matters in controversy between complainant and defendants in relation to the brand "Old Crow" and "Old Crow Bourbon."

Second. That whatever communications were made by defendants' counsel to complainant's counsel with a view of arriving at such compromise are privileged and cannot be used in evidence by either party.

Third. That it is both unfair and unjust for the counsel of complainant after having obtained the affidavit in question with other affidavits submitted for the purpose above stated to now make any use of them in the trial of this case.

A. I can't say exactly whether it is mine or not.

Q. Are you acquainted with A. J. McNeal, Notary Public in Shelby County, Tennessee?

A. Yes, sir, I know him.

Q. Can you state whether or not you made any affidavit before said A. J. McNeal as Notary Public on the 19th day of March, this year, 1904?

A. I don't remember the date, but I did.

Q. Was the affidavit the same as the one which is before you?

A. I'm not sure, it seems to me it was. Couldn't say ex-

actly, but it was simply to that effect.

Q. But as to your identification of the glass sign, Defendants' Exhibit No. 5, you are absolutely positive that you saw it in defendants' place of business in the year 1865?

A. I couldn't say that it was exactly that, or not, but it was a sign

just like that.

Q. Well, you are positive that you saw either this sign Defendants' Exhibit No. 5, or a substantial duplicate of it in the place of business of I. & L. M. Hellman before January 1st, 1866, are you?

A. I am not positive — the date. I know I saw it after I was

there a little while, and I went there in '65.

Q. When did you first learn definitely that there was an Old Crow whiskey which was a regularly distilled whiskey and not the brand or compound of the Hellman house?

A. I can't say I ever learned it, I just heard of it, I never handled

any of it, or saw it.

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Q. Since you have been in business for yourself have you ever read any of the journals or price lists of the whiskey trade of the United States?

A. Yes, I have sometimes.

Q. Did you ever do so while you were in the employ of I. & L. M. Hellman?

A. No. I never did.

Q. In what part of the business establishment of I. & L. M. Hellman did you do this work of making or preparing this so-called Old Crow whiskey?

A. Right on the first floor, right on the store floor.

Q. Did you do the branding there also?

- A. Right there. Yes, sir. Just where we put up all our goods, on the first floor.
- Q. What would determine the straight whiskey to be used by you in making this so-called Old Crow? Who would determine it?

A. Some one of the firm.

- Q. Who bought the straight whiskey which was so used?
  - A. Well, one of the firm generally done the buying.

Q. Did you ever do any of that buying?

A. Never bought any.

Q. You have testified in the direct examination that signs like Defendants' Exhibit No. 5 were very often distributed or sent by I. & L. Hellman to their customers. How many of said signs were so distributed by them in 1865?

A. I don't remember, Mr. Hopkins.

Q. How many of those signs were there distributed in that manner by I. & L. M. Hellman during 1866?

A. I couldn't say.

Q. Can you state positively that during 1865 and 1866 there was a single sign like Defendants' Exhibit No. 5 sent out by I. & L. M. Hellman to any of their customers?

A. I can't say whether there was or not, Mr. Hopkins, I don't remember.

Q. Were you ever acquainted with Robert Forbriger of Atchison, Kansas?

A. No, sir. I can't say I knew him.

Q. Were you ever acquainted with O. Waldkirch of Baton Rouge, La.?

A. No, I didn't know him.

Q. During the years 1865 and 1866, did I. & L. M. Hellman to your knowledge sell any of their so-called Old Crow whisky in the City of St. Louis?

A. I don't remember.

Redirect examination by Mr. Klein:

- Q. Mr. Heron, who was it that did the actual compounding or blending of whiskeys for the firm of I. & L. M. Hellman and the firm of A. M. Hellman & Co. while you were in the employ of the firm?
  - A. A man by the name of Edward Brennan.

Q. He was the compounder and rectifier?

A. Yes, sir.

Q. In answer to a question put my Mr. Hopkins, you say that you cannot remember that any of the glass signs like Exhibit No.

5 shown you were distributed or sent to customers of the firm in the year 1865 and 1866. Do you mean to say by that that none of the signs were so distributed in those years,

or not?

A. I don't remember, they may have been or they may not, there was several of those signs distributed while I was there, but I don't remember the year or the date.

Q. What is your recollection about the use for which these glass

signs were obtained by the firm?

A. What was the purpose for which they were used?

Objected to on the ground that the question contains the assumption that the witness had opportunity of knowledge upon the subject.

A. For advertisement, just the same as any firm would have them

for advertisement.

Q. Mr. Heron, with regard to the affidavit which has been shown you by Mr. Hopkins, do you remember that at the time you made the affidavit before Mr. McNeal the Notary Public, you signed and swore to the paper in duplicate?

A. Yes, sir, I did.

Q. And what did you do with those that you signed?

A. I sent them back to Mr. Hellman.

Q. Do you remember that before signing the affidavits you had a correction made in it, with red ink?

A. Yes, sir.

Q. And looking at that affidavit, does that circumstance refresh your memory in the matter?

A. Yes, sir, it does.

Q. You see that both these papers, you mean to say that it is your opinion that you signed both of those papers? And the two you signed you sent to Mr. Hellman?

A. Yes, sir.

Recross-examination by Mr. Hopkins:

Q. How did you come to make the affidavit which Judge Klein has shown you?

A. By being notified by Mr. Hellman that they were going to

have a lawsuit. 399

Q. Did he send these affidavits to you for your signature?

A. Yes, sir.

Q. They were already made out and all that you did was to have this erasure made with red ink, to which Judge Klein has called your attention, before you signed them?

A. Yes, sir, of course, I read them over before I signed them.

MARTIN W. HERON.

Subscribed and sworn to before me this 13th day of December, 1904.

JAMES R. GRAY, Examiner.

At this point the further taking of testimony on behalf of defendants was adjourned until to-morrow at 2 o'clock P. M.

At 2 o'clock P. M. of Wednesday, Dec. 14th, 1904, the further taking of testimony, on behalf of defendants in the above entitled cause was proceeded with. And

HERMAN H. LIEMKE being duly sworn, deposes and says as follows:

Direct examination by Mr. Klein:

Q. Please state your name, age, residence and occupation? A. Herman H. Liemke. I will be sixty-one—I am sixty-one now, sixty-one years old. 203 North Thirt Street, St. Louis. Designer. I design for glass signs, for metal signs, for all kinds of

Q. How long have you lived in St. Louis?

A. I came here in '60. I was here in '58, but didn't stay.

Q. What business were you engaged in in the years 1865, 1866 and 1867?

A. I came home in '65 when the war was over. In '66 and '67, I started in the glass sign business.

Q. Did you engage in any business or work for anybody in 1865 after your return from the war?

A. No, sir, not till '66. In '66, in the fall, I started in that busi-

Q. Did you start in that business in the fall of 1866 on your own account or were you then working for somebody else?

A. I worked for Max Buegel in the glass sign business in '66, 1866.

400 Q. When did you begin in business for yourself?
A. In December, '66, to the best of my knowledge.

Q. Do you remember the firm of I. & L. M. Hellman who did business on Pine Street between Second and Third Street-, and if so, how long ago did you become acquainted with them?

A. In 1866.

Q. Did you know of the firm while you were working for Mr. Buegel?

A. Yes, sir.

Q. How long did you work for Mr. Buegel before you began for yourself?

A. Three months, about.

Q. What was Mr. Buegel's business?

A. Manufacturing glass labels and signs.
Q. Do you remember whether while you were in his employ any work was done by him for I. & L. M. Hellman?

A. Yes, sir.

Q. What kind of work was done for them?

A. Glass signs.

Q. Can you remember any of the glass signs made by him for

that firm so that you can now describe them?

A. Well, it would be pretty hard to tell all the kinds of signs. I couldn't truthfully answer that question. There, I can remember some, but not all.

Q. Please name any that you can remember.

A. Star, Congress, Crow. We made signs for different parties, I can't remember the others.

Q. Will you please describe as well as you can the glass sign you speak of as the Crow sign?

A. You want me to make a sketch of it?

Q. What I want you to do is describe it in words.

A. The sign read "Old Crow," then there was a barrel in the center of the sign, a gold barrel, with a gold crow on top of the barrel, the position of the crow like it was ready to fly. Underneath the words "Whiskey," then I. & L. M. Hellman, St. Louis, Mo.

Q. Do you now refer to the sign or signs, made by Mr. Buegel while you were in his employ?

A. No. sir.

Q. Well, what sign were you giving a description of?

A. The sign which I made.

Q. Can you remember anything about the Crow signs made by Mr. Buegel while you were in his employ?

A. Well, I can't tell sure, but I think they were similar. Q. Mr. Liemke, I show you now a glass sign which is

401 Q. Mr. Liemke, I show you now a glass sign which is marked Defendants' Exhibit No. 5, and will ask you whether you remember this sign?

A. Yes, sir.

Q. By whom was this sign made?

A. By myself.

Q. Is that similar to the sign which you have described?

A. Yes, sir.

Q. State whether or not it is similar to the Crow signs made by Mr. Beugel for the firm of I. & L. M. Hellman white you were in Mr. Buegel's employ?

A. Well, the style of the sign, I improved on his style. The

wording is the same.

Q. Will you please look at this photograph marked by the Examiner as Defendants' Exhibit No. 6, and state whether it is a correct representation reduced in size of the glass sign before you?

Counsel for complainant admits of record that Exhibit No. 6 is a correct photographic representation, reduced in size, of the glass sign marked Defendants' Exhibit No. 5.

Q. When did you make the first of the glass signs like the one I have just shown you, for the firm of I. & L. M. Hellman?

A. In '67, beginning of 1867.

Q. Can you state when you made the particular sign I have shown you?

A. In '78 or '79.

Q. How frequently were you in the place of business of the firm of I. & L. M. Hellman from the time you went into the employ of Mr.

Beugel and while you were in business for yourself?

A. Well, that would be hard to tell the number of times, but every week, or every day, sometimes. I can't tell how often between 1856 and '78 or '79 I can't tell, up to 1884 or 1885 I had business with Hellman. It might have been two hundred times, five hundred times, I cannot tell.

Q. Did you, during all of that time, after you went into business

for yourself, do work for them?

A. Yes, sir, off and on.

402 Q. Have you any recollection of the number of glass signs of the Crow whiskey such as Defendants' Exhibit No. 5 were made by you in the year 1867?

A. It might have been a hundred, it might have been more.

Q. You stated that you improved upon the design of the signs relating to Crow whiskey which had been made by Mr. Beugel but that the wording was the same on those made by Mr. Beugel and the one I have shown you here. Do you remember whether while you were working for Mr. Beugel any considerable number of the Crow signs were made by him for the firm of I. & L. M. Hellman?

A. Well, how many, I don't know. We used to have them stacked up, you know, boxed, at his place, as the firm would send over for two or three or six or ten, why he would send me over with them.

Q. Please explain in what respect the signs made by Mr. Beugel

were different from the sign marked Exhibit No. 5.

A. His letters might have not been filled out. This line (Crow) might have been smaller. This sign is more beautiful that what he made. His shading of letters might not have been like that. Which

was added in order to embellish it. He did not have any of this scroll work on.

Q. Mr. Liemke, on what is this sign Exhibit 5 painted?

A. On glass. On the back of the glass.

Q. Have you any recollection of the price of these signs charged

by Mr. Beugel and yourself?

A. I can't give it to you exactly. Mr. Beugel's prices were higher and - I started in business I had to make superior work and meet his prices, and if anything make 'em a little cheaper.

Q. Do you remember what the price was which you charged?

A. I think it was between \$3 and \$4.

Q. Do you mean per sign? A. Per sign, without the box.

Q. About how many of the signs did you prepare?

A. Between '67 and '85?

Q. Yes. 403

- A. It might have been seven or eight hundred; maybe more: I can't tell.
  - Q. Please state to your best recollection the number made by you. A. Well, that's what I would say, from seven to eight hundred.
- Q. Do you remember whether during the time that you worked for the firm the firm name was changed?

A. Of Hellman? No. sir.

Q. Do you remember that the firm name was changed from I, and L. M. Hellman to A. M. Hellman & Co. during that time?

A. I do not.

Q. Did you know the members of the firm; that is, the persons who seemed to be the members of the firm, in the place of business of the firm?

A. Those that are still living?

Q. All of them.

A. I knew three Hellmans. I can't tell the first names. Q. You know this gentleman? (Pointing to the defendant, A. M. Hellman.

A. Yes, sir.

Q. Do you know his first name?

A.

Q. I will tell you that this - A. M. Hellman?

A. Yes, sir.

Q. Did you know him?

A. Yes, sir.

Q. Did you know Mr. Isaac Hellman?

A. Yes, sir. Q. Did you know Mr. Louis M. Hellman?

A. Yes, sir; I knew him; he died about three years ago.

Q. How long can you remember that Mr. A. M. Hellman was in the place of business of the firm, either as clerk or as proprietor? I mean from what time can you remember him?

A. Well, about 1867 or 1868.

Q. Where was Mr. Beugel's place of business when you worked for him?

A. Second Street between Market and Walnut, on the east side of the street, on the third floor.

Q. At that early day were there more than Mr. Beugel engaged in this same kind of business of making glass signs in the city?

A. Not that I know of; no, sir.

Q. Where was your place of business when you started? 404 A. Northeast corner of Sixteenth and Clark Avenue, in my parents' house.

Q. How long did you conduct business there?

A. About three or four months.

Q. Where did you establish yourself after that? And how long did you continue in business in the locality, the same locality?

A. Probably—Main and southeast corner of Main and Walnut—

probably there six or seven months.

Q. Then where did you go?

A. I had to give up in '67 on account of my stepfather failing in business and involving all of my money, for three or four months I was crippled, then I started again on Fourth Street between Market and Walnut, above Miller's dry goods store, on the east side of the street staved there about two years.

Q. In what other places did you conduct your business: state them as nearly as you can in order, after you were on Fourth Street?

A. I was with a firm after that, named Weiseberger & Co.; I was a silent partner in the firm. I think it is 207 North Third Street. From there I went about four doors north on the same side of the street, worked then for myself. Was there probably a year or so. Then from there to between Twelfth and Thirteenth on Pine Street; five or six months there. Then I went down to Fourth and Olive Street-, southeast corner; was there probably—was there a short time. Next place was Fourth and Locust; I was there about a year. From there to Pine Street, Olive Street, rather, between Third and Fourth, where that sign Defendants' Exhibit 5 was painted, in about the year 1878 or '79. But the sign was the same as painted by me before that, a reproduction.

Q. Where are you now employed?

- A. William Barr Dry Goods Company. I am writing advertising tickets and cards.
- 405 Cross-examination by Mr. Hopkins:

Q. Who designed the sign, Defendants' Exhibit No. 5?

A. That's my design.

Q. And this sign, Defendants' Exhibit No. 5, was made by you at 315 Olive Street; address painted at the bottom of the sign?

A. Yes, sir.

Q. When and where did you last see this sign, Defendants' Exhibit No. 5, before giving your testimony here today?

A. This same sign here? Q. Yes, sir.

A. I have seen a sign similar to that, if not the same one, probably two or three months ago.

Q. Where did you see it three or four months ago?

A. Down in the Rialto Building, Fourth and Olive Streets.

Q. Who was present at that time and place?

A. One or two, two gentlemen; I can't remember the names; Mr. Hellman was there.

Q. The defendant who stands here?

A. Yes, sir; one of them.

Q. That was in a law office, was it not?

A. I believe it was.

Q. How did you happen to be there at that time?

A. Well, I was asked by a gentleman to come down there.

Q. Who was that gentleman?

A. I don't know his name now.

Q. Prior to this occasion three or four months ago, when you last saw this sign, when had you seen this sign before?

A. I couldn't tell you, sir: it might have been a year.

Q. Have you got any books of account?

A. No. sir.

Q. Relating to this sign business of yours?

A. No, sir.

Q. Have you any record of any kind concerning these signs about which you have been testifying?

A. No, sir. Q. The very first of these signs which you say you made 406 for I. & L. M. Hellman was of the same design as this one before you, Defendants' Exhibit No. 5, was it not?

A. No; not exactly like that; I improved on it. That is, all ex-

cept the "crow" and the barrel. I improved on everything except

that.

Q. Then, if I understand you, you first improved on Buegel and then improved on yourself?

A. Yes, sir.

Q. How do you fix the time when this sign, Defendants' Exhibit

No. 5, was made by you as being in 1878 or 1879?

A. How do I fix the time? Because I was married shortly after, in '68 or '69, and I have the marriage certificate to show: I mean 1878 or 1879; and that was the last sign made in that locality, bearing that number, 315 Olive Street.

Q. Now, which of the four years you have referred to were you

married in: 1868, 1869, 1878 or 1879?

Defendants' counsel objects to the form of the question, because it is perfectly apparent that the testimony of the witness relates to the period 1878 or 1879, and not to the years 1868 or '69. And the question as propounded is both unfair and unjust under the circumstances.

A. In 1878 or '79.

Q. Have you been married more than once?

A. No, sir.

Q. Will you kindly explain fully why it is that you are unable to fix the date of your marriage more definitely than at some point within two years, 1878 or '79, while on the other hand, you are able to fix the date of the making of first Crow Sign by you for I. & L. M. Hellman as definitely as you have in your direct examination.

A. Because you wouldn't give me a chance to correct myself.

Q. About what?

A. Well, you get me confused in the difference of years.

Q. Are you positive that you first made one of these Crow signs for I. & L. M. Hellman in the early part of the year 1867?

A. To the best of my knowledge, yes.

Q. In what month of that year?

A. It was in the winter, but what month I cannot say exactly.

Q. Are you positive that it was in 1867 and not 1868?

A. Yes, sir.

Q. And yet you don't know whether the year of your marriage

was 1878 or 1879, do you?

A. Well, I would have to write to Waterloo, Ill., to find it out. I have had lots of trouble, five or six deaths in my family, in no time, and it's pretty hard for me to answer definitely without writing to the church where it is recorded.

Q. All of the testimony you have given as to facts transpiring prior to the time you made this sign, Defendants' Exhibit No. 5, has been given entirely from your memory, has it not, without reference

to any records or other physical substance?

A. You mean what's been asked me here? Yes, sir. Q. What sort of a memory have you, good or bad?

A. I think it's pretty good.

Q. What was the coloring of the word "Celebrated" in the first of

these signs which you made for I. & L. M. Hellman?

A. To the best of my knowledge, I made some solid letters instead of having them filled out on top, with the word "Celebrated" in smaller letters. I can't tell you as to color; I filled out some with red, some with gold, some with purple, different style; just like if you would take and instead of having red in there, put blue in. The Word "Crow" was inlaid with pearl.

Q. You are positive that this was in 1867 and not in 1868, are

you?

A. You refer to this sign?

Q. The same as the last question, relating to the first sign that you made for I. & L. M. Hellman?

A. '67, as I remember.

Q. When you went to the lawyer's office to look at this last sign, did you make an affidavit there?

A. Yes, sir.

408 Q. Who dictated that affidavit?

A. That was a stout man; I don't remember his name.

Q. Do you remember that there were some dates in that affidavit?

Defendants' counsel objects to all questions relating to the affidavit referred to in the last question, for the same reasons and upon the same grounds specified in the objections made to the question to the witness Martin W. Heron by complainant's counsel, relating to the affidavit made by the witness Heron.

The affidavit was procured at the solicitation of the then counsel of complainant during and as part of negotiations then pending for the compromise of the controversy between complainant and defendants, having been so obtained, complainant should not in equity and good conscience be permitted to make any use whatever of the affidavit in question.

A. What dates?

Q. Did you read that affidavit before you signed it?

A. Sure.

Q. Did you suggest any dates to be put in that affidavit?

A. No, sir; not to the best of my knowledge.

Q. You didn't dictate the affidavit yourself, did you?
A. No, sir; what would I do that for?

- Q. Was that affidavit prepared while you were in the lawyer's office, or was it prepared and ready for you to sign when you went there:
  - A. No, sir; it was prepared in the office while I was waiting. Q. Did you suggest the dates that were put in that affidavit? A. I suggested nothing that I know of. How could I suggest.

Q. Did you tell the clerk who dictated that affidavit the date when this glass sign, Defendants' Exhibit No. 5, was made.

A. I don't remember, sir.

Q. You saw this glass sign at that time and place, did 409 you not? (Referring to Defendants' Exhibit No. 5)

A. Yes, sir.

Q. Before you signed that affidavit were you asked when you made this sign, Defendant's Exhibit No. 5?

A. I believe I was; I don't know. I am not positive.

Q. In what month was it that you made the affidavit referred to? A. In the spring or summer; I don't know what month exactly; it was this year; though, I believe.

Q. Can you remember what month it was?

A. No, because I was upset; we have been moving, and I have been very busy.

Q. I hand you the affidavit concerning which I have been questioning you, and which is as follows:

STATE OF MISSOURI,

City of St. Louis, 88:

Herman H. Liemke, being duly sworn, on his oath states that he is past sixty years of age; that he first came to St. Louis in the year 1858; that he first started in business in St. Louis in 1866 with Max Buechel, engaged in a glass sign and label business; that he continued with Max Buechel about three or four months, and then started in the same business for himself. When he first started out he solicited the work of I. & L. M. Hellman, as he was aware that while he was in the employ of Max Beuchel, they had been doing such work for I. & L. M. Hellman. They gave him an order for work of this character, and among the first glass signs he made for them was one for "Crow" whisky, similar to the sign, a photograph

of which is attached to this affidavit; that he continued to make signs for the firm of I. & L. M. Hellman, including the "Crow" sign aforesaid continuously from the winter of 1866 and '67 up to 1885 or 1886, during which time he made a large number of signs for their "Crow" whisky, as they had occasion to use such signs in advertising that whisky. In the year 1885 or 1886, he quit this business and went into the dry goods advertising business, and is now connected

with the firm of William Barr Dry Goods Company in that 410 capacity. The sign, of which the photograph is attached to this affidavit, was one of the signs which was made by him

when he was in the business.

#### HERMAN H. LIEMKE.

Subscribed and sworn to before me this 14th day of March, 1904. My commission expires Jan. 9, 1907.

[SEAL.] IRWIN WALKER,

Notary Public, City of St. Louis, Mo.

Do you recognize this as the affidavit concerning which I have just been examining you?

Defendants' counsel objects to the question, upon the same grounds heretofore stated in relation to said affidavit, and moves that the question be stricken out, as well as any answer that may be made thereto, for the reasons before stated, and for the additional reason that the question is irrelevant and immaterial and that the information obtained in the affidavit procured as aforesaid is privileged.

A. Yes, sir.

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Q. At the time when you made this affidavit you knew, of course, that this man Buechel or Buegel had made these Crow signs for I. & L. M. Hellman before you did, did you not?

A. Well, I can't remember exactly what he made, but I believe to the best of my knowledge that was among the signs, that kind of

sign among the signs made by him, similar.

Q. Well, you knew as much about this on the 14th day of March, this year, as you do now, didn't you?

A. About what? I knew about what; I knew about this? Q. And you knew at that time, did you not, that the first of these Crow signs which you claim you made for I. & L. M. Hellman was made in '67 and not in '66, did you not?

A. In '67; yes, sir; that I made.

Q. How many other kinds of signs, glass signs, do you

think you made for I. & L. M. Hellman in 1867?

A. Well, the exact number I cannot say; four or five different style of signs. Some was the Star Bitters, some were the Congress Bitters; then there were signs with all kinds of different brands illustrated in a field, and amongst them — Crow sign; I believe that's all. Then I made various other signs, smaller signs; I don't know all the different brands of the smaller signs.

Q. Now that you have had half an hour to think it over, or there-

abouts, please that what year you were married in.

Defendants' counsel objects to the form of the question, because it assumes that the witness has had time within the past half hour to think of the particular matter while he was constantly under cross-examination by complainant's counsel.

Counsel for complainant withdraws the question.

Q. It is now 18 minutes past 5 p. m. Please take all the time you want for reflection and then state, if you can, in what year you were married? Kindly preface your answer by the time when you begin to answer the question.

Counsel for defendant-objects to the form of the question, because it assumes that the question is put at 18 minutes past 5 o'clock, whereas it is only 18 minutes past 4 o'clock, and because the form of the question is otherwise objectionable, there being nothing apparent that the wirness' testimony is not in all respects perfectly candid and fair.

Question withdrawn.

Q. It is now 21 minutes past 4 p. m. Please take all the time you want for reflection and then state, if you can, in what year you were married. Kindly preface your answer by the time when you begin to answer the question.

Same objection is made to this question on the ground stated in the latter part of the previous objection.

A. I don't understand the meaning of that last part there. Now, not interrupting all this, would you please give me time and I will go down and look at that certificate. (Witness asks if he can go down and look at certificate.) If you had a telephone you could telephone down to Waterloo and I would pay the price of it. I don't know your mode of operation.

Do you permit me to go down and get that?

By Defendants' Counsel:

Q. Mr. Liemke, complainants' counsel is entitled to your best recollection independent of any examination by you of the certificate of marriage. Kindly state the best of your recollection as to the date of your marriage; if you cannot give the exact date, please state that fact. The counsel for complainant is doubtless endeavoring to discredit your testimony because you could not in your previous questions answer or state the exact date of your marriage.

A. Well, I was married in February; I know that; the exact date I can't tell. It is the 27 or not, but in '78 or '79, I am sure one of

those two years.

Counsel for defendants states that it is exactly half-past four o'clock; 29 minutes past four o'clock.

A. The marriage was published in the Missouri Republic of '78 or '79.

Q. Are you sure it was not in 1877?

A. It could not have been.

Q. Are you positive of that?

A. To the best of my knowledge I am.

Q. Can you testify positively that it was not as early as 1876?

A. I think I can.

Q. Can you testify positively that it was not as early as 1875?

A. Yes, sir.

All the above questions and answers objected to as irrelevant and immaterial, as a useless waste of time, and the useless expenditure of money, and the useless making of costs, and defendants'

- counsel moves that the costs of same be taxed against complainant irrespective of the results of this case.
- Q. Before you went to the lawyer's office to sign the affidavit I have referred to, did you talk over these dates when you made the affidavit with any one?

A. Not that I know of.

Q. Are you positive as to that?

A. I am pretty positive.

Q. Do you know where your former employer, Beugel or Buechel is now, if he is alive?

A. I don't know.

Q. Have you any information as to whether he is alive or-

A. I read he was dead.

Redirect examination:

Q. Was I present in the office when you made the affidavit which has been shown you?

A. I don't believe you were.

Q. Do you remember whether the gentleman whom you describe as a stout gentleman that asked you some question, was Mr. Hough of the firm of Klein & Hough?

A. In the attorney's office in the Rialto Building? He was a

stout man, florid complexion, red hair.

Q. You can't tell his name?
A. Well, I couldn't swear to it; no sir.

HERMAN H. LIEMKE.

Sworn and subscribed before me this 22d day of December, 1904.

JAMES R. GRAY, Examiner.

At this point the further taking of testimony on behalf of defendants in the above entitled cause was adjourned until to-morrow afternoon, December 15, 1904, at 2 o'clock.

At two o'clock P. M. of Thursday, Dec. 15, 1904, the further taking of testimony on behalf on defendants in the above entitled cause was proceeded with as follows:

JOHN O. URNER being recalled for further examination testified as follows:

414 Direct examination by Hon. Jacob Klein:

Q. Mr. Urner. I show you a book marked on the back "Jour. nal H. M. & Co., the first entries in which occur under date of January 1st, 1863, and the last entries in which appear under date of September 15, 1869, and I will ask you whether you recognize that book?

A. I recognize my own hand writing in it.

Q. Are there entries in this book in your hand writing?

A. There are in the rear of the book; my first entry begins on page 235.

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Q. What is the date of the first entry that you find in your hand writing?

A. July 31, 1865.

Q. What is the book?

A. Style of keeping the cash account, I see. Style we had of keeping all transactions; I have forgotten. Can see by the hand writing that it is a journal; must have been transferred from other books of original entry into this, for the purpose of posting into the ledger.

Q. Do the entries which you find in the book after the date of July 31, 1865, have any reference to the transactions of the firm of

I. & L. M. Hellman?

A. These all refer to the transactions of the firm of I. & L. M. Hellman with their customers.

Defendants' counsel offers the book in evidence and requests that the same be marked Defendants' Exhibit No. 10, which is accordingly done.

Q. Mr. Urner, will you kindly look at page 267 of this book, Defendants' Exhibit No. 10, and state in whose hand writing are the entries you find there?

A. They are in my hand writing.

Q. What is the date of the entries, Mr. Urner?

A. October 31st, 1865.

Q. Please read the last entry on that page.

A. The last entry "147; M. O. Heron, \$30.00." Q. Do you remember the person designated M. O'Heron?

A. I remember him.

Q. Who was he?

A. He was the individual; at present I think his name is Martin Heron; the same individual that I put down there is M. O'Heron.

Q. You mean the same individual whom you put down there as M. O'Heron is the same individual whom you now know as Martin Heron? 415

A. Yes, the same: he was always called Martin around the store.

Q. Was or was he not at that time in the employ of the firm?

A. He was.

Q. What is the meaning of the figures 147, which precede the name?

A. It refers to the ledger page to which that account is posted.

Q. What is the meaning of the figure 30-00?

A. \$30.00 per month wages.

Q. Under what heading to you find the entry?

A. Expense Dr. to Sundries.

Q. What is the meaning of that entry?

A. It means to credit the parties named in the entry with the wages that was due them for the month that was just expired and charge it

to the expense account.

Q. From the entry which you see there can you now state whether or not you are satisfied that Martin W. Heron, the witness who testified here on Tuesday of this week, was the person referred to in this entry, and was then at the date of the entry in the employ of the firm of I. & L. M. Hellman?

A. I didn't see him here on Tuesday, but did see him on Monday; I am satisfied that he was in the employ of the firm at the date of the

entry.

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# Cross-examination by Mr. Hopkins:

Q. On what date did you enter the employ of I. & L. M. Hellman?

A. Third day of July, 1865.

Q. Are you sure it was not as early as January of 1865?

A. I was in Chicago in January of 1865.

Q. I note in the early part of your direct examination that in response to the question, "When did you enter the employ of the firm?" your answer was, "January 3rd, 1865." Do you desire to make any explanation in regard to this?

A. I did not say January 3rd, 1865, but did say July 3rd, 1865; I am positive that I said July 3rd, 1865, and that the record of what

I did say at that time is wrong. The reason why I know I said July 3, 1865, is because July 3rd, 1865, was the beginning of an important epoch in my life, and it was indelibly

impressed upon my mind.

There is another error in the record. On page 2, where the following question appears: "Q. Yes? I presume it was changed——A. It was changed in 1867. Isaac Hellman died in April, 1867." I said he died in August, 1867, and that the word April did not correctly show my statement.

Q. I notice that the books last offered in evidence, Defendants' Exhibit No. 10, is marked upon the back H. M. & Co. Do you know

to what those initials refer?

A. Hellman, Myers & Co.

Q. Was that the style of the firm when you were employed in July, 1865?

A. It was not.

Q. You have always been a reasonably careful bookkeeper, have you not?

A. I try to be.

Q. Do you know of any reason why you should enter the name

of the employe, Martin W. Heron, as M. O'Heron?

A. No. The rectifier of the concern was a man who was not able to read to write, and he may have given it to me and I may have put it down that way; the only reason I can see.

Q. In connection with your testimony defendants have offered in evidence a book marked Defendants' Exhibit No. 7, and particularly the entries on page 48 thereof. Among those entries being the following:

### 18. Robert Forbriger.

Atchison.

	Bbl. Bourbon, P. Crow, 38 2	
6	Box- Lemon Syrup	350 - 21
1	Keg Bourbon, best for Zachari 5	3 16
	Permit 40 Drayage 30	
		-
		70 49

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After the word keg some symbol appears which I cannot read.

I will ask you to state whether this entire entry is, in your opinion, in the hand writing of the late Louis M. Hellman?

A. No; I think the words "permit" and "Drayage" are in a different hand writing—hand writing of Meyers. I am uncertain whether the words "P. Crow" was written by Meyers or by L. M. Hellman. I think the main body of the entry is in the hand writing of L. M. Hellman.

Q. Was any part of this entry made by you?

A. No.

Q. Are you positive that the words "P. Crow" were entered by Louis M. Hellman or by his partner, Myers?

A. My positive opinion, though I wasn't in the concern at that

time.

Q. Mr. Urner, I will ask you to write the words "P. Crow" upon the piece of bristol board which I hand you.

(Witness does so.)

Q. I will ask you to write the word "Bourbon" right underneath the words "P. Crow," if you please.

(Witness does so.)

Counsel for complainant offers in evidence the writing made by the witness it response to the two preceding questions, and asks that the same be marked Complainant's Exhibit, "Urner Cross-examination No. 1," which is accordingly done.

Q. During the time that you were employed by the firm of I. & L. M. Hellman, was any person of the name of P. Crow connected with the firm of I. & L. M. Hellman, as an employe or otherwise?

A. No.

Q. Did you ever know a person by the name of P. Crow engaged in the liquor business?

A. I don't remember of ever hearing the name before.

Q. Will you please write upon the piece of bristol board which I hand you the words "O. Waldkirch, Baton Rouge," also the words "Crow's Bourbon," "W. G. Wear & Co., Memphis,"

"S. Mendelsohn," "D. Brunner, Montgomery City"?

(Witness does so.)

Complainant's counsel offers the writing made by the witness in response to the foregoing examination, and asks that the same be marked "Urner's Cross-examination Exhibit No. 2."

Defendants' counsel objects to the exhibit as well as to Urner's Cross-examination Exhibit No. 1, on the grounds that each of them

is irrelevant and immaterial.

Q. Please write upon the bristol board which I hand you the words "Crow's Whisky," "Havana," "M. D. Thatcher, Pueblo," and "Albert Ertel, El Paso."

(Witness does so.)

Plaintiff's counsel offers the writing made by the witness in response to the last question in evidence, and asks that the same be marked Defendants' Exhibit, Urner Cross-examination Exhibit No.

Defendants' counsel interposes the same objection as to the exhibits previously offered, as complainants' exhibits Urner's Cross-ex-

amination No. 1 and 2.

Q. Who was J. W. Crow?

A. I don't know.

Q. There wasn't any one of that name connected with the firm of I. & L. M. Hellman while you were employed there, was there?

A. No one.

- Q. When did you last see the metal brand of which you have identified Defendants' Exhibit No. 4 as a cast?
- A. I don't remember when I saw that last, that metal brand. Q. Have you ever seen it since you left the employ of I. & L. M. Hellman?

A. No.

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Q. Do you know of your own knowledge when or where or by whom this plaster cast, Defendants' Exhibit, was made?

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Q. When and where did you first see this plaster cast, Defendants' Exhibit No. 4?

> A. I can't recall the date. Q. About how long ago?

A. About the year 1865 or '66 one, it was the time that I went there.

Q. Where was this plaster cast at that time?
A. Do you mean the plaster cast or the metal brand?

Q. I mean the plaster cast.

- A. I misunderstood; I thought he was talking about the metal The metal brand which is produced from this plaster cast. I can't recall any particular date when I saw this: I mean this plaster
- Q. Did you ever see this plaster cast except in connection with this pending lawsuit or Mr. Hellman's preparation for it?

A. Yes.

Q. When and where?

A. It was in the vault in the rear of the store. 112 Pine Street, either this or one like it. I remember seeing it there.

Q. In your capacity as bookkeeper for I. & L. M. Hellman would the bills for regularly distilled whisky purchased by the firm come under your supervision or inspection?

A. Yes.

Q. Do you recollect what distillers such whiskies were purchased from by I. & L. M. Hellman in 1865 and 1866?

A. I can't call to mind any distillers except High Wine distillers. And purchases were made of high wines through the commission

merchants here in the city

Q. Were any of those high wines purchased under the brand of Crow, or J. W. Crow, or P. Crow, by the firm of I. & L. M. Hellman, during the year- 1865 and 1866?

A. No.

Q. All of the goods sold by I. & L. M. Heliman under the brand Crow, Old Crow or J. W. Crow were prepared on the premises, were they not?

A. Yes: they were all prepared on the premises, as well as my

memory serves me; I am not sure about that.

- Q. You remember the brand J. W. Crow, of which you say Defendants' Exhibit is a cast; I will ask you how many other brands. meaning thereby metallic brands use for branding the heads 420 of whisky barrels, you recollect as being in use by I. & L. M.
  - Hellman, in 1865 and 1866, and what those brands were? A. I can't just now recall any brand except Arnold's and Fuller's. Q. Magnolia Whisky appears frequently upon these books of ac-

count during that period, does it not? A. I presume so; yes.

Q. Was there a metal brand there bearing the name Magnolia?

A. There was not.

Q. Wasn't that Magnolia a whisky made on the premises just like J. W. Crow or Old Crow?

A. It was not as good an article of whisky as Crow. It was 30 below proof and common whisky.

Q. That Magnolia whisky was blended or compounded there at

the place of business of I. & L. M. Hellman, was it not?

A. It was rectified there. It was leached through charcoal and drawn from a large tub into a barrel, and the brand Magnolia put on the head of the barrel, which had previously been painted yellow. It was put on with a stencil brand.

Q. You remember that stencil being on the premises of I. & L. M.

Hellman, don't you?

A. Yes. Q. Now, what material was used by I. & L. M. Hellman in making this Magnolia whisky?

A. High wine.

Q. I. & L. M. Hellman never purchased any whisky under the brand Magnolia, did they?

A. No.

Q. And consequently they never purchased any Magnolia whisky from S. N. Pike & Co. of Cincinnati, did they?

A. No.

Counsel for defendant- objects to the question as irrelevant and immaterial.

Q. Did I. & L. M. Hellman ever purchase any Magnolia whisky from Mills, Johnson & Co.?

A. No.

Same objection.

A. No.

Q. You did not know at that time of any Old Crow whisky other

than that made by I. & L. M. Hellman, did you?

A. I have heard all my life the word Crow in connection 421 with whisky; in fact, I may have heard the words Old Crow without being able to place them. I don't remember of ever seeing a barrel with that brand on it.

Q. Did you at that time know of any Magnolia whisky other than

that produced by I. & L. M. Hellman?

A. I never saw any Magnolia whisky that was produced by any

other party than I. & L. M. Hellman.

Q. Didn't you as a matter of fact know that the Magnolia brand was at that time one of the leading brands of American whisky sold extensively throughout the United States? And that it was owned by parties other than I. & L. M. Hellman?

Counsel for defendants objects to the question as irrelevant and immaterial.

A. I would like to explain that when you speak of a matter of fact I don't know anything about any other Magnolia whisky than that made by I. & L. M. Hellman, as a matter of fact.

Q. Was there any person of the name of Arnold connected with

the firm of I. & L. M. Hellman in the years 1865 and 1866?

A. No.

Q. Do you know who that brand Arnold belonged to? A. No. Except that it belonged to I. & L. M. Hellman.

Q. Was there any person named Bowen connected with the firm of I. & L. M. Hellman in 1865, 1866?

A. There was not.

Q. Did you know at that time who the Bowen brand belonged to?

A. I can't remember.

Q. Was there any person named Fuller connected with the firm of I. & L. M. Hellman in 1865 and 1866?

A. There was not.

Q. Did you know who the Fuller brand belonged to?

A. Belonged to I. & L. M. Hellman.

Q. Who received the orders for goods when they were sent in to I. & L. M. Hellman in writing by their traveling salesmen?

A. The letters were opened by some member of the firm. 422 Q. Were any whiskies purchased from any of the Kentucky distilleries by I. & L. M. Hellman in the years 1865 and 1866 to your knowledge?

A. I don't remember any whiskies purchased in Kentucky by

I. & L. M. Hellman during those years.

Q. Did you examine the book which has been offered in evidence within a year past and before you examined them in your testimony?

A. I saw a few entries on those books; can't say that I examined

them.

Q. Can you recollect any stencil brands used by I. & L. M. Hellman in 1865 and 1866, besides that which they used in brand-

ing the Magnolia barrels?

A. Yes, I remember that it was in that day that they had Nectar whisky, also Copper distilled whisky. There was a brand of Planters' Favorite that they used very frequently during the early part of my term.

Q. Do you recollect any other stencils?

A. The words called Old Bourbon that was branded on the head

of a barrel, then there was a brand called Arrow whisky.

Q. Can you recollect about how much Magnolia whisgy was sold by I. & L. M. Hellman in proportion to their sales of Crow?

A. No.

Defendants' counsel objects to the question as immaterial.

Q. What is your best impression as to whether more or less of Magnolia was sold than of the Crow, by I. & L. M. Hellman?

Same objection.

A. I think there were more barrels of Magnolia than there were of Crow.

Q. Can you estimate about how many barrels of Magnolia were sold by I. & L. M. Hellman per year when you first entered their employ?

Same objection.

A. No.

423 Q. Mr. Urner, was the grade of whisky sold as Magnolia whisky a lower or higher priced whisky than that sold by the firm as Crow whisky?

A. Magnolia was lower priced.

Q. Had you any knowledge of the whisky business while in the employ of the firm of I. & I., M. Hellman other than derived from the transactions which occurred under your observation in the store?

A. No.

.Q. Mr. Hopkins, I want to ask the witness a question which is not really proper in redirect examination?

No objection.

—. Mr. Urner, I call your attention to an entry in Defendants' Exhibit No. 10, under date of September 30, 1865, under the heading Expense Dr. to Sundries, on page 256. I refer to the last entry under the heading just mentioned. Will you please read the entry?

A. 147 M. O'Heron, 13-30's Mo., \$13.00.

Q. What is the meaning of the figure 147?
A. It means that it is a posting marking denoting that it was posted in the ledger at page 147.

Q. What is the meaning of the fraction 13-30ths? A. It means that M. O'Heron began to work for the concern 13 days before the expiration of the month.

Q. What is the meaning of the figures on the right hand side

of the page, 13-00?

A. The meaning is \$13.00.

Q. What does the entry indicate as to the time when M. O'Heron

entered into the employ of the firm, if anything?

A. Well, it would indicate that he began to work on that day for the wages \$30.00 per month; 13 days before the expiration of the month.

Q. To whom does the name M. O'Heron apply? Who is the

person indicated thereby?

A. It applies to the man whom I now know as Martin Heron. JOHN OSBORNE URNER.

Sworn to and subscribed to before me this December 16th, 1904. JAMES R. GRAY, Examiner.

424 The further taking of testimony on behalf of the defendants in the above entitled cause was postponed indefinitely, by agreement of parties, to be resumed at such time in the future as said parties may agree upon.

December 29, 1904.

The further taking of testimony in said case was continued this day at 2 o'clock p. m., pursuant to notice served by the counsel of the defendants upon the counsel of the plaintiff, which notice and the proof of service thereof, is hereto attached, and is in words and figures as follows, to-wit:

# W. A. Gaines & Co., Complainants,

VS.

ABRAHAM M. HELLMAN and MORITZ HELLMAN, Defendants.

To the above named Complainant or its Attorneys:

You are hereby notified that the taking of depositions on behalf of the defendants under the stipulation heretofore entered into between counsel for complainant and defendants, on the second day of December, 1904, for the taking of depositions de bene esse on behalf of defendants, will be taken at the office of Mr. James R. Gray, examiner herein, on the 29th day of December, 1904, at Room 342 Custom House Building, St. Louis, Mo., at 2 o'clock p. m.

KLEIN & HOUGH. Attorneys for Defendants. STATE OF MISSOURI,

City of St. Louis, 88:

Served the above notice, by delivering a true copy thereof to James L. Hopkins, attorney for the complainant, W. A. Gaines & Company, this 27th day of December, 1904, at his office in the city of St. Louis, Missouri.

LUTHER ELY SMITH.

Subscribed and sworn to before me this 27th day of December, 1904. My term expires January 9th, 1907.

[SEAL.] IRWIN WALKER,

Notary Public, City of St. Louis, Mo.

There were present Hon. Jacob Klein, on behalf of defendant-; the complainant not being represented by counsel; thereupon the taking of testimony on behalf of said defendant- was proceeded with and—

## Frederick A. Hugo.

Frederick A. Hugo, a witness of lawful age, being duly produced and sworn, on behalf of said defendants testified as follows:

Direct examination by Mr. Klein:

- Q. Please state your full name, your age, residence and occupation.
- A. Frederick A. Hugo; thirty-six years; 2034 Adelaide; St. Louis; bookkeeper A. M. Hellman & Co.

Q. How long have you been in the employ of A. M. Hellman & Co.?

A. Eleven years past.

Q. State the month and year of the beginning of that employment.

A. April, 1893.

Q. Did you know a person of the name of E. C. Homan?

A. Yes, sir.

Q. Is he living or dead?

A. He is dead.

Q. When did he die?

A. I think about three or four years ago. Q. Where did he reside, if you know?

A. I don't know positively, but I think it was in New York.

Q. Did he ever come to the place of business of the firm of A. M. Hellman & Co. and transact any business there?

A. Yes, sir.

Q. During what period of time?

A. From the time I came to the house until the time he died.

Q. What was the nature of the business done by him there?

A. He sold, or tried to sell, whiskies and wines.

Q. For whom?

A. The whisky business, he represented Allen, Bradley & Co. But imported goods, such as wines, was Paris, Allen & Co. 426 Q. Do you remember of any conversation between Mr. Homan and Mr. Hellman, concerning the brand Old Crow,

at anytime?

A. Yes, sir.

Q. Where was the conversation, and at what time?

A. In the office of A. M. Hellman & Co. I think it was in the early fall or late summer of 1896.

Q. Who was the person, A. M. Hellman, with whom the conver-

sation took place?

A. He was the senior member of the firm of A. M. Hellman & Co.

Q. Is there any circumstance which reminds you of the time when the conversation took place? If so, please state it.

- A. Why, the bottling and bond bill was pending before Congress, which brought up the conversation of bottled whiskies and the brands thereon.
- Q. What, if any, discussion did you hear between Mr. Homan and Mr. Hellman concerning the bottled in bond bill?
- A. It was a general discussion; Mr. Hellman didn't think much of it, but Mr. Homan thought it was a big thing.
- Q. Please state what you can remember was said by each of them in regard to the matter.
- A. Why, Mr. Homan, among other things, stated that when that bill was passed it would make their brand, as he called it, very valuable.
  - Q. Did he mention any brand; if so, what brand did he mention?

A. He mentioned particularly the brand of Crow.

Q. What did Mr. Hellman respond to that statement?

A. Why, he didn't agree with him, the discussion was rather lengthy.

Q. What did Mr. Hellman say?

A. He said, among other things, that whisky at 100 per cent was too strong, and later on they got back to the matter of the Crow brand, Mr. Homan stating that they would get after us people that are using said brand, when Mr. Hellman told him, "You might contend that I have no right to use the brand." Mr. Homan

427 answered, "Neither have you." Mr. Hellman told him that the brand was handed down to him by his brothers, and he had been using it for many, many years, but if he, Homan's, people would convince him of his claims, or prove to him that they had it prior to the Hellmans, he is no pirate, and would quit using the brand. Mr. Homan said they would prove it to him and Mr. Hellman stated again, "If you do I will assure you that I am a gentleman and will quit."

Q. During that conversation, was there any reference made to

any sign bearing upon it the words Crow Bourbon?

A. Yes, sir.

Q. What, if anything, was said about the sign, and where was the sign?

A. Well, as near as I could remember about the sign, Mr. Hell-

mal pointed to it during the conversation and stated, "That's been

here as long as I have."

Q. Will you look at the sign now shown here and marked Defendants' Exhibit No. 5, and state whether you have seen that sign before?

A. I have.

Q. Where did you see it first?

A. Why, I saw it just as soon as I entered the employ of the establishment.

Q. Where was it?
A. Hanging on the north wall of the store.

Q. Was it in the office?

A. No, in the store.

Q. Please state whether this is the sign to which reference was made in the conversation which you have detailed?

A. Yes, sir.

Q. Can you state whether or not Mr. Hellman saw the sign on the occasion to which you have referred?

A. I am satisfied he did.

Q. After that conversation, was Mr. Homan ever in the place of business of A. M. Hellman & Co.?

A. Yes, sir.

Q. How frequently and for what length of time?

A. He came about twice a year. He came there until he died;

he kept on coming until he died.

Q. Was there ever any reference made in your presence 428 subsequently to the matter of the Crow brand between Mr. Hellman and Mr. Homan?

A. Not to my recollection.

Q. Do you know a person by the name of Harry E. Blood?

A. Yes, sir. Q. Who is he? Yes, sir.

A. He now represents the same people Mr. Homan did.

Q. When did you first see him? A. I judge about three years ago.

Q. Do you remember whether you saw him in the summer of 1903?

A. Yes, sir. Q. Where?

Q. Was that the first time you have seen him or not? A. No, sir.

Q. In the summer of 1903, did you hear any conversation between him and Mr. A. M. Hellman, concerning the Crow brand?

A. Yes, sir.

Q. Please state the conversation.

A. As near as I can remember, Mr. Blood told Mr. Hellman that they were causing him trouble. Mr. Hellman stated, "In what way?" He then pulled out a list which was supposed to contain names of people to whom we were selling Crow whisky.

Q. Did Mr. Blood say anything about the list, and if so, what did

he say about it?

A. Well, he didn't get a chance to say hardly anything, because Mr. Hellman told him they could save themselves that trouble; that his books were open and they could get the names when they wanted them. He told him about what he had asked Mr. Homan, to ask his house, and repeated the same request to Mr. Blood, telling him exactly as he did Mr. Homan, that he was not a pirate; that he would not allow any one to use a brand that belonged to him, hence surely would not use one that belonged to some one else. He went on further and related how long the concern had been using the

brand, telling him that it had been handed down to him by his brothers, and he would not quit using it until they proved

to him that they had it prior to his predecessors.

Q. Was there any reference made in that conversation as to the year in which W. A. Gaines & Co. or their predecessors had first used the brand, and if so, what year was mentioned?

A. No, I don't think it was that time. He called shortly there-

after again.

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Q. What did Mr. Blood reply to the statement of Mr. Hellman? A. I am quite satisfied he said he would write his house.

Q. Did he come back subsequently?

A. Yes, sir.

Q. What, if any, conversation took place in your presence between

him and Mr. A. M. Hellman?

A. Why, Mr. Hellman asked him how long they had been using the brand. His answer was '67. Mr. Blood's answer was '67. Mr. Hellman then asked him, "Suppose I show you that we used it prior to that time, what would you say then?" He then said, "If that's the case the brand belongs to you." And I believe that was the time he handed Mr. Hellman a paper which he wanted him to sign. He had another man with him and said, "You see, Mr. Hellman, I am merely a hireling, and have to do as I am told,"

Q. Mr. Hugo, is Mr. A. M. Hellman now living or dead?

A. He is dead.

Q. When did he die?

A. Fourteenth of December, this year.

Q. Mr. Hugo, please state whether during the time since you entered into the employ of the firm of A. M. Hellman & Co. they sold any whisky under the designation of Crow Bourbon, or under the designation of Old Crow Whisky?

A. Yes, sir; they did.

Q. During what period of time, and how frequently?

A. As long as I have been with them; just how frequently it is pretty hard to tell. Some days perhaps five or six lots; other days again, none. 430

Q. Have there been sales made from time to time during all of the time since you have been there?

A. Yes, sir.
Q. How, if at all, were the whiskies branded or marked?

A. The barrel goods were burnt with an iron brand. Q. What was on the brand?

A. The circle was A. M. Hellman & Co., St. Louis, Mo., and if I remember right, inside of the circle "Crow Whisky." The bottle 431

goods were labeled Hellman's, then the picture of a crow, under that the word- "Crow Whisky."

Q. Where did the firm get the whisky they sold as Crow Whisky? A. Why, it was blended in our establishment, or compounded.

Q. During the years that you were there, were any purchases of whisky made from W. A. Gaines & Co. or from any other concern as Old Crow Whisky?

A. Yes, sir; I remember one purchase.

Q. What was done with the whisky so purchased?

A. It was sold to a party in Moberly, Mo.

Q. Were they sold to that party in the same or in different packages from what they were received in?

A. In the same packages.

Q. How did the firm come to make that purchase?

A. The party insisted upon having that goods. FREDERICK A. HUGO. (Signed)

Sworn to and subscribed before me this 29th day of December. 1904. JAMES R. GRAY, Examiner. (Signed)

Adnul Hobbs.

Adnul Hobbs, a witness of lawful age, being duly produced and sworn on behalf of the defendants, testifies as follows:

Direct examination by Mr. Klein:

Q. Please state your full name, your residence and occupation.

A. Adnul Hobbs; 4306 Cook Avenue; stenographer for Rothschild Bros.

Q. Were you ever in the employ of the firm of Λ. M. Hellman & Co.?

A. I had that pleasure, sir.

Q. When did you enter into the employ of the firm, and how long did you remain with them?

A. I entered their employ December 14, 1893, and remained there until February 27th, 1900.

Q. In what capacity were you employed?

A. Stenographer.

Q. I show you a sign which is marked Defendants' Exhibit No. 5, and ask you whether you have ever seen that sign before?

A. I have, sir.

Q. Where did you see it?

A. It was hanging on the north wall of Mr. Hellman's store, out in the hallway.

Q. In the position which it occupied, was it or was it not visible

to any person coming into the store?

A. Yes, sir; if they were to look up at it they could see it. But it was most visible, Judge Klein, in the office, because the wall of the office was glass, and any one in the office could look out and see it hanging in the store.

Q. How long did the sign remain in the same position, to your knowledge?

A. I do not remember of its ever having been removed during my

stav there.

Q. Do you remember a person named E. C. Homan?

A. Distinctly.

Q. Where did you ever see him?
A. In Mr. Hellman's office.

432 Q. How often did you see him there?

A. About twice a year.

Q. During what period of time?

A. Through my stay there, I think, Judge Klein.

Q. Do you remember of hearing of his death?

A. Yes, sir.

Q. Was that before or after you left the firm?

A. After.

Q. Do you remember any conversation between Mr. E. C. Homan and Mr. A. M. Hellman concerning this sign marked Defendants' Exhibit No. 5?

A. Vividly.

Q. Please state the conversation as nearly as you can remember the same, stating what was said by Mr. Homan as well as by Mr. Hellman.

A. Mr. Homan came into the office and did not act as he usually did. It was prior to the passing of the bottling in bond bill. Mr. Homan in a very haughty manner told Mr. Hellman that when that bill passed it would make their brand, The Crow, a very valuable one, and that they were going to go after him for using it. Mr. Hellman told him that the Crow brand he was using had been handed down to him by his brothers, I. & L. M. Hellman. And here Mr. Hellman, he didn't mean anything by it, but I even remember the Sunday School word he used, when he told Mr. Homan that if he could prove that they had a prior right to the brand to go ahead and do it, that he was a gentleman, no pirate, and that he would then quit.

Q. Was any reference made in that conversation to the sign, De-

fendants' Exhibit No. 5, which is before you here?

A. Yes, sir. When Mr. Hellman spoke of the brand as being handed down to him by his brother he pointed out to him through the glass window or wall. Mr. Homan saw him point; Mr. Homan's gaze followed Mr. Hellman's motion.

Q. You state, Miss Hobbs, that this conversation took place before the passage of the bottling in bond bill; can you remember the year and season in which the conversation took

place?

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A. Some time in the late summer of 1896, I think.

Q. Was Mr. Homan ever in the store or place of business of A. M. Hellman & Co. after that time?

A. Oh, yes, sir.

Q. Can you state whether or not he had any business transactions with the firm after that time?

A. I do not know.

Q. How many times, according to your recollection, was he there after that conversation?

A. Well, he generally came about twice a year on his semi-annual

trips.

Q. What, if any, reference was ever made within your hearing, to the Crow brand, by Mr. Homan, after the conversation which you have stated here.

A. Judge Klein I do not know.

Q. You do not remember of any, do you? A. Not now, sir; it has been several years.

Q. Whom did Mr. E. C. Homan represent when calling at the store of A. M. Hellman & Co.?

A. Allen Bradley & Co. and Paris, Allen & Co.

Q. Miss Hobbs, did you have anything to do with the keeping of

the books of the firm?

A. Only occasionally when I wanted to get a statement for a customer, or in getting the cash credit and day book charges for our traveling salesmen.

Q. What were your specific duties there?

A. Stenographer for the firm, and also I suppose you would call it, acted as secretary for Mr. Hellman. He wrote a good many articles for the Trade Journals, and I always wrote them.

Q. As stenographer, did you write letters relating to the firm's business at the dictation of the members of the firm, or other persons in the office?

A. Yes, sir.

Q. State how often, if at all, you heard mention in such letters of the Crow Bourbon, or Celebrated Crow Bourbon of the firm?

A. Whenever the occasion existed. Frequently we would have mail orders for the Crow whisky. Frequently it was spoken of in letters to the salesmen.

Q. During the time you were with the firm, did they issue price

lists?

A. I do not ever remember of doing it to the customers, but we would often get up price lists for our salesmen, as a guide.

Q. Who was the bookkeeper when you first went there?

A. Mr. Hugo.

Q. You refer to the witness who has testified just before you?

A. I do.

(Signed)

ADNUL HOBBS.

Subscribed and sworn to before me this 29th day of December, 1904.

(Signed)

JAMES R. GRAY, Examiner.

435 The United States of America for the Eastern Division of the Eastern Judicial District of Missouri.

STATE OF MISSOURI.

County of St. Louis, 88:

I, James R. Gray, Examiner, hereby certify that the above witnesses, John Osborne Urner, Martin W. Heron, Herman H. Liemke,

Frederick A. Hugo and Adnul Hobbs, were by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that their depositions were reduced to writing by Miss M. I. Clute in the presence of the said witnesses, respectively, and when completed read over to said witnesses, respectively, and subscribed by them in my presence and in the presence of such of the parties and counsel as attended; that said depositions were taken pursuant to the annexed notice and stipulation, at the office of James R. Gray, Room 342 Custom House, in the City of St. Louis, Missouri, beginning on the 12th day of December, 1904, and continuing from day to day as set forth; that the parties were represented at the taking of said deposition by their respective counsel as set forth; that the several exhibits recited were offered in evidence and marked as specially noted in the foregoing depositions; and that I am not counsel or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand and official seal, this 29th day of December, 1904.

JAMES R. GRAY, Examiner.

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W. A. Gaines & Co., Complainants,

vs.

ABRAHAM M. HELLMAN and MORITZ HELLMAN, Defendants.

To the above named complainants or its attorneys:

You are hereby notified that the taking of depositions on behalf of the defendants under the stipulation heretofore entered into between counsel for complainant and defendants, on the second day of December, 1904, for the taking of depositions de bene esse on behalf of defendants, will be taken at the office of Mr. James R. Gray, examiner herein, on the 29th day of December, 1904, at Room 342, Custom House Building, St. Louis, Mo., at 2 o'clock P. M.

KLEIN & HOUGH, Att'ys for Defendant-.

STATE OF MISSOURI, City of St. Louis, ss:

Served the above notice, by delivering a true copy thereof to James L. Hopkins, Attorney for the complainant, W. A. Gaines & Company, this 27th day of December, 1904, at his office in the City of St. Louis, Missouri.

LUTHER ELY SMITH.

Subscribed and sworn to before me this 27th day of December, 1904. My term expires, January 9th, 1907.

[SEAL.] IRWIN WALKER.

Notary Public, City of St. Louis, Mo.

437 And on May 29th, 1907, the following depositions on behalf of defendants were filed in said cause which said Depositions are in words and figures as follows, to-wit:

44-311

In the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

No. 5096. In Equity.

W. A. Gaines & Company Complainant, vs.
Max Kahn et al., Respondents.

To the above named complainant or its attorneys of record:

Take notice that pursuant to stipulation heretofore entered into by and between counsel for complainant and respondents in the above entitled cause, depositions of witnesses on behalf of respondents will be taken at 902 Rialto Building, Southeast corner of Fourth and Olive Streets, St. Louis, Missouri, on the 11 day of April, 1906, at 10 o'clock A. M. and continue thereafter from day to day until said depositions are completed.

These depositions shall be taken in shorthand and transcribed

thereafter on the typewriter.

KLEIN & HOUGH, Attorneys for Respondents.

Service of the above notice acknowledged this 26th day of March, 1906, and all exceptions as to time, place and sufficiency of notice for whatsoever cause, hereby expressly waived and consent given to taking the depositions in shorthand and their extension thereafter on the typewriter.

J. L. HOPKINS, Solic, for Compt.

438 Time for taking Respondents' proof extended by consent to May 1, 1906, and complainant's time for rebuttal extended to and including September 1, 1906.

KLEIN & HOUGH, Attorneys for Respondents. JAMES L. HOPKINS, Attorney for Complainant.

In the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

No. 5096. In Equity.

W. A. GAINES & COMPANY, Complainant,

Moritz Hellman and Max Kahn, Administrator with the Will Annexed of Abraham M. Hellman, Deceased, Respondents.

Depositions of witness- produced, sworn, and examined on the 11th day of April, 1906, between the hours of eight o'clock in the forenoon of that day — at the law office of Klein & Hough, 902 Rialto

Building, southeast corner of 4th and Olive Streets, in the City of St. Louis, State of Missouri, before me, Arthur E. Mooney, a notary public within and for the City of St. Louis, State of Missouri, in a certain cause now pending in the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, wherein W. A. Gaines & Company is complainant, and Moritz Hellman et al., are respondents, on the part of the respondents.

Present: James L. Hopkins, Esq., counsel for complainant, and Luther Ely Smith, Esq., counsel for respondents.

TIMOTHY W. MANNING, of lawful age, being produced, 439 sworn and examined on behalf of the respondents, deposes and says as follows:

Direct examination by Mr. Smith:

Q. What is your name? A. Timothy W. Manning.

Q. What is your business? A. I am a compounder and superintendent for W. H. Lee & Co.

Q. In what business is W. H. Lee & Co. engaged?

A. The wholesale liquor business.

Q. How long have you lived in St. Louis?

A. Forty-one years last February, the latter end of February. Q. Then you came to St. Louis in the year 1865?
A. I came here in 1865?
Q. What business did you engage in?

A. Well, anything I could. I worked for the Transfer Company,

anything that I got until I got to work for this house.

Q. What occupation, if any, did you engage in about August, 1865? A. I was working for the St. Louis Transfer Co. on the levee, I

think it was. Q. Did you undertake at that time any permanent employment? A. Yes, sir; I went to work for Samuel McCartney & Co., the 14th

of August, 1865. Q. What was their business?

A. Wholesale liquors and groceries.

Q. How long did you continue with that house and its successors?

A. Down to the present day.

Q. Who succeeded in business Samuel McCartney & Co.? A. First Hill & Lacroix for a short time, then came Tyra, Hill & Co. for a few years, then came Wood & Lee, then W. H. Lee & Co. after that, which still continues.

Q. And you have been connected with these firms uninterruptedly

from August, 1865, until the present day?

A. Yes, sir.

Q. What were your duties during these years, in what 440 capacity were you there?

A. Just the same as I am now.

Q. Compounder?

A. Yes, sir.

Q. What did you do when you first went there?

A. I took a position under the rectifier and compounder there.

Q. You assisted him?

A. Yes, sir.

Q. When did you become compounder for the house yourself?

A. I think it was about, I am not sure how many years, some-

where about 1868, or '69, some place in there, or 1870.

Q. Do you recall whether or not at the time you first went into the employ of Samuel McCartney & Co. that firm were using a brand of whisky containing the word "Crow," or the words "Old Crow?"

Counsel for complainants objects to the question as immaterial.

A. Yes, sir, we were using—it was my duty to put up the whisky and brand our packages, cases, barrels or half barrels.

Q. And in putting up these packages that you have spoken of was

it your duty to put brands on them?

A. Yes, sir.

Q. Have you with you any impression from the brand or stencil that you used at that time?

A. I have, sir.

Q. Will you produce the same?

By Mr. Hopkins:

Q. Was it with the McCartney house originally?

A. Yes, sir; with the McCartney.

The witness produces an impression or stencil containing the words, "Pure Old Crow Bourbon," and the figures, "1858," surrounded by a figured border, which respondents' counsel offers in evidence and the same is marked, "Respondents' Exhibit Manning A," and is hereto attached.

Counsel for complainant objects to the said exhibit as secondary evidence, agreeing to withdraw the objection if the original 441 stencil is produced before the termination of the examination

of the witness.

By Mr. Smith:

Q. I will ask you to state if you know when this impression was taken?

A. This morning.

Q. Was it done in your presence?

A. Yes, sir; I had it taken by one of the boys at the store.

Q. Do you know it to be an accurate and exact reproduction of the original stencil?

A. Yes, sir: I know it to be so.

Q. I will ask when you first saw this stencil?

A. I could not give the date, but it might be the date when I went to work there; it was in that year.

Q. You are sure it was sometime in the year 1865?

A. Yes, sir.

Q. And was this stencil in use for placing brands upon packages of whisky by the house of Samuel McCartney & Co.?

A. Yes, sir, it was.
Q. And how long did the house continue to use it?

A. Well, up to the present day, we might put on, for instance, "Pure Old Bourbon," and leave the word "Crow" out, on account of the box-head, the boxes at that time were small ones, not so large as they are now, and not having wrappers around them as now; it was a smaller head.

Q. You were using this brand in the year 1865, and for a long

time thereafter?

A. Yes, sir.

Q. And you have continued to use this brand in one form or another to the present time?

A. Yes, sir; there are a few more brands. Q. Have you any impression of any other brand?

A. Yes, sir; I have an impression of the J. Crow brand.

Witness produces an impression of a burning brand bearing the words, "J. Crow Bourbon, Paris, Ky.," which counsel for respondents offers in evidence, and the same is marked "Respondents' Exhibit

Manning B," and hereto attached.

442 Counsel for complainant objects to same as secondary evidence, but states that the objection will be withdrawn if the original burning brand is produced before the termination of the examination of the witness.

Q. I will ask you whether or not this brand which is marked Respondents' Manning Exhibit B was in use at the time you went into the employment of Samuel McCartney & Co. by that house?

A. I don't remember whether it was then or not, but my impression is it was, because we had several burning brands at that time, we had been using that, to the best of my judgment, up to that time, but I couldn't swear that I had.

Q. But your best impression is that you were using it at that time?

A. Yes, sir; I will state there were several brands we still hold, and some burned out and renewed again, my impression is it was in use at that time.

Q. How long did you continue to use this same brand?

A. We use this still.

Q. On what kind of goods did you use the two brands, the impressions of which are in evidence?

A. On a rather fair grade of blend.

Q. And was the blend that you have mentioned put up and compounded by your house?

A. Yes, sir.

Q. And during the time that you were assistant compounder and compounder this was done under your supervision?

A. Yes, sir.

Q. And the whisky upon which these brands were placed was so branded or stenciled without reference to the distillery from which the goods were produced?

A. Yes, sir; according to the grade of the goods.

Q. I will as- you whether or not the words "Crow" or "Old Crow" were in use by other houses in St. Louis at or about the time that you entered the employ of Samuel McCartney & Co.?

Counsel for complainant objects to the question as immaterial.

A. Well, I remember having seen the "Crow" not as a brand stenciled, but there was a kind of stenciled brand with the bird, the old crow picture on. I know "Old Crow" was used, because you can see some of them now, they point out many years ago that they used it altogether, I mean used to put on barrels, stencil brands with the picture of a crow.

Counsel for complainant moves to strike out the answer of the witness as irrelevant, immaterial, and as being secondary evidence.

Q. Do you remember whether or not the words "Crow," or "Old Crow," or the figure of a crow that you mentioned as having been used by other houses than the one that you were connected with from 1865, or were used on blended goods?

Counsel for complainant objects to the question as irrelevant and immaterial.

A. I don't remember, sir.

Q. Do you know whether or not the firm of William H. Lee & Co. in and about the year 1901, received at its place of business in St. Louis, and single stamp so-called Old Crow whiskey?

Counsel for complainant objects to the question as irrelevant and immaterial.

A. Yes, sir.

Q. On or about the month of April, 1901, was there such a lot received?

Counsel for the complainant objects to the question as irrelevant and immaterial.

A. I can't recall the day of the month, but I remember in 1901 getting about 115 barrels.

Q. What was the character of this whisky?

Counsel for complainant objects to the question as irrelevant and immaterial.

A. It was supposed to be Old Crow whisky.

Q. Well, what was it?

Counsel for complainant objects to the question as irrelevant and immaterial.

A. That would be a pretty hard question to answer, because I considered it blended whisky.

Q. Did you yourself examine it and test it?

Counsel for complainant objects to the question as irrelevant and immaterial.

A. Yes, sir, and I reported such to Mr. Lee.

Q. What did you find was the matter with this whisky, if anything?

Counsel for complainant objects to the question as irrelevant and immaterial.

A. I found it was not up to flavor; it was not up to quality, and not the standard it ought to be.

Q. Do you remember from whom these goods came?

Counsel for complainant objects to the question as irrelevant and immaterial.

A. I think it came from Paris, Allen & Co., that is the best of my belief now.

Q. Did you have any conversation with reference to these goods with any representative of Paris, Allen & Co., and if so, with whom?

Counsel for complainant objects to the question as irrelevant and immaterial, and as calling for hearsay evidence.

A. I did with Mr. Blood.

Q. What was his connection with Paris, Allen & Co.?

Counsel for complainant objects to the question as irrelevant and immaterial.

A. I understand he is their agent here.

Q. Traveling salesman?
A. Yes, sir.

Q. What, if anything, was said by Mr. Blood to you with reference to this whisky being known as tank whisky?

Counsel for complainant objects to the question as irrelevant and immaterial, as leading, and as calling for hearsay evidence.

A. Well, it was spoken of as tank whisky and I asked him why it was tank whisky, I wanted to get two-stamp whisky, and he 445 said this whisky was put in tanks to save storing, and where

the barrel was not quite full it would be better to store it in tanks than in barrels where there was 15 to 18 gallons out: I objected to that, and I told him I couldn't see it that way. However, I reported to Mr. Lee about it, and he objected to the whisky in general, he shook his hands and said, "What can I do, my hands is tied." I objected to the quality of the whisky, and I always insisted to try and get the two-stamp goods, because I knew there was a chance of a mix-up on the tank goods, that they could mix it up with a cheaper grade of whisky, make an inferior grade of whisky.

Counsel for complainant moves to strike out the answer of the witness as irrelevant and immaterial, and moves especially to strike out that portion of the answer beginning with the words, "However, I reported," as irresponsive to the question and as irrelevant and immaterial.

Q. How did the quality of this whisky differ from other so-called Old Crow whisky that you had obtained from Paris, Allen & Co.?

Counsel for complainant objects to the question as irrelevant and impaterial.

A. Well, the age it was supposed to be it was inferior in taste and flavor, it was not up to the standard.

Q. How was the color?

Counsel for complainant objects to the question as irrelevant and immaterial.

A. The color was dark, a dark, heavy color.

Q. What age was this claimed to be.

Counsel for complainant objects to the question as irrelevant and immaterial.

A. It was supposed to be—to the best of my recollection, it was 1890, it might be a year older or so.

Q. Did you see the barrels in which this whisky was contained?

A. Yes, sir.

Q. Did you notice whether or not they were marked, and if so, how were they marked?

446 Counsel for complainant objects to the question as irrelevant and immaterial.

A. To the best of my recollection they were branded "Old Crow."

Q. I will ask you whether or not you have in your possession since the date last testified to a sample bottle of the so-called tank whisky, which you have testified about?

Counsel for complainant objects to the question as immaterial.

A. Yes, sir; it was handed to me as the tank whisky to look at, and see what I thought about it, or give my opinion.

Q. Who handed it to you?

Counsel for complainant objects to the question as irrelevant and immaterial.

A. Mr. Morrin, some gentleman connected with the office anyhow.

Q. Did you talk at any time with Mr. Blood with reference to the sample bottle of so-called tank whisky?

Counsel for complainant objects to the question as irrelevant and immaterial.

A. Yes, sir; I have spoken to Mr. Blood about the whisky. I spoke to Mr. Blood about the whisky before Mr. Lee died.

Q. Did you talk with Mr. Blood about the particular bottle or bottles that you testify to?

Counsel for complainant objects to the question as irrelevant and immaterial.

A. To the best of my recollection I did, it was brought up about the quality of the whisky and what I thought about it, and I certainly denounce it as not being an Old Crow whisky, according to my judgment, to the best of my belief. Q. I will ask you whether you know where that sample bottle of Old Crow tank whisky is now?

Counsel for complainant objects to the question as immaterial.

447 A. No sir.

Q. Is it in the possession of the firm of William H. Lee & Co.?

Counsel for complainant objects to the question as immaterial.

- A. No, sir; the last I seen of it I gave it to Mr. Morrin, packed it up for him, sealed and packed it up, it was in my possession for quite a while.
- Q. I show you a photograph and ask you to examine the same and tell me what it is?

Counsel for complainant objects to the question as irrelevant and immaterial.

A. Yes, sir; that is the bottle, the mark is on it.

Q. Is that a reproduction or photograph of the bottle that you have testified about?

Counsel for complainant objects to the question as immaterial and irrelevant.

A. Yes, sir, to the best of my knowledge.

Counsel for respondents offers the said photograph in evidence and asks the notary to mark the same Respondents' Exhibit Manning C, which is accordingly done.

Counsel for complainant objects to same as secondary evidence.

Q. I will ask you what, if any, label appears to be on the bottle?

Counsel for complainant objects to the question as immaterial.

A. The identical label, the very thing itself that was on the bottle when it came from the east.

Q. If there is a label there, read it out?

Counsel for complainant objects to the question as irrelevant and immaterial.

A. (Reading:) "Old Crow, 1890, from sealed tank."

Q. I will ask you to examine the book which I now show you, and state what it is?

Counsel for complainant objects to the question as irrelevant and immaterial.

448 Λ. That is a record book, the entries made of receiving and discharging.

Q. Is that what is familiarly known as Form 52?

A. Form 52.

Q. I will ask you if you know in whose handwriting these entries seem to be?

A. I think in Charles H. Ballman's.

Q. What connection, if any, does he have with the firm of William H. Lee & Co.?

A. He is traveling salesman.

Q. What connection did he have in April, 1901?

A. He was shipping clerk, then.

Q. What duties, if any, did he have to perform with reference to keeping this book?

A. He entered and discharged all goods, entered all a certain

number.

Q. I call your attention to an entry appearing under the date of April 18th, 1901, and ask you if you will read it into the record? A. (Reading:) "April 18th, 1901, Received from Paris, Allen &

A. (Reading:) "April 18th, 1901, Received from Paris, Allen & Co., New York, 115 packages (kind of spirits) Bourbon, (by whom distilled or rectified) Paris, Allen & Co., Second District, New York, inspected by J. Kissick, April 11, 1901, number of gallons (wine) 5194.59 (proof) 5194.59, number of gallons out blank, serial number of package blank, warehouse stamp blank, tax paid stamp blank, rectifier's stamp 8172085/139, wholesale liquor dealer's stamp blank, imported liquors (custom) stamp blank, imported spirits stamp blank, and all entries under "spirits emptied for rectification from stock received" blank.

Q. The house of William H. Lee & Co., in April, 1901, was engaged in the bottling of so-called old Crow whisky, was it not?

A. Yes, sir.

Q. State whether or not this lot of 115 barrels which appears to have been entered in Form 52 that you have last identified, is the same whisky that you testified about in the early part

of your examination?

A. Well, yes, we got in several lots before and after that.

Q. Was this whisky received by your house to be bottled as "Old Crow?"

Counsel for complainant objects to the questions as irrelevant and immaterial.

A. It is all as we would want it by the bottle, barrel or any way you want.

Q. But for Old Crow?

Counsel for complainant objects to the question as irrelevant and immaterial.

A. But for Old Crow.

Q. Do you know whether or not Mr. Blood tasted the sample of sealed tank Old Crow whisky that you testified to?

Counsel for complainant objects to the question as irrelevant and immaterial.

A. I have shown it to him, yes, sir; I objected to it and showed it to him.

Q. Do you know whether he tasted it himself?

Counsel for complainant objects to the question as irrelevant and immaterial.

A. To the best of my recollection he has, I showed it to him and I denounced it.

Q. What did Mr. Blood say?

Counsel for complainant objects to the question as irrelevant and immaterial.

A. Of course, he said it was Old Crow, but I met him one morning early before he was going upstairs, I knew he would be in that morning, and I waited for him at the front door, and he said to me, "Tim, you are going to get that shipment of whisky," he said, "If they give it to you straight,"-I had been after them about the whisky, I would tell Mr. Lee about it. Mr. Lee said, "Tim, what can I do, my hands are tied," but I made it a point to see Mr.

Blood and that is the answer he told me. "If they will give it to you straight," I says-it is not necessary to say what I did say, but I gave him to understand if it was not right they

would hear about it.

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Counsel for complainant moves to strike out that portion of the answer beginning with the words, "I would tell Mr. Lee," as irresponsive and as hearsay.

Q. Was that all that he said, "If they give it to you straight?"

Counsel for complainant objects to the question as irrelevant and immaterial.

A. Yes, sir; and I said, "By God, if you don't you will hear about

Cross-examination by Mr. Hopkins:

Q. What period does the form 52 that you have produced here cover?

A. I am not posted with that book, I never made an entry in it in my life, it is for to take in, receiving, entering and discharging packages as they come in and go out, or dumped or whatever it is.

Q. Please look at the book and state what period it covers?

A. I never looked at the book, as far as the book goes I don't know anything at all about it, any more than I can swear to the number and the like of that.

Q. Please look at the book now and state what period it covers?

A. From July 2nd, 1900, to April 17th, 1905.

Q. Please state from this Form 52 the dates when you found whisky to have been received by William H. Lee & Co., distilled by W. A. Gaines & Co., and received from W. A. Gaines & Co., or any other person, and the number of packages and the kind of spirits?

Counsel for respondents objects to the question as immaterial and irrelevant to any issue in this case.

A. July 21st, 1900, ten packages Bourbon. August 18th, 1900, 100 packages Bourbon. November 26th, 1900, 5 packages Bourbon. 451

April 11th, 1901, 10 packages Bourbon. April 22d, 1901, 5 packages Bourbon, received from L. Caesar. May 9th, 1901, 15 packages Bourbon.

May 14th, 1901, 10 packages Bourbon.

July 20th, 1901, 80 packages Bourbon, received from Paris, Allen & Co.

January 18th, 1902, 5 packages Bourbon.

February 11th, 1902, 100 packages Bourbon, received from Paris, Allen & Co.

March 31st, 1902, 5 packages Bourbon. June 7th, 1902, 5 packages Bourbon.

August 29th, 1902, 100 packages Bourbon, received from Paris, Allen & Co.

December 9th, 1902, 10 packages Bourbon.

January 2d, 1903, 100 packages Bourbon, received from Paris, Allen & Co.

May 14th, 1903, 25 packages Bourbon. May 23rd, 1903, 15 packages Bourbon.

July 7th, 1903, 3 packages Bourbon, received from David Nicholson.

July 20th, 1903, 10 packages Bourbon.

July 30th, 1903, 89 packages Bourbon, received from Paris, Allen & Co., New York.

July 30th, 1903, 21 packages of Rye, received from Paris, Allen & Co., New York.

August 6th, 1903, 20 packages Bourbon.
October 17th, 1903, 10 packages Bourbon.
November 23d, 1903, 10 packages Bourbon.
January 2nd, 1904, 10 packages Bourbon.
January 19th, 1904, 10 packages Bourbon.
February 17th, 1904, 5 packages Bourbon.
March 15th, 1904, 10 packages Bourbon.
April 5th, 1904, 10 packages Bourbon.
April 26th, 1904, 5 packages Bourbon.
May 20th, 1904, 10 packages Bourbon.
May 20th, 1904, 10 packages Bourbon.

June 20th, 1904, 40 packages Bourbon.

July 25th, 1904, 10 packages Bourbon.
September 3rd, 1904, 30 packages Bourbon.
October 5th, 1904, 10 packages Bourbon.
October 20th, 1904, 10 packages Bourbon.
October 28th, 1904, 30 packages Bourbon.
November 1st, 1904, 15 packages Bourbon.
November 23d, 1904, 80 packages Bourbon.

January 3d, 1905, 40 packages Bourbon. February 23d, 1905, 60 packages Bourbon. April 8th, 1905, 10 packages Bourbon.

April 10th, 1905, 25 packages Bourbon.

Counsel for respondents moves to strike out the above answer on the ground that the matters contained therein are immaterial and irrelevant.

Q. I show you a label containing printed matter reading as follows: "Old Crow Pure hand-made sour mash Kentucky Bourbon, Distilled by W. A. Gaines & Co., Frankfort, Kentucky, selected and bottled by William H. Lee & Co., St. Louis. We guarantee the

purity and high quality of the goods, which we especially recommend for family use;" I will ask you if you are familiar with that label?

A. Yes, sir. Q. How long have you been familiar with that label?

A. From the time we commenced to put it up.

Q. When was that?

A. I don't remember what year it was.

Q. About how long since? A. I couldn't say, exactly.

Q. Can you tell within ten years?

A. It was inside of ten or twelve years. Q. How is your memory, good or bad? A. Well, it is not as good as it used to be.

Q. Then it is nearly as good on cross-examinations at it was on direct examination, it is, Mr. Manning?

A. Well, I will give it to you as well as I can remember.

Q. Who has charge of the bottling in which this label has been used?

A. I have had.

Q. You have had charge of all of it?
A. Well, yes, sir. 453

Q. Can you approximate the number of cases of bottled whisky put up under this label, which have been bottled and sold by William H. Lee & Co.?

Counsel for respondents objects to the question as immaterial to the issues raised in this case, stating that these depositions are now being taken for use in the case against Hellman, and not in the case against Lee, which is not on trial.

A. No, sir.

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Q. How many cases a year have been so bottled and sold?

Counsel for respondents states that he makes the same objection.

A. I have got no idea, it is not my business to keep the stock.

Q. Can you tell within 10,000 cases of how many there were during the year 1905?

Counsel for respondents states that he makes the same objection, and objects further because the witness has stated that he has had nothing to do with the record in this branch of the business.

A. No, sir; I have no idea in the world how many cases they have sold, or how many were put up, I never paid any attention.

Q. Might there have been as many as 50,000 in the year 1905?

Counsel for respondents states that he objects on the grounds above noted.

A. I never kept any account of it at all.

Q. And it is your business to see that this stuff is bottled under these labels, is it?

Counsel for respondents states that he makes the same objection.

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A. Yes, sir.

Q. You have had charge of it?

A. Yes, sir; I had the men and boys putting them up. Q. You are in sole charge of that department, are you not?

Counsel for respondents states that he makes the same objection,

A. Yes. sir.

Q. And were during 1905?

A. I was as far as giving instructions, I didn't stand by and see every case put up. I didn't know how much they each put up, just would keep the boys working, and that is all there is about it.

Q. You have a very distinct recollection of facts transpiring in 1867 and 1868, and yet you can't remember the amount of work

done in your department last year?

A. Well, sir, I had boys putting them up, I didn't stand there to see what was done, there being so many different brands and cases coming up, it was not this alone, it was others.

Q. Were there as many as 100,000 cases of Old Crow whisky bot-

tled and sold under this label in 1905?

Counsel for respondents objects to the question as immaterial and irrelevant.

A. I don't know how many were sold, I will answer the question that way; in fact it was not my duty to see how many was kept or put up, the orders would go upstairs and we would keep the boys working on them, and that is all I bothered about it.

Q. What is your best recollection as to the number of cases of whisky that were put up in your department under this label during

the year 1905?

Counsel for respondents object- to the question as irrelevant and immaterial.

A. I have got no idea, sir.

Q. What is your best impression of the number of cases bottled in your department under this label during the past month of March, 1906?

Counsel for respondents objects to the question as irrelevant and immaterial.

A. I have no idea.

Q. Has any whiskey been bottled under this label under 455 your supervision during the current week, and, if so, how much?

Counsel for respondents objects as immaterial and irrelevant.

A. There has been, yes, sir.

Q. How much?

Counsel for respondents objects to the question as irrelevant and immaterial.

A. I don't know.

Q. Can you say whether or not there was as much as 1,000 cases?

Counsel for respondents objects to the question as irrelevant and immaterial.

A. It takes pretty lively work to do that.

Q. Is that the best answer that you can give to my question?

A. I don't suppose there was a thousand cases put up, I don't really know how many because I do not pay any attention to how many goes up.

Q. If you don't pay attention to how much bottling goes on in

your department, who does?

Counsel for respondents objects to the question as irrelevant and immaterial in this case.

A. There is no regular line of work for one fellow to do, we get the orders and put up so much, then get an order for something else, and that is the way it goes.

Q. In what month was it that you first began to use the stencil,

Manning Exhibit A?

A. That was in the house when I went there. Q. What month was that?

A. That was in August, 1865.

Q. How soon after that did you begin to use the burning brand,

Manning Exhibit B?

A. I don't remember that, sir, when we commenced to use that, but I remember that other brand was in the house—I am pretty sure that is where the burning brand was because it was an old brand.

I know this stencil brand I have been using nearly all the time; in fact I nursed up that brand pretty good, because 456 the old man that I was working for I like as a good man.

Q. Who was that?

A. Samuel McCartney, I have got a few little relics that I hold.

Q. How long have you been aware of the existence of W. A. Gaines & Co.?

A. I don't remember, I have known them for years.

Q. How many years?

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A. I have known them by the brand of whisky, the Gaines whisky. I don't remember, sir, I couldn't say exactly how many years.

Q. What brand of whisky do you refer to?

A. This Old Crow whisky, you asked about Gaines, and that means Old Crow.

Q. Gaines means Old Crow?

A. Not exactly, I have seen other brands, different brands.

Q. You have had nothing to do with the buying of whisky, either for the Lee Co. or its predecessors, have you?

A. No, sir; not a thing. I have examined the liquor when it came

into the house to see what it was, that was my duty.

Q. When did you first examine a package of W. A. Gaines' Old Crow whisky in that manner?

A. I didn't select that more than I would any other.

Q. I say when did you first examine it?

A. When it came into the house.

Q. How long ago, how many years?

A. I don't know exactly how many years, it didn't make any particular difference to me what kind of whisky came in, I would examine it and report. I would see if it come up to sample.

Q. You have not had anything to do with the buying of whisky

at any time, as I understand you?

A. No. sir.

Q. Did you pay any attention to the market quotations of whisky?

A. Not a thing.

Q. You confine your work to your own department?

A. I certainly do.

Q. And your work has always been rectifying and compounding?

A. Yes, sir.

Witness produces stencil and burning brand referred to heretofore in this deposition, and thereupon counsel for complainant, having inspected and compared the same with Manning Exhibits A and B, withdraws his objections as to the occupancy of said exhibits, but reserving his objections as to relevancy and material-ty.

The label concerning which the witness has been interrogated on cross-examination is the same label which is exhibited in the bill of complaint in the case of W. A. Gaines & Co. vs. William H. Lee & Co. et al., now pending in this court, and it is stipulated that a copy of the said label may be hereafter filed as an exhibit herein by

complainant.

#### Redirect examination by Mr. Smith:

Q. Mr. Manning, counsel on cross-examination has asked you with reference to the various lots of whisky received by William H. Lee & Co. having been distilled by W. A. Gaines & Co., said receipts being between July 21st, 1900, and April 10th, 1905; now I will ask you if you recall a lot of eighty-nine barrels which, on cross-examination, appeared to have been received about July 30th, 1903?

A. Well, my memory is of the lot, but not the number of barrels. I know it was quite a carload or so.

Q. What do you mean by saying that your memory is of the lot

and not of the number of barrels?

A. Because I objected to the whisky. I sampled the whisky and

objected to it.

Q. Why did you object to the whisky?

A. Like any other samples or any other whisky because if I found it was not up to sample or to the grade I, would object to it; at least I would state my objections whether I thought it was the right whisky or not.

Q. Do you remember where this lot come from?

A. I think that came from Paris, Allen & Co., if my recollection serves me right.

458 Q. What kind of goods was it?

Counsel for complainant objects to the question as immaterial.

A. According to my opinion it was not up to the standard of the

Old Crow whisky.

Q. Was it double stamp or imported, or what kind of goods was it?

Counsel for complainant objects to the question as immaterial.

A. I really could not remember. Your one stamp goods is what they call tank whisky; then the two stamp, there would be an importer's stamp on them—the proof would not be up to the standard and the quality of the goods would not.

Q. You refer now to the goods that had been exported and re-

imported?

A. Well, yes; I refer to that, too, because I have shown it up where it was not the quality of the goods that it ought to be.

Q. Were there other receipts at or about this time that you

found to be below the standard?

Counsel for complainant objects to the question as immaterial and on the ground that the question is indefinite, as it does not specify what standard.

A. I have found a great deal of the whisky below the standard.

Q. When you say below the standard, what do you mean?

Counsel for complainant objects to the question as immaterial.

A. I mean it was not up to the grade. I considered it was not

Old Crow whisky; it was a blend or a mixture.

Q. Was there more than one lot which was of the quality that you have described?

Counsel for complainant objects to the question as immaterial.

A. Yes, sir; there were several of them. I have got whisky from Kentucky, from this Gaines distillery, that I objected to; I objected to it before Mr. Blood.

Signature waived.

EMILE Schaefer, of lawful age, being produced, sworn and examined, on the part of the respondents, deposes and says, as follows:

Direct examination by Mr. Smith:

Q. What is your name?

A. Emile Schaefer.

Q. Where do you reside?

A. I reside in Yazoo City, Mississippi.

Q. What business were you engaged in immediately following the close of the Civil War, and where?

A. I commenced with the dry goods business in Yazoo City, but soon spread out and had a general supply business; kept everything that people wanted; dry goods, hardware, groceries, liquors and everything of that kind.

Q. Did you have any dealings, while you were engaged in busi-

ness as you describe, with the firm of I. & L. M. Hellman?

A. Yes, sir; I had a good deal of business with them, and I knew them both; L. M. Hellman visit- us two or three times; I am not certain of the number of times, but he was down there; he was a large, heavy-set man.

Q. When did you first have dealings with the firm of I. & L. M.

Hellman?

A. My recollection is I didn't have any dealings with them until 1866; I may have had some in the latter part of 1865; I am not positive of that, but I am sure of 1866.

Q. In what line were your dealings?

A. With Hellman?

Q. Yes.

A. Only in the liquor line; that is all they kept.

Q. Did you have occasion to purchase from them any liquor under the name of Crow or Old Crow?

A. Yes, sir; we scarcely ever had a shipment from them without

a barrel or two of that liquor.

Q. What is the earliest purchase that you recall of Crow whisky from them?

A. 1866 is the earliest that I can recall.

Q. That is the earliest date that you would be positive of?

A. Yes, sir; I may have bought it in 1865, but I could not say positively. I commenced in June, 1865, in business.

Q. In what sort of packages was the whisky which bore the mark

"Crow" or "Old Crow" contained?

A. Always in barrels; iron-hooped barrels.

Q. Will you describe what marks, if any, these barrels bore?

A. They had on one end of the barrel a bird with the wings spread out, burnt in the head of the barrel and the words "Old Crow" were burnt under it, they were all burnt, not marked, burnt in the wood.

Q. Did the name of the firm appear on the barrel?

A. I cannot say; I don't think so; I am not sure about that. Q. You are positive that the word "Crow" was there?

A. Yes, sir; that was on one end of the barrel and on the other end was my mark, where they shipped it to me.

Q. How long did you continue to purchase the Crow or Old

Crow whisky of I. & L. M. Hellman?

A. I am satisfied that I bought it up to 1870, and rather think I bought it even from Mr. Howard afterwards; my line of business changed afterwards, and I didn't deal in liquors after 1875. I am satisfied of that; I let the liquor part of the business drop.

Q. Who, if anyone, traveled in your country and visited your

place in the interest of I. & L. M. Hellman?

A. The first one that came there was a man by the name, he had the same initials that I did, Emile L. Charropin, who is now living at Covington, Louisiana; I met him three years ago.

Q. What kind of goods was it that were contained in these

barrels marked "Crow" or "Old Crow"?

A. The finest whisky that I handled and I had some customers that wanted fine whisky, and it was flush times 461 shortly after the war; the people had saved some cotton out of the wreck, and they had plenty of money, and they wanted the You could not sell those goods down there now.

Q. I will ask you whether it was single stamped or double stamped

goods, if you remember?

A. I am not so sure that the Stamp Act was in force at that time; I don't remember about the stamp; I think it was before the Stamp Act was passed.

Q. Do you remember whether it was blended or not?

A. No, they were not blended; they were pure goods; they were first-class goods. I am not sure about the stamp; my idea is that in those years there was no Stamp Act; I think it was passed afterwards; I am not sure about that, because I don't remember about the stamp; I know my recollection is not very distinct on that. My recollection is that I always paid \$3.00 a gallon for that whisky. They charged us a pretty good price in those days and did not sell goods as close as they do now.

 $\tilde{Q}$ . You have not been engaged in the liquor business since 1875? A. No, sir.

Q. Do you recall whether these barrels bore any other marks than what you have described?

A. I don't remember any other marks; I remember this partic-

ularly.

Q. How frequently did you make purchases from Hellman?

A. That depended on how my stock stood; generally three or four times a year; I think Charropin came there every sixty days, and he scarcely came there that I did not buy goods from him, but I may not have bought this fine whisky every time. I became very intimate with him, and whenever he came he took dinner with me at my house, and was generally there on Sundays; arranged it so that he could be there on Sundays.

Q. Was there anyone else in the city who sold or dealt in this Old

Crow?

A. Yes, sir; there was an old bar-room man whose family is there now, he is dead himself, named Haberkamp, and another man named John Lear, whose son is now the president of the Delta Bank and Trust Co.; those men who handled it are all dead. There was another man by the name of R. C. Shepard that handled it, but he is dead.

Q. These three houses that you mention handled Old Crow

whisky?

A. I think so; I could not swear positively to that; I think they all handled fine whisky, and that was the finest whisky we handled. Two of these kept a bar-room or saloon; the third was quite a wealthy man, who done business like I did.

Q. Did you, during that period, visit St. Louis? Yes, sir; I was in Hellman's store several times.

Q. Did you see packages there branded with the words "Old Crow?"

A. I don't remember that, whether I saw it in the store or not; I generally went in the office, transacted my business and went out again; I never stayed here a long time; I was always a hurry man; attended to business and went back home. L. & M. Scharff can tell you what kind of a man I used to be; I used to be quite active in my younger days, but I am getting a little slower now. Up here at Rice-Stix, the Eismann's, if they are living yet, they can tell you about me.

Q. Do you know of any other houses in the South in addition to those that you have mentioned that you know dealt in Hellman's

Old Crow?

A. No, sir.
Q. You are familiar with those people in your own town?

A. Yes, sir.

Q. You are certain that you dealt in this as early as 1866?

A. Yes, sir; about that I am very positive; I may have handled it in the latter part of 1865, but I am not sure of that.

Q. Why are you so positive?

A. Well, I know that Mr. Charropin commenced traveling there very early in 1866 and I bought the goods of him. Then I

know of the circumstances that I sold to a Captain Walker a barrel of this whisky in overflow times, and that overflow was in 1867; we have had only three high waters there, the high water of 1867, 1882 and 1897; this was in 1867, and he lost half a barrel of whisky. He was the son of Secretary of War Pope Walker. I know that was before that overflow a year; that is the reason I am positive. I talked it over with Charropin. In fact, there is a gentleman living in Yazoo City that clerked for me 19 years, who is now City Clerk; I am on the board of school trustees in my town, and he happened to be present the other night and I mentioned this thing, and he remembers something of this, too; if you want him you can get him; he is the City Clerk in our town; he was working for me 19 years.

## Cross-examination by Mr. Hopkins:

Q. Was this whisky that you bought and handled in this manner a Bourbon or Rve whisky?

A. I think it was a Bourbon whisky. Q. Kentucky Bourbon whisky?

A. I don't know whether is was Kentucky or not; I don't know where it was made.

Q. You don't know who it was distilled by?

A. No; the finest whisky I handled was that whisky, and I bought it from I. & L. M. Hellman, and it was graded "Old Crow"; I don't know who made it.

Q. You bought it, believing it to be a straight, high-grade Bour-

bon whisky?

A. That is it; yes, sir.

Q. That is a regularly distilled whisky and not a compound or blend?

A. No, sir; nothing of that kind.

Q. And you paid a very high price for it?

A. Yes, sir; my recollection is that it always cost me \$3.00 and upwards.

Q. In what business have you been engaged since 1875?

A. I was engaged in the same business up to 1883. Q. You simply discontinued the liquor branch?

A. Yes, sir; in 1875.

Q. You have been in what since 1883?

A. Since 1883 I have been in various businesses; I ran a cotton oil mill there for 14 years, and in addition to that I have a cotton farm which my son is managing for me; I am making cotton for a living now, which is a very hard living, too.

Q. Since 1875 you have not had occasion to handle or deal in any

whisky?

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A. No, sir.

Q. And during all that period that you handled this whisky was it of the same high character that you described, uniformly the same?

A. Yes, sir; I handled other whiskies in addition to that,

Q. But I mean this particular whisky?

A. Yes, sir. Q. This was at all those times a high-grade, straight Kentucky Bourbon?

A. I don't know about the Kentucky part; I don't know where the whisky was made; it may have been made in Kentucky; I don't

Q. At all events, you never knew it was made in Hellman's cellar. did you?

A. No; you can't prove the making of it by me.

## Redirect examination by Mr. Smith:

Q. You yourself are not familiar with the distilling process?

A. No, sir; I know nothing about liquors; I merely handled them in that way. The only way I found out this liquor was fine was by people who were judges of liquor; they always smacked their lips and said, "Schaefer, this liquor is very good."

Q. You yourself never pretended to be a judge of whisky?

A. No, sir; no judge of whisky; I never drank much of it; I reckon if I did I wouldn't be here now. The friend that I mentioned that was a rich man drank a good deal and he has been dead 20 years, and was no older than I am.

Q. When counsel used the word "straight" you did not attach any

technical meaning to that, did you?

465 A. I merely mean by that that it was not mixed in any way; I don't know what that technical means: I supposed it was whisky that had never been tampered with; was in its original state like it came from the distillery.

Q. You don't know anything about the process of blending?

A. No, sir; I know nothing about that; I only heard of it and I suppose it means that the goods are mixed.

Q. You are not informed as to whether or not there are any high-grade blands that rank very high?

A. No, sir; I know nothing about the modus operandi of making

whisky?

Q. Or the blending of it?

A. No, sir.

- Q. Nor the relative merits of high-grade blends and other whiskies?
- A. No, sir; you will have to get a better judge than me to get that.
  Q. You are positive as early as 1866 that you dealt in Hellman's Old Crow?

A. Yes, sir.

Q. You ordered it by the name of Old Crow?

A. Old Crow; yes, sir.

Q. And it came in packages marked "Old Crow?"

A. Yes, sir.

Q. Have you known the firm of I. & L. M. Hellman, and its suc-

cessors, A. & M. Hellman, down to date?

A. No, sir; I never had any dealings with its successors, after the firm of I. & L. M. Hellman I dealt no more in liquors. This Mr. Hellman that came to see me here in the city the other day, I didn't know him.

Q. During the time that you dealt with the firm of I. & L. M.

Hellman did you know the reputation of that firm?

Counsel for complainant objects to the question as immaterial and irrelevant.

A. It was always very good; if it was not I would not have dealt with them.

Q. How did they treat you in their dealings with you?

Counsei for complainant objects to the question as immaterial.

A. Always treated me correctly, courteously and straight; I never had any difference with them.

Q. You always got the goods you asked for?

466 Counsel for complainant objects to the question as immaterial and irrelevant.

A. I always got the goods I asked for, and I think if they were

living they would tell you that they always got their money.

Q. I will ask you if you recall seeing at the place of business of I. & L. M. Hellman, or elsewhere, a glass sign of which this photograph is a reproduction (referring to the photograph of the glass sign heretofore put in evidence)?

A. I have no recollection of it; none at all.

Q. Do you recall seeing a brand similar to the one a cast of which I now show you, marked "J. W. Crow's Old Bourbon," (referring to Defendants' Exhibit No. 4, December 12th, 1904)?

A. No, sir; I don't remember that; I don't think I ever saw that;

neither one of those.

Q. But you are positive that the words "Crow" or "Old Crow"

appeared on the heads of the barrels, that you bought from I. & L. M. Hellman?

A. Yes, sir.

Signature waived.

At this point, not being able to complete the taking of these depositions at this time by consent of counsel, I adjourned the further taking of the same until 10 A. M., April 13th, 1906.
[SEAL.] ARTHUR E. MOONEY,

Notary Public.

Pursuant to adjournment, as above stated, on April 13th, 1906, at the same place and between the same hours, I resumed the taking of the depositions as follows:

Present: James L. Hopkins, Esq., counsel for complainant, and

Luther Ely Smith, Esq., counsel for respondents.

HERMAN E. HAEUSSLER, of lawful age, being produced, sworn and examined on the part of the respondents, deposes and says as follows:

Direct examination by Mr. Smith:

Q. What is your name? A. Herman A. Haeussler.

Q. Where do you reside and what is your occupation?

A. I reside in this city; I am a lawyer.

467 Q. Do you know the firm of I. & L. M. Hellman, formerly engaged in the liquor business in St. Louis?

A. Yes, sir; very well.

Q. When did you first know that firm?

- A. They succeeded Klyman, Meyers & Co., and I don't know exactly when the change took place. Mr. Isaac Hellman was the company of that firm, and then after Klyman & Meyers quit or died then Louis Hellman became a partner with Isaac, and then the firm of I. & L. M. Hellman was made; I don't remember exactly the date of that.
  - Q. Did you know the members of this firm of I. & L. M. Hellman?

A. Yes, sir.

Q. Did you know the firm of A. M. Hellman & Co.?

A. Yes, sir.

Q. And Abraham M. Hellman and Moritz Hellman?

A. Yes, sir; I knew all of the changes of the firm from 1862; they were my neighbors; I was their attorney; they were on my bond and I was on their bond as so on.

Q. Where was their place of business first located?

A. On Pine Street between Main and Second, Sharp & Broadhead was at the corner, the Board of Underwriters was next and then at the corner of the alley came the Hellman concern.

Q. You were in the same block with them?

A. Yes, sir; in the same half block there together.

Q. I understand you acted as the attorney of the firm of I. & L. M. Hellman.

A. Sharp & Broadhead did, with which I was until I afterwards went in with Slayback, and then it was Slayback and myself that were their attorneys.

Q. How far back do you think you acted as their attorney? A. You mean of I. & L. M. Hellman, or the firm before that?

Q. The firm before that. A. Since 1862, anyway.

Q. Did you visit their place of business frequently?

A. Yes, sir; I used to go in there often. After we had been on the corner of Main and Pine we moved to the southeast corner of Second and Pine, but in the same block still.

Q. During how many years were you a near neighbor of theirs? A. I think it was to 1868, and then we came to the corner of

Third and Pine and we were there many years.

Q. Do you know whether or not the firm of I. & L. M. Hellman

dealt in whisky known as Crow or Old Crow?

A. They were a liquor house—I have been asked before about the matter, and all I remember is this: There was a brand of Crow whisky at that time, and I remember that they had it there; whether I saw it on the signs—my recollection is I saw it on the barrels laying on the sidewalk; they always had their stuff laying on the Pine Street side when it was shipped; I noticed it on the brand there and either on the picture or on the barrels there was a crow with it, or a bird with it meant for a crow, I reckon; anyhow, there was a bird with it.

Q. The picture of a bird and the words "Crow" and "Old Crow?' A. My recollection is "Crow;" I don't recollect any "Old Crow"

to it.

Q. You think that was used as far back as 1862?

A. Yes, sir; anyhow between 1862 and 1864; during those two years; the particular time I don't know. The whisky they would get in barrels from Cincinnati and Kentucky were placed mostly alongside of the house on the alley side, and they also had a real and they had them there. Their whiskies would come there in their natural state, as it might be called, from the distilleries, or wherever they bought it, and they were generally there for a few days, one or two rows deep; they had everything from top to bottom in that building

Q. Do you know whether or not the Crow whisky was dealt in by

other houses in St. Louis at that time?

A. Those times the folks that went in to take a drinl would call for Crow whisky the same as they called for Bour

bon or Robinson County, different drinks of that kind. I has got to be here of late all kinds of Stonewall and everything else but at that time there were not so many. They had a lot of sign hanging in the office, kind of gilt fixings, fancy signs, made her in town; but what particular ones I don't know; they had differen manufacturing houses' signs hanging all over the office.

Q. You don't remember whether there was a Crow sign there of

not?

A. That I don't remember; I don't know whether that was hang ing there or not; but I remember seeing it, but I can't tell you th

particular place. I used to get my whisky there, but I used to get it by the demijohn; there were some bottled goods, but I don't think they made the bottled goods so much at that time.

Q. Do you know whether they had any bottled goods with the

word "Crow" or the picture of a crow on them?

A. I don't remember; they had a kind of case there with bottled Those bottled goods you would get in a saloon if goods in them. you wanted to go off on a fishing trip, or something of that kind. I think there was a concern there at that time where I would get a bottle when I would go on a trip; I think a concern called Schureman & Keferstein; Keferstein afterwards got to be a real estate agent. They had all kinds of liquors and fancy goods.

#### Cross-examination by Mr. Hopkins:

Q. You were on the same block with the Hellman office?

A. The same half block between the alley and Main Street on the south side of Pine; our office was on the second floor on the corner, and there was a room in between us.

Q. When you moved from Main Street to Second Street were you

on the same block?

A. Yes, sir; but on the other half; then we were on the third floor;

Sharp, Broadhead and myself. 470 Q. Your offices were in that half block from 1862 to 1868?

A. Yes, sir; and then we came up here in the Insurance Building, Third and Pine.

Q. After you got up to Third Street you still continued to be the

legal advisers of Hellman & Co.?

A. Yes, sir; most of our clients were down there; the Trader's Bank went in there and Isaac Hellman and I were directors in that bank from the start; when Isaac died Louis Hellman took his place in the Board of Directors, and he and I were directors until we wound the bank up.

Q. You have nothing which enables you to fix definitely the earliest date when you saw any of this Crow or Old Crow whisky?

A. Nothing except it was back of that time; I am sure the first two years we were there, because I took more notice of those things at that time; that was the time of the war, and they were making those goods to give to the sutlers. Barnhardt & McCarty were in the business then, and they had a peculiar habit of putting all their goods on the sidewalk to show what business they were doing.

Q. Are you positive whether the picture of a bird was branded on

the barrels or whether it was merely the word "Crow"?

A. No; there was a bird there, and the word "Crow," I am not sure whether that was on the barrel or on that sign; my impression is that it was the barrel, because I don't recollect that particular sign out of any of the balance of them.

Q. Then, if I understand, you are positive that in that establishment or on the sidewalk you saw the picture of a crow and the word

"Crow" as applied to whisky?

A. On a whisky barrel or applied to whisky.

Q. Either on a sign or on a barrel?

A. Yes, sir; it was a black brand or something of that kind that was on a barrel. They had other brands there, too, that they used in the same way.

Q. You had never your attention particularly attracted to this brand in connection with litigation, or anything of that

471 sort?

A. No, sir; I only recollect drinking it, and the boys calling for that brand of liquor; sometimes I would take the same as they did; some thought it was a little sweeter but when you got it pure you got it pretty strong.

Signature waived.

At this point, not being able to complete the taking of these depositions at this time by consent of counsel, I adjourn the further taking of the same until 2 P. M. April 21st, 1906.

SEAL.

ARTHUR E. MOONEY. Notary Public.

Pursuant to adjournment, as above stated, on April 21st, 1906, between the same hours and at the same place, I resumed the taking of the depositions as follows:

Present: James R. Hopkins, Esq., counsel for complainant, and

Luther Ely Smith, Esq., counsel for respondents.

MORITZ HELLMAN, of lawful age, being produced, sworn and examined on the part of the respondents, testified as follows:

Direct examination by Mr. Smith:

Q. State your name?

A. Moritz Hellman.

Q. What is your age?A. My age is 55 on the 17th of May.

Q. Were you acquainted with the firm of A. M. Hellman & Co. and its predecessors?

A. Yes, sir.

Q. When did you first know that firm or its predecessors?

A. Well, I came to this country in 1871, in 1871 I arrived here from Europe.

Q. Did you come to St. Louis at that time?

A. I came to St. Louis at that time and I worked for the firm on the 1st of January, 1872, but I had been around the store all the time since 1871, when I arrived here.

Q. What was the firm name?

A. I. & L. M. Hellman.

Q. How long have you been connected with the firm of I. & L. M. Hellman, and its successors in business?

A. At the time I worked for the firm?

Q. Yes.

A. From the 1st of January, 1872.

472 Q. From the 1st of January, 1872, you have been connected with the firm and its successors?

A. Yes, sir; I have been working for the house all the time.

Q. And have you during the latter part of that time been a member of the firm?

A. Yes, sir, I have been a member of the firm.

Q. You were a member of the firm of A. M. Hellman & Co.?

A. Yes, sir.

Q. I will ask you if when you first came to St. Louis you saw in the house of I. & L. M. Hellman any sign or brand containing the words "Crow" or "Old Crow" upon whiskey?

A. Yes, sir, I did.

Q. Will you tell the Court what that brand was, describe it?

A. It was J. W. Crow, a half round brand, J. W. Crow Bourbon, a burned brand.

Q. Was that brand burned upon barrels? A. Yes, sir.

Q. I will ask you to examine Defendants' Exhibit No. 4, dated December 12th, 1904, and tell the Court what that is?

A. This is the exact brand that I saw.

Q. That is a plaster cast?

A. I know, but this is the brand, the types, I have seen it burned into the barrels at that time.

Q. Then the lettering which is on this plaster cast corresponds with your recollection of the brand that you testified to?

A. Yes, sir.

Q. I will ask you if you saw any glass sign bearing the words "Crow," or "Old Crow" when you first went to the house in 1871?

A. Yes, sir, we had signs of I. & L. M. Hellman Crow Bourbon,

the sign that we have got down at the store now.

Q. I will show you a photograph which has been heretofore offered in evidence as an exhibit on the part of the defendants, and will ask you to tell the Court what that is?

A. Well, that is the brand, that is the show card that we had. Q. What is that a photograph of?

A. This is a photograph of the exact show card that we had down at the house all the time, we shipped it out, we sent is out to customers.

Q. That is, you sent out glass signs of which this is a photograph?
A. Yes, sir.

Q. This sign reads "Celebrated Crow Bourbon, I. & L. M. Hellman, St. Louis," and has the figure of a barrel with a crow perched on it in the center?

A. Yes, sir.

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Q. You say you first began employment in the firm in 1872?

A. On the 1st of January, 1872.

Q. In what capacity? A. Shipping clerk.

Q. Did you, as shipping clerk, ship out goods bearing the brand "Crow" or "Old Crow?

A. Yes, sir.

Q. I will ask you what kind of goods it was?

A. Blended goods. In those days we did a big southern business, and all over the southern country we shipped mostly blends, there

was very little straight goods sold then.

Q. I will ask you whether or not the words "Crow" or "Old Crow" that you used on packages containing the blended whiskey that you have testified to, had any reference to the distillery in which the goods were originally distilled?

Counsel for complainant objects to the question as incompetent and immaterial, as the personal meaning of the words "Crow" or "Old Crow" is entirely different from the meaning of the words "Crow" or "Old Crow" to the trade, and consumers of whiskey, and as foreign to the issues.

A. No, they had no reference, we sold it under that "Crow," that is all I know about it.

Q. Did you at that time, during the time that you testified to, buy whiskey from W. A. Gaines & Co. or Gaines, Berry & Co.?

A. Not that I remember.

Q. And the words "Crow" or "Old Crow," or the figure of a crow, that you used, were put solely on packages containing whiskey that you yourself had blended?

A. Yes, sir.

Q. During the years that you testified to, to what class of customers did you sell the goods, the wholesale or retail trade?

A. The retail trade.

Q. And in what portion of the country?

A. I traveled in Missouri, a little in Illinois, and I was substituted as traveling man whenever any one left or got sick, I made one trip in Texas, I made one trip to Arkansas, I traveled to Florida, I traveled to Georgia, to Alabama, but my principal traveling was through Louisiana and Mississippi, where I have not seen any straight Crow whiskey, all blends from all different people.

Counsel for complainant moves to strike out the answer of the witness beginning with the words "I have not seen any straight whiskey," on the ground that that portion of the answer is not responsive to the question.

Q. I show you an impression of a stencil brand and ask you to state what it is?

A. You want me to state what this brand is?

Q. Yes.

A. They are using this brand on barrels that we sell of Crow whiskey, blends.

Q. And what does this brand consist of?

A. This brand reads, "Hellman's Celebrated Crow Whiskey," with the figure of a crow, the whole contained in a circle with a fancy border.

Counsel for respondents offers in evidence the impression of a stencil brand last testified to by the witness and asks the notary to

mark the same "Respondents' Exhibit Moritz Hellman A," which is

accordingly done. Counsel for complainant objects to same as secondary evidence, the objection to be withdrawn on the production of the stencil at or before the hearing of this cause.

# Cross-examination by Mr. Hopkins:

Q. Where do you reside?

A. I reside here in St. Louis now, but I have been living in the South.

Q. Where? A. In Natchez, Mississippi.

Q. What is the style of your business here at the present time?

A. I am at the present time of the Hellman Distilling Co. Q. How long did you reside in Natchez, Mississippi?

A. Since 1890 up to last year.

Q. Were you engaged in business there?

A. No, sir, I was engaged in our firm here, I traveled.

Q. You traveled in the southern territory for them?
A. Yes, sir.

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Q. Did you ever see the metal burning brand of which this plaster cast purports to be a fac-simile?

A. Yes, sir.

Q. What became of it?

A. I suppose it is down at the store; I don't know.

Q. When did you last see it?

A. I have not seen it for years, because I have not been here much. Q. Did you ever compare it with this plaster of paris cast to see if this is an exact copy?

A. Yes, sir, this is an exact copy, I know the style and I know the

lettering.

Q. That was not my question, did you ever compare the two to see if this was an exact copy? A. I never thought it necessary to compare it, but it is exactly the

same brand.

Q. That is the same words and the same arrangement? A. That is the same words and the same arrangement.

Q. What do you mean by a blended whiskey?

A. A blended whiskey is a whiskey that is of two different kinds or more mixed, it makes goods suitable to the taste of the trade.

Q. Have you ever seen "Old Crow" listed in any of the price lists

of the liquor trade?

A. I suppose I did, but I never paid any attention to it, as I had no reason to do it.

Q. Are you acquainted with the whiskey price list of the J. W. Biles & Co.?

A. I have seen it, but I have not paid much attention to it because my trade was mostly blends.

Q. Can you name any of the other price lists of the whiskey trade?

A. I have seen a number of them.

Q. Can you name some of them?

A. Well, I have seen—we are getting them every day, Clarkson. Voss.

Q. And then there is another Biles price list published in 476 Cincinnati, is there not?

A. I don't know whether there is or not. Q. Have you seen a small, red price list?

A. I don't recollect.

Q. You have been familiar with those price lists for a great many

years, have you not?

A. No, sir, I have not, because I have not been here much. I have been mostly down South and I have not paid much attention to price lists.

Q. Did I understand you to testify that this photograph which Mr. Smith showed you is a photograph of a sign that was displayed in the place of business of I. & L. M. Hellman in 1871?

A. 1871, yes, sir, I didn't start with the firm in 1871, but I seen

it in 1871.

Q. This is a photograph of that same sign?

A. Yes, sir.

Q. Where was it displayed?
A. It was at 112 Pine Street near the shipping office.

Q. Your business has been incorporated since the beginning of this suit, has it not?

A. Since A. M. Hellman died.

Q. Since the death of Mr. A. M. Hellman?

A. Yes, sir.

Q. He was related to you in what manner?

A. He was my uncle.

Q. And it was after his death that you moved to this city from Natchez?

A. Yes, sir.

Redirect examination by Mr. Smith:

Q. Do you know whether or not the words "Crow" or "Old Crow" were in general use in St. Louis when you began business with the firm of I. & L. M. Hellman, on whiskey?

Counsel for complainant objects to the question as incompetent, immaterial and irrelevant.

A. How is that?

Q. Whether other houses used the words "Crow" or "Old 477

Counsel for complainant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, sir, other houses used it. I remember there was a house here by the name of Quinlan Bros. & Spotswood, they had a sign also with a Crow brand on it.

Counsel for complainant objects to the portion of the answer beginning with the words "I remember there was a house," and

move that the same be stricken out as irresponsive to the question and as incompetent.

Q. What other houses do you remember that used the words "Crow" or "Old Crow"?

Counsel for complainant objects to the question as incompetent, irrelevant and immaterial.

A. Samuel McCartney & Co.

Q. Any other house?

A. Do you mean here in St. Louis?

Q. Yes, you mentioned the house a moment ago.

Counsel for complainant objects to the question as incompetent, irrelevant and immaterial.

A. Quinlan Bros. & Spotswood.

Q. Do you know on what kind of goods the brand "Crow" or "Old Crow" or the mark "Crow" or "Old Crow" was employed?

Counsel for complainant objects to the question as incompetent, irrelevant and immaterial.

A. Blends.

Q. Do you recall a kind of brand or mark which was used by Samuel McCartney & Co.?

Counsel for complainant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. Describe it?

Counsel for complainant objects to the question as incompetent, irrelevant and immaterial and as being secondary evidence.

478 A. J. Crow.

Q. How was that marked on the package?

Counsel for complainant objects to the question as incompetent, irrelevant and immaterial.

A. It was branded.

Q. With a burning brand or—

A. With a burning brand.

Q. Have you seen that mark or brand, or any impression of it recently?

A. No, I have not seen any recently.

Q. I show you an impression of a burning brand and ask you to tell the Court what that is?

A. This is a burning brand that we have used on barrels of whiskey.

Q. Just read it?

A. (Reading:) "A. M. Hellman & Co. Old Crow Bourbon, St. Louis, Mo."

Counsel for respondents offers the impression referred to in evi-

dence and ask- the notary to mark the same Respondents' Exhibit

Moritz Hellman B, which is accordingly done.

Counsel for complainant objects to same as being secondary evidence, the objection to be withdrawn on the production of the original burning brand at or before the hearing before the Court,

Recross-examination by Mr. Hopkins:

Q. Then neither you nor your company in this suit pretend to claim that the mark "Crow," or "Old Crow" as a mark for whiskey ever belonged to your firm, or its predecessor, I. & L. M. Hellman, do you?

Counsel for respondents objects to the question as irrelevant and incompetent, and for the further reason that the question of pretense is not an issue, and for the further reason that this witness is not competent to testify as to what "his company" pretend.

 We never knew any other way but that brand was ours, which we have used.

Q. Yet you now say it was in common use by other firms of the City of St. Louis when you began to use it, do you not?

A. Yes, sir, always used Crow whiskey, but this brand that was used here was ours, but others have used it also, we never interfered with anybody else.

Q. You never undertook to stop anybody else from using it, did

you?

A. No, we never did that I remember.

Q. You let them all use it?

A. If you notice in our brand it is J. W. Crow, I don't know that

anybody else used those initials.

Q. I am talking about the words "Crow" or "Old Crow," did you ever undertake to stop anybody from using this brand on khiskey?

A. I don't remember whether A. M. Hellman or I. & L. M. Hell-

man did as I was traveling and I was not in the office.

Q. You never heard of it?

A. I don't remember hearing of it.

Q. And you now testify that the marks were commonly used in the trade in St. Louis by a number of houses in the trade when you came here in 1871?

A. Yes, sir.

Q. You have been the president of the Hellman Distilling Co. since it was organized, have you not?

A. Yes, sir.

Q. The Hellman Distilling Co. never tried to stop anybody from using "Crow" or "Old Crow" as marks on whiskey, have they?

A. No, sir.

Q. When you came here in 1871, did you ever know of a Kentucky whiskey known as "Crow" or "Old Crow," a straight whiskey?

A. We never dealt in it, and in those days, as I say, we sold mostly blends, but while I was traveling in Missouri I might have heard of Gaines' Crow here and there, but I never heard of it in the South.

Q. Are you sure you ever heard of it before this suit was brought?

A. Of Gaines' Crow? Q. Yes?

A. Yes, sir.

Q. Did you ever look it up in the price lists used in the 480 whiskey trade?

A. No, sir, I had no occasion to look it up.

Q. You don't know what the words "Old Crow" mean in an ordinary price list such as is circulated in the whiskey trade and has been for the last 20 to 25 years?

A. I heard of Gaines' Crow and that is all, I never looked it up.

Q. Of course you did, and you have seen Gaines' Crow listed, have you not, in these price lists?

A. I have not looked for it.

Q. Though you were selling whiskey of your own under the same brand you never looked for that?

A. I never looked for it because our brand "Crow" was sold. I never sold any Crow whiskey here, I was not traveling here.

Q. In what cities of the south have you had this experience where Old Crow of W. A. Gaines was sold?

A. I don't know of any.

- Q. What cities have you covered in the south, I mean large cities?
- A. I go to Natchez, I go to Vicksburg, I go to Baton Rouge, to Plaquemine, to Donaldsonville and a number of others.

Q. Do you go to Mobile and New Orleans?

A. I have been there, yes, sir.

Q. How frequently have you been in Mobile and New Orleans in the last thirty years? A. I go there quite often, but I don't do any business, very little

business with the saloon trade in New Orleans.

Q. How long have you known W. A. Gaines & Co.'s Old Crow to be on sale in Mobile and New Orleans?

A. I don't know that I have seen it.

Q. Have you visited the principal liquor resorts in those cities? A. I have not seen Gaines' Crow in any of those places where I have been.

Q. At what hotel do you stop when you go to New Orleans?

A. I stop at the Cosmopolitan Hotel.

Q. Did you ever go to the bar of the St. Charles Hotel in New Orleans?

A. No, sir.

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Q. Did you ever go to the bar of the Cosmopolitan Hotel in New Orleans?

A. Yes, sir.

Q. Did you ever notice that any Old Crow whiskey was sold there? A. No, sir, I had no occasion to notice it because I did not sell it.

Q. When did you make this trip in Texas?

A. In 1879.

Q. What cities did you go to in the State of Texas, large cities at that time?

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A. I didn't go to any large cities that I remember, I went to Dallas. I went to Sherman, I went to Paris, but I sold to those people that had bought goods from us before.

Q. Do you recollect seeing any W. A. Gaines & Co.'s Old Crow

whiskey in those places?

A. No, sir, I do not.

Q. You would not swear that there was not some there, would you?

A. I couldn't swear to it, I could swear that I have not seen any.

Q. And you give the same testimony as to New Orleans, Mobile and those other places?

A. Yes, sir.

Q. Simply that you have not seen any?

· A. I have not seen anv.

Q. And you never looked for any?

A. I never looked for any.

Q. Can you fix the date as near as possible when you first heard of W. A. Gaines & Co.'s Old Crow whiskey?

A. No, sir.

Q. Can you fix it within ten years?

A. I was not interested enough to remember anything of that kind.

Q. How long have you been a partner in the firm of A. M. Hellman & Co.?

A. I don't recollect how long.

Q. You cannot tell how many years?
A. I suppose probably twelve to fourteen years, I couldn't tell exactly.

Q. And during that time you never looked in a price list of 482 the whiskey trade, any of the standard recognized trade price lists to see whether Old Crow whiskey was listed or not?

A. I had no occasion to look because I haven't sold any.

Q. Have you seen any Old Crow whiskey of W. A. Gaines & Co. either in barrels or bottles?

A. I have never seen any in barrels, but I have seen some in bottles, bottled by W. H. Lee & Co.

Q. How long ago did you first see any of that?

A. I couldn't tell.

Q. As long ago as ten years past?

A. I suppose so.

Q. It may have been as long ago as twenty years?

A. I don't think so.

Q. During the past thirty years have you been in any of the northern cities?

A. Well, I have traveled in Missouri.

Q. Have you visited Chicago or New York?

New York, but not on business.

Q. Have you visited any of the prominent bars in either of those cities?

A. I might have taken a drink there, that is all.

Q. Don't you recollect of seeing any W. A. Gaines & Co.'s Old Crow whiskey in those cities?

A. I have not noticed it because I did not look for it.

By Mr. Smith:

Q. You don't mean to be understood as saying that you knew of W. A. Gaines whiskey away back in 1870, do you?

A. No, sir.

Q. You are one of the defendants in this case, are you not, in which this testimony is being taken?

A. Yes, sir.

Signature waived.

At this point by consent of counsel, I adjourned the further taking of these depositions until the 8th day of February, 1907.

SEAL.

ARTHUR E. MOONEY, Notary Public.

Pursuant to adjournment, as above stated, on February 8th, 1907, at the same place and between the same hours I resumed the taking of the depositions as follows:

Present: James L. Hopkins, Esq., counsel for plaintiff, and Luther

Ely Smith, counsel for defendants.

WILLIAM J. BRENNAN, of lawful age, being produced, 483 sworn and examined on the part of the defendant-, deposes and says as follows:

## Direct examination by Mr. Smith:

Q. What is your name?

A. William J. Brennan.

Q. What is your age? A. I will be fifty next June.

Q. And your residence?

A. 1414 North Prairie, St. Louis, Mo.

Q. And your present business?
A. Teamster.

Q. For whom?

A. C. E. Udell & Co.

Q. Were you ever in the employ of the firm A. M. Hellman & Co.? A. Yes, sir.
Q. Please state when?

A. From 1881 to 1889, about seven or eight years.

Q. Were any other members of your family in the employ of that firm?

A. Yes, sir, my father was.

Q. How long was your father in their employ?

A. Thirty-five years.

Q. When did he leave their employ?

A. I believe he left there about 1892.

Q. Now what duties did you perform when you were in the employ of A. M. Hellman & Co.?

A. Assistant compounder, and compounder when my father was not there.

Q. Who was compounder during the time you were there?

A. My father.

Q. Do you remember whether or not during that time the firm sold a brand of whiskey known as "Old Crow"?

A. Yes, sir.

Q. As compounder or assistant compounder did you have any duties to perform with reference to Hellman's Old Crow?

A. Yes, sir. Q. What were those duties? 484

A. With Old Crow?

Q. Yes.

A. Well, generally brand the barrels "Old Crow," and generally fix up the formula of Old Crow.

Q. When you say you fixed up the formula, what do you mean

by that?

A. Fixed up the refined spirits.

Q. Well, was it a blend? A. Yes, sir.

Q. Blended there on the premises?

A. Yes, sir.

Q. I will ask you whether or not you ever visited the store of A. M. Hellman & Co., or their predecessors, before you went into their employ?

A. Yes, indeed.

Q. How did you come to visit them?

A. Well, bringing my father's dinner there. Q. How old were you then?

A. About ten years, nine or ten years.

Q. When you visited the store as a boy I will ask you if you ever saw any Old Crow brands or signs there?

A. Yes, sir.

Q. Just tell us what you saw?

A. I saw a sign up on the wall when the house was on Pine Street between Main and Second Stretts with "Crow Bourbon" on it.

Q. What kind of a sign was that? A. It had a slate colored ground. Q. Well, what was it made out of?

A. It was a glass sign.

Q. Do you think you would recognize that sign, if you saw it?

A. Yes, indeed. Q. Have you seen it recently?

A. No. sir.

Q. How long since you have seen it?

A. I guess about 17 years, maybe.

Counsel for defendants here produces glass sign heretofore introduced in evidence and marked Defendants' Exhibit No. 5."

Q. I will ask you if you ever saw that sign before?

A. I have; yes, sir.

Q. Where did you see that?

A. I seen that down at the old store on Pine Street. Q. Is that the sign to which you have reference?

A. It is similar to it.

Q. Where was that placed in the store at the time you used to visit the store as a boy?

A. It was placed in the rear, as you go in the back door.

Q. During those times in the early days that you visited the store did you notice any brands with the words "Crow" or the figure of a crow on them?

A. I know there were brands with "Crow Bourbon" on them.

Q. Where were these brands? A. Upstairs in the back part.

Q. In what shape were they? Did you see them in barrels or were they burning brands?

A. They were burning brands.

Q. Do you remember seeing them?

A. Yes, sir.

Q. I will ask you if during all the time that you were connected with the firm of Hellman & Co. they continued to make the Crow whiskey blend and sell it?

A. Yes, sir.

Q. Where was their trade?

A. Mostly in the south, very near every order that used to come in used to be Crow Bourbon.

# Cross-examination by Mr. Hopkins:

Q. What was your employment immediately after you left Hellman's?

A. I went into the wholesale grocery business as porter.

Q. Before you went into the employ of the Hellman Company?

A. I was in the wholesale grocery business, porter.

Q. How long had you been porter in a wholesale grocery house prior to your entering the employ of the Hellman concern?

A. About two years.

Q. Prior to that what had been your occupation?

A. Prior to that I was working in the Collier Company, pressman.

Q. What business was that?

A. The Collier White Lead works.

486 Q. In this city?

A. Yes, sir, on Clark Avenue and 10th.

Q. How long were you there? A. About four or five years.

Q. What year did you enter their employ?

A. I started there when I was young, I couldn't say exactly what year it was.

Q. Could you tell within four or five years when it was?

A. Well, it was 1873 or '4, after the bridge opening. Q. What employment did you have before that time?

A. Before that I was on an ice wagon; I left the ice wagon to go to the Collier Company.

Q. You mean you were driving an ice wagon?

A. No, helper on an ice wagon.

Q. How long did you have that occupation?

A. Just one season.

Q. Prior to that what was your occupation?

A. I was working right here across the street on 4th and Locust in a millinery store running errands.

Q. How long were you there? A. About a year or so, I guess.

Q. What was your age when you entered that employment?

A. About fifteen, I guess, or fourteen, that was about the first job I ever had.

Q. What year was that, do you remember?

A. Somewhere around 1869, I guess, 1868 or '9.

Q. What year were you born?

 A. 1857, June 12th.
 Q. Where was the place of business of the Hellman concern when you were in their employ?

A. 112 Pine Street and 508 North Second Street. Q. During what years was it at 112 Pine Street?

A. Between 1880 and 1885, I guess, or 1882 and 1885 or '6.

Q. And from that time on where?

- A. At 508 North Second Street.
- Q. During that time you were acting as compounder or assistant compounder for them?

A. Yes, sir.

Q. In what part of the premises was that compounding 487

A. Generally in the back part of the store. Q. On the ground floor?

A. Yes, sir. Q. Who assisted you in that work?

A. I was assistant to my father.

Q. Was your father in charge of that work during all the time that you were there?

A. Yes, sir.

Q. Was there anyone else employed in that department?

A. No, sir, we had a young fellow upstairs doing the bottling goods in the bottling department.

Q. Was all the stuff used in the bottles compounded in your department?

A. Yes, sir.

Q. Did you use any whiskey in that compounding?
A. Yes, sir.
Q. What brands?

A. Well, several brands they used to use.

Q. Please name them.

Counsel for defendants objects as being a trade secret that the witness is not compelled to disclose even after a lapse of some years.

Q. What is your answer?
A. Well, as Mr. Smith says it is a formula and it is secret, that formula is generally secret in liquor houses, of course I am not in business now and it is none of my business, and I don't like to give anything away.

Q. You are positive that you used some whiskey in making up

this mixture?

A. Yes, sir. Q. Did you always use the same brand of whiskey in this mix-

A. In the bottle goods or Old Crow, do you mean? Q. In the so-called Old Crow.

A. We never bottled any Old Crow at that time, it is only the last few years that this Old Crow has been put up in bottles.

Q. Did I ask you anything about bottling?
A. You were asking me about the bottled goods.

(Question read.)

A. I thought you had reference to the bottled goods.

Q. Answer the question, please.

488 Counsel for defendant- states that he objects on the same grounds.

Q. What is your answer?

Mr. Smith: That is a part of the secret of the business.

By Mr. Hopkins:

Q. Did you always use the same brand of whiskey in making this so-called Old Crow mixture for the Hellman concern?

Counsel for the defendant- makes the same objection.

Q. Now, what is your answer?

Mr. Smith: We don't desire to have that information disclosed.

By Mr. Hopkins:

Q. What is your answer?

A. Mr. Smith says this formula is a secret and I am not going to say anything about it.

Counsel for complainant asks to have this question certified to the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri.

Q. During all that time did you use the same ingredients other than whiskey in making this mixture for the defendant-' predecessor?

Counsel for defendants objects to the question on the same ground heretofore noted as calling for trade secrets of this firm.

Q. What is your answer?

A. Well, it is a secret formula, of course I don't like to give them away.

Counsel for complainant asks that this question be likewise certified.

Q. During that period did you use any of the Old Crow whisky of W. A. Gaines & Co. in making this mixture under the name of Crow for the Hellman concern?

A. Well, I don't remember.

Counsel for complainant withdraws the request for certification.

Redirect examination by Mr. Smith:

Q. Do you recall having used W. A. Gaines & Co.'s Old Crow whisky?

Counsel for complainant objects to the question as leading and improper redirect examination.

A. No, sir.

Signature waived.

JAMES F. BRENNAN, of lawful age, being produced, sworn and examined on the part of the defendant- deposes and says as follows:

Direct examination by Mr. Smith:

Q. What is your name?

A. James F. Brennan.

Q. How old are you?

A. I will be 43 in July next. Q. Where do you reside?

A. Do you mean where I live.
Q. Yes.
A. Here in the city.
Q. In St. Louis?

A. Yes, sir. Q. What is your business?

A. Now compounding for the Hellman Distilling Co.

Q. How long have you been in the employ of the Hellmans?

A. Since June, 1898.

Q. I will ask you if, during that time, your firm has advertised and sold a brand of whisky known as Old Crow?

A. They have; yes, sir.

Q. Was such brand on the market by them when you went into the employment of the firm?

A. It was; yes, sir. Q. Now, I will ask you whether or not during all the time you have been there, goods marked with the words "Old Crow" or "Crow" have been sold by the Hellman firm?

A. Yes, sir.
Q. Did you as compounder have occasion to blend such goods?

A. I have.

Q. Have you had charge of the blending since you have been there?

A. I have.

Q. And in general I wish you would state what the character of this blend is.

A. Well, we take highly refined spirits and whisky, old whisky and put them together.

Q. In that way you make the blend?

A. Made the blend.

Q. Do you mark packages with the words "Crow" or "Old 490 Crow?"

A. Yes, sir.

Q. And have you done that since you have been there?

A. Yes, sir.

Defendants' counsel here presents to the witness the glass sign heretofore marked Defendants' Exhibit No. 5.

Q. I will ask you - you have seen that sign before?

A. Yes, sir. Q. Where have you seen it?

A. Right in the store.

Q. Has it been there since you have been in the employ of the firm?

A. I have always seen it there while I have been there.

Q. Did you ever see it before you went into the employ of the firm?

A. I can't remember that.

Q. You are certain it was there when you went into the employ of the firm?

A. Yes, sir.
Q. When you speak of using highly refined spirits I will ask you what the character of those spirits is as regards impurities?

A. I understand the impurities are all taken out of it. Q. And you use that character of spirits in making the blend?

A. In all of the blends, yes, sir.

# Cross-examination by Mr. Hopkins:

Q. Are you related to the witness who has just testified?

A. Yes, sir.

Q. What is the relationship?

A. Brother.

Q. Prior to your entering the employ of the Hellman house what was your occupation?

A. I was working for a wholesale cheese house.

Q. What house?

A. A. C. E. Udell & Co., it used to be S. R. Udell & Co.

Q. How long were you with that concern?

A. I was with them from September, 1889, until June, 1898.

Q. Prior to that time what was your employment?
A. That was my first position, I was sixteen years old when I went there.

Q. When you entered the employ of the Hellman house-what was its name, A. M. Hellman & Co.?

A. Yes. sir.

Q. When you entered the employ of A. M. Hellman & Co., had you had any experience in compounding?

A. None.

Q. Had you any acquaintance with the liquor trade? 491

A. No. sir.

Q. You knew nothing about it?

A. No, sir.

Signature waived.

Counsel for defendants offers in evidence the original bill in

equity filed in this case November 11th, 1904.

Counsel for plaintiff objects to same as irrelevant and immaterial. Counsel for defendant- also offers in evidence petition styled "In the Circuit Court, City of St. Louis, State of Missouri, to the December term, 1904, W. A. Gaines & Co., a corporation, vs. Abraham M. Hellman and Moritz Hellman, co-partners as A. M. Hellman & Co." under date, to-wit, October 1st, 1904, being suit No. 4 to the December Term, 1904, of the Circuit Court, City of St. Louis, and asks that the same be marked Defendants' Exhibit A. B. No. 1, which is accordingly done.

Also, the certificate of Sam J. Roberts, collector of the 7th District of Kentucky, under the date of December 8th, 1906, Lexington, Kentucky, certifying that public record No. 10 kept on file in the office of said Roberts shows J. P. Williams, Frankfort, Kentucky, to have paid special taxes as rectifier and wholesale dealer for the purpose therein mentioned in such certificate and asks that the same be marked Defendants' Exhibit A. B. No. 2, which is accord-

ingly done.

Counsel for the complainant objects to the paper upon the grounds

that the same is incompetent, irrelevant and immaterial.

Also, trade mark certificate No. 9278 of the United States Patent Office registered by W. A. Gaines & Co. on April 11th, 1882, for the trade mark in circular form as follows: "Old Crow Distillery, copper distilled whisky, W. A. Gaines, distiller, Woodford Co., Kentucky," and asks that the same be marked Defendants' Exhibit A. B. No. 3, which is accordingly done.

It is hereby stipulated between counsel for complainant and respondents that the further taking of testimony on behalf of respondents may be extended until the 15th day of March, 1907, and that complainant shall have twenty days thereafter for its rebuttal testi-

mony.

492 UNITED STATES OF AMERICA, Eastern Division of the Eastern

Judicial District of Missouri, ss:

STATE OF MISSOURI, City of St. Louis:

I. Arthur E. Mooney, a Notary Public within and for the City and State aforesaid, and duly qualified under the laws of the United States to take depositions for use in the Circuit Courts of the United States, do hereby certify that the reason for taking the foregoing depositions is and the fact is that the testimony of said witnesses is material and necessary for the respondents in the cause in the cap-

tion of said depositions named.

I further certify that on the 11th day of April, 1906, and on the days following as in the foregoing deposition stated, I was attended at the office of Klein & Hough, 902 Rialto Building southeast corner of Fourth and Olive Streets, in the city and state aforesaid, by James L. Hopkins, Esq., counsel for complainant, and Luther Ely Smith, Esq., counsel for respondents, and the witnesses Timothy W. Manning, William J. Brennan, and James F. Brennan, who were of sound mind and lawful age, and who were by me carefully cautioned and sworn to testify the truth, the whole truth and nothing but the truth, and their depositions were by me reduced to writing in shorthand in the presence of the witnesses and from their state-

I further certify that it was then and there agreed in my presence by counsel for the respective parties that by transcript of said shorthand notes might be read in evidence in said cause, without the signatures of deponents, with the same force and effect to all intents and purposes as if said transcript had been subscribed by said deponents in my presence.

I further certify that the foregoing is a true and faithful tran-

script of said shorthand notes so taken.

I further certify that I am not of counsel or attorney for either of the parties in said depositions or caption named, nor in any way interested in the event of the cause named in said caption.

And I further certify that the fee for taking said depositions, \$48.00, has been paid to me by Luther Ely Smith, Esq., 493 counsel for respondents, and that the same is just and reasonable.

In testimony whereof I have hereunto set my hand and official seal at the City of St. Louis, in the State of Missouri, this 26th day of February, 1907.

SEAL.

ARTHUR E. MOONEY, Notary Public.

And afterwards, to-wit: on the 21st day of May, A. D., 1906, the following depositions on behalf of Defendants were filed in said cause, which said depositions are in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

No. 5096. In Equity.

W. A. Gaines & Company, Complainant, vs.
Max Kahn et al., Respondents.

To the above named Complainant or its attorneys of record:

Take notice that depositions of witnesses on behalf of the Respondents will be taken at Room No. 1316 Union Trust Building, Cincinnati, Ohio, before Nathaniel Wright, Notary Public, on the 20th day of April, 1906, at 10 o'clock A. M., and that the same will be continued from day to day until the taking of said depositions has been completed.

KLEIN & HOUGH, Counsel for Respondents.

Service of the above notice acknowledged this 16th day of April, 1906, and all exceptions as to time and place of taking said depositions, issue of dedimus and sufficiency of notice specifically waived, and it is hereby agreed and stipulated that the Notary Public above named shall have the same right and authority to issue subpœnas and compel the attendance of witnesses as if a [commissioner] had issued from the Clerk of said Court to said Notary in regular from.

Consent given to taking of said depositions in shorthand and thereafter extending same on typewriter by Douglas A. Brown.

J. L. HOPKINS, Sol's for Complainant.

494 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

No. 5096. In Equity.

W. A. Gaines & Co., Complainant, vs. Max Kahn, Adm'r, et al., Respondents.

Deposition in Behalf of Respondents.

Depositions of witnesses produced, sworn and examined, pursuant to notice beginning on the 20th day of April, in the year of our Lord 1906, at 10:00 o'clock A. M., at the office of Nathaniel Wright, Room 1316 Union Trust Building, Cincinnati, O., and thereafter by consent adjourned to the 9th day of May, in the year of our Lord 1906, at 11:30 o'clock A. M., at the office of A. Julius Freiberg, 1201 Union Trust Building, and also by consent at 3:00 o'clock P. M. of said date, at the residence of

Abraham Rheinstrom, No. 3550 Washington Avenue, Avondale, in the City of Cincinnati, Ohio, before me, Nathaniel Wright, a notary public in and for Hamilton County, Ohio, in a certain cause now depending in the Circuit Court of the United States, for the Eastern Division of the Eastern Judicial District of Missouri, between W. A. Gaines & Co., Complainant, and Max Kahn, Administrator, et al., Respondents.

Present: Mr. J. L. Hopkins, Solicitor for Complainant; Mr. A. Julius Freiberg, Solicitor for Respondents.

Nathaniel S. Reeder, of lawful age, being produced, sworn, and examined on the part of the respondetns, deposeth and saith:

Direct examination by Mr. A. Julius Freiberg:

Q. 1. Please state your name, age, residence and occupation.

A. Nathaniel S. Reeder; age sixty; Cincinnati, Ohio; present occupation, wholesale liquor dealer.

Q. 2. How long have you been in the business of a wholesale liquor dealer?

A. Oh, about thirty-five years.

Q. 3. With whom were you first associated in the business?A. Well, first with W. W. Johnson & Co.

Q. 4. Beginning with what year?

A. Oh, I don't know, it was somewhere in the neighborhood of 1867, I guess. Q. 5. With W. W. Johnson?

A. Yes, sir.

Q. 6. Go on and state whether you made any changes 495 after that.

A. It was Mills, Johnson & Co. in the first place; then W. W. Johnson & Co.

Q. 7. You have been connected then with that firm ever since 1867?

A. Yes, sir.

Q. 8. In what capacity were you connected with that firm in the early days, Mr. Reeder?

A. Well, almost since I have been there, as foreman.

Q. 9. Did you have charge of purchasing goods for the concern? A. At times, ves.

Q. 10. Were you acquainted with the purchases made by the concern?

A. Yes, gentlemen.Q. 11. What was the nature of your duties as foreman with reference to the rectification goods?

A. I had the management of the output of the house, manufacturing output of the house.

Q. 12. Would you be in position to state as to the condition of whiskies manufactured by that house?

A. Yes, in a general way.

Q. 13. As to their origin, that is to say, where they came from?

A. Yes.

Q. 14. And what disposition was made of them?

A. Yes.

Q. 15. And what names were branded on them?

A. Yes.

Q. 16. Will you state whether or not during your connection with the firm of W. W. Johnson & Company you had occasion to know the condition and the names of the various brands in the whisky business at that time?

A. Yes.

Q. 17. And up to date?

Q. 18. And the customs of the trade?

A. Yes.

Q. 19. Have you ever heard of the name "Old Crow"?

A. Yes.

- Q. 20. Or "Crow"? A. Yes, or "J. Crow."
- Q. 21. Or "J. Crow"?

A. Yes.

Q. 22. When did you first begin to hear of that name?

A. Well, my recollection is that the brand was there when I went to the house. I think it was in the house when I 496 went there.

Q. 23. That was in 1867 or thereabouts?

A. Yes.

Q. 24. Did you have supervision in a general way of the affixing of brands to the barrels containing whisky?

A. Yes, it was done generally by my orders.

Q. 25. Under your direction? A. Yes, under my direction.

Q. 26. Can you tell upon what class of goods that brand was affixed by your own house?

(Objected to by Solicitor for complainant as calling for secondary evidence.)

A. Well, it was generally affixed to an inferior brand of whisky.

Q. 27. Rectified goods?

A. Yes, rectified goods.
Q. 28. When you say inferior, what do you mean?

A. Cheaper grade. Q. 29. A blend?

A. No, not necessarily a blend.

Q. 30. It might be any kind of whisky?

A. Yes. Well, it was not a brand treated with much respect. Q. 31. What did the brand "Crow"-and when I say "Crow,"

I mean all of those various "Crows"-indicate to the minds of the trade generally, if you know, as to the origin of the goods, as to the place from which the goods came?

(Objected to by Solicitor for complainant, as incompetent.)

A. Well, we didn't know anything about—we didn't consider what the trade generally meant by a brand we only considered what

we meant by it. We only were interested in what we sold.

Q. 32. I would like to ask you what you did use in the barrels containing whiskies that you stamped "Crow," or had any designation containing the word "Crow"?

(Objected to by Solicitor for complainant as irrelevant, immaterial and incompetent.)

A. The words we used were "Old Crow" and "J. Crow."
Q. 33. What did you use under that brand?

(Objected to by Solicitor for complainant as before.)

A. Well, we used a specific grade of whisky to certain customers. Certain customers got that whisky at a certain standard—I don't know whether that covers your ground or not—a specific grade.

Q. 34. What did it indicate to any particular customer?

(Objected to by Solicitor for complainant as before.)

Q. 35. Will you explain that a little more fully?

(Objected to by Solicitor for complainant as before.)

A. It indicated a special price of whisky, or grade of whisky.

Q. 36. Can you remember whether or not the designation "Crow" carried with it—was intended to carry with it—the classification of a fairly good grade of whisky, or what grade of whisky?

(Objected to by Solicitor for complainant, as immaterial, irrelevant and incompetent; and also as leading.)

Q. 37. I will correct the leading part. Can you remember what class of whisky the designation "Crow" was ordinarily intended to carry with it; if so, please state?

(Objected to by Solicitor for complainant as irrelevant, immaterial and incompetent.)

A. Well, I don't know just how to answer, because the brand meant very little to us. It meant a cheap whisky. It meant very little to us—and I don't know just how to answer your question.

Q. 38. Can you state, Mr. Reeder, whether the whisky that was sold by your house as "Crow," or "Old Crow," came from W. A. Gaines & Co., or any of its predecessors?

ace a con, or any or no predecessors.

498 (Objected to by Solicitor for complainant, as calling for secondary evidence.)

A. I think it never did.

Q. 39. Can you state what if any town, county, river, creek or country, the term "Old Crow" was used to indicate?

(Objected to by Solicitor for complainant, as immaterial, irrelevant and incompetent.)

A. No.

Q. 40. Did it indicate any town, and so forth?

A. No, to us it didn't.

Q. 41. Did it to the trade generally? You were a member of the trade; your house was quite a large house, was it not?

(Objected to by Solicitor for complainant as incompetent.)

A. Yes, it was at one time—did a large business. We didn't use that brand but very little.

Q. 42. Have you ever heard of Woodford County?

A. Yes.

Q. 43. Have you ever heard of "Glenn's Creek?"

A. Yes.

Q. 44. Before today?

A. Yes.

Q. 45. Will you please state what if any brand carried with it in your mind the necessary implication that the goods were made at Glenn's Creek, Woodford County, Kentucky, in those days?

A. No, I don't know whether we ever used any.

Q. 46. I will put the question again: Will you state what if any brand carried with it in your mind the necessary implication that the goods were made at Glenn's Creek, Woodford County, Kentucky, in those days, if any brands there was?

A. No, I don't know of any brand.

Cross-examination by Mr. J. L. Hopkins:

X Q. 1. Are you a member of the firm of W. W. Johnson & Co.?

A. I was at that time, yes.

499 X Q. 2. What is the style of your business now?

A. The same style.

X Q. 3. You have been connected with that business continuously?

A. Yes.

X Q. 4. Did you ever know of the "Magnolia" brand of whisky?

A. Yes.

X Q. 5. To whom did that brand belong in 1867? A. Mills, Johnson & Co., I think, at that time.

X Q. 6. When you became acquainted with Mills, Johnson & Company in 1867—was it?

A. About that time, yes, sir.

X Q. 7. Did Mills, Johnson & Co. and its successor W. W. Johnson & Co., continue to produce "Magnolia" whisky?

(Objected to by Solicitor for respondents, as irrelevant and incompetent.)

A. Yes.

X Q. 8. W. W. Johnson & Co. have been the exclusive producers of the "Magnolia" whiskey, have they not, ever since they succeeded Mills, Johnson & Company?

(Objected to by Solicitor for respondents, as before.)

A. "S. N. Pike's Magnolia Whisky"—always "S. N. Pike's Magnolia Whisky."

X Q. 9. That is to say the name "S. N. Pike's" was used in connection with "Magnolia Whisky?"

A. Was and is used.

X Q. 10. How long have you been acquainted with W. A. Gaines & Co.?

A. I don't know W. A. Gaines & Co.

X Q. 11. Are you familiar with the price currents used in the whisky trade?

A. In a general way, yes.

X Q. 12. Do you use they or refer to them in your business?

A. Yes, sir.

X Q. 13. Please name the principal price currents for the whisky trade which you have so used and referred to in your business which are now being published?

(Objected to by solicitor for respondents as irrelevant.)

A. Biles & Co. and Voss Co.

X Q. 14. How long have you been acquainted with the "Old Crow" whisky of W. A. Gaines & Co.?

500 A. I am not acquainted with it. Personally I know nothing about it.

Further deponent saith not.

NATHANIEL S. REEDER.

Hamilton County, State of Ohio, 88:

Sworn to and subscribed before me this 16th day of May, 1906.

NATHANIEL WRIGHT,

N. P., Hamilton County, Ohio,

And also-

WILLIAM N. HOBART, of lawful age, being produced, sworn and examined on the part of the respondents, deposeth and saith:

Direct examination by Mr. A. Julius Freiberg:

Q. 1. Please state your full name, age, residence and occupation? A. William N. Hobart, seventy years; residence, Cincinnati, O.; occupation, in the general liquor business.

Q. 2. Since what year have you been engaged in that business?

A. Since 1854.

Q. 3. With what firm?

A. First with Lowell Fletcher as a clerk; afterwards with him as a partner, one of the firm of Fletcher, Hobart & Co., dissolved in 1865. In 1866 the firm of Maddux, Hobart & Co. was formed, continued until 1896, when it was changed to the Diamond Distilleries Co., being a direct succession.

Q. 4. How long have you been living in Cincinnati Mr. Hobart?

A. Since 1845.

Q. 5. What offices if any, have you held with the National Liquor Dealers' Association, or other associations of liquor dealers?

A. Well, various associations; I have been connected in different capacities. The present association, I have simply been a member of the Board of Control.

Q. 6. You have never been president of it?

A. No. There is a Bureau of it—the protective—that I am chairman of, but not the association itself.

Q. 7. In the period beginning, we will say from 1860 to 1870, or beginning at the time when you began business, what was the nature of your duties in connection with your business?

A. We were manufacturing and selling alcohol and cologne spirits, and domestic whiskies. At that time they didn't do anything—the firm of Fletcher, Hobart & Co. never did anything in distilling particularly from grain. The custom then was to purchase high wines, and re-distill.

Q. 8. Did they do a rectifying business?

A. Yes.

Q. 9. To "rectify" means taking the raw material—

A. Rertifying ordinarily meant simply passing through charcoal. The Government when they made the term "rectifying" made it to cover any change in the condition of the goods; any addition of any foreign substance or other figuors they called rectification.

Q. 10. What does the term "rectified" mean as contrasted with

straight goods?

A. Well, "rectified" as I just stated, originally simply meant passing through charcoal. "Rectified" now as compared with "straight goods" simply means such change in the condition of the goods as requires a change in the stamp on the package, by the addition of foreign substance or mixing with other liquors.

Q. 11. How far back does that change in signification go?

A. That goes back to 1873 certainly. I am not quite sure about the term being included in the law previous to that, but it goes back to the law of seventy-three, I know. Probably I guess I can safely say going back to the law of 1868. Prior to 1868 there was no stamping, they were branded. The stamping was after that. Then the term "rectified" arose in the Government.

Q. 12. Prior to 1870 what was your actual personal duties with

reference to the business?

A. It was general supervision of the business, looking out for the manufacturing and distribution of the goods.

Q. 13. Were you acquainted with the ingredients placed within

the goods that were sent out to the trade?

A. Well, such goods as we turned out, I was, of course—and some goods we didn't make, quite a veriety—of liquors.

Q. 14. Were you familiar with the producing department? A. Yes.

A. 1 es.

Q. 15. Have you ever heard of the name "Crow"?

A. Yes.

Q. 16. Or "Old Crow"?

A. Yes.

Q. 17. Or "J. W. Crow"?

A. I don't remember "J. W. Crow." The terms "Crow" or "Old Crow" were very common names to the trade.

(Solicitor for complainant moved to strike out the following portion of above answer, viz.: "the terms 'Crow' or 'Old Crow' were very common names to the trade," as not responsive to the question.)

Q. 18. How far back, Mr. Hobart, do you remember the use of

any designation containing the word "Crow"?

A. Well, it is a very difficult thing to go back forty or fifty years, and say exactly; but I can say in a general way that it is one of my earliest recollections in the business.

Q. 19. The use of that word "Crow"?

A. The use of that word.

Q. 20. Now, will you kindly tell by whom the word "Crow" was used, and upon what kind of goods?

Objected to by Solicitor for Complainant as incompetent, and calling for hearsay.

A. Well, the word "Crow" and "Old Crow" was used by a great many houses on whiskies that they turned out.

Q. 21. What was the class of goods?

Objected to by Solicitor for complainant on same grounds as above.

A. It was partly on the double stamp, or the original goods, and partly on the goods that bore a single stamp.

Q. 22. I will ask you whether or not when it was used on double stamp goods, whether that use was restricted to any one house?

503 Objected to by solicitor for complainant on same grounds.

A. So far as I know, yes, I don't know of but one house using it on double stamp goods.

Q. 23. In those days?

A. In those days I don't know of but one house using it on double stamp goods. I never knew of but one house using it on double stamp goods.

Q. 24. Can you say anything as to the use of the brand by your

own house?

Objected to by solicitor for complainant as calling for secondary evidence.

A. Yes, we used that brand for a number of years.

Q. 25. Upon what class of goods did you use the brand?

A. Used it on whiskies such as are technically termed by the government "rectified whiskies," what we would call "blends," or "compounds."

Q. 26. When you used the brand on that class of goods, what import did the name have as to the origin of the goods, as to county, state, river, creek, or and so forth?

Objected to by solicitor for complainant as incompetent.

A. Had no particular signification in any way.

Q. 27. In those days I will ask you whether or not there was any particular name, or designation, or brand which would indicate to

the trade or to you that certain whiskies came from Glenn Creek, Woodford county, Kentucky?

Objected to by solicitor for complainant as calling for hearsay, and incompetent.

A. I don't think the brands at that time of the goods made at any distillery would show as closely as that where they were made; in fact, I know they would not. There was a stencil that showed the district. I don't know that I knew of any whiskey made at that place you named at all. I don't remember the place at all.

Q. 28. Was the fact that various houses, including your own, used the words "Old Crow," or "Crow," upon various kinds of goods generally known; was it a custom generally known?

Objected to by solicitor for complainant as incompetent.

Q. 29. Up to the year 1875?

Objected to by solicitor for complainant on same ground.

A. Yes.

Q. 30. Was any objection ever made to such use of such name?

Objected to by solicitor for complainant as immaterial, irrelevant and incompetent.

A. I can't locate exactly the year. Paris, Allen & Company were controllers of the brand and made objection to it, and finally brought suit against us.

Q. 31. What year was that?

A. That is a thing I could not locate exactly, but I should say it was early in the '80's.

Q. 32. Prior to that time-

A. Prior to that time they made no objection.

Q. 33. Was the use on your part sufficiently widespread as that the dealers would know of your use?

Objected to by solicitor for complainant as immaterial, irrelevant and incompetent.

A. Undoubtedly.

Q. 34. What was the tax on whiskies in the years 1867 and 1868?

A. It was two dollars until the year 1868.

Q. 35. And then?

A. Then it was reduced to fifty cents, with some special taxes which made it nearly to about sixty-three cents.

Q. 36. Up to 1870—take that period from 1865 to 1870, how were brands designated on packages.

A. Well, I don't know that I quite understand you.

Q. 37. In what year was it brought home to the trade that the brand was connected with a certain class of goods; was it burned on?

A. It was partly stenciled, partly burned. Sometimes a stencil was used; sometimes branded. When we used the "Old Crow" brand we put on a large label.

Q. 38. Put on a large label?

A. A large lithographed label that went on the head of the rrel.

Q. 39. Paper label?

A. Paper label.

Q. 40. When the word "Crow" was used in the trade, to the oduct of what distiliery did it have reference?

Objected to by solicitor for complainant as incompetent, and callfor hearsay.

A. That would depend upon whether it was double stamp or gle stamp.

Q. 41. I mean, if it was rectified goods?

A. Rectified goods, nearly everybody was using the brand, it ald not possess a significance. I say "nearly everybody"—a ry large number, "nearly everybody" would be too much; but a ge number were using the brand.

Q. 42. When your house used the word "Crow," or any designan containing the words "Crow" on whisky, what connection, if y, did the ingredients of the barrels have with the distillery of ines, Berry & Co., or other producers?

Objected to by solicitor for complainant as irrelevant and imma-

ial.

A. None whatever. Q. 43. Can you remember, Mr. Hobart, up to 1870, what was the ade of goods indicated by the word "Crow" in your own house?

Objected to by solicitor for complainant as irrelevant and immaial.

A. I simply know it was blended or compounded, but I could t remember just what grade—not a low grade at all.

Q. 44. Would it have meant the same to every customer?

Objected to by solicitor for complainant as incompetent, calling hearsay.

A. It would from our house.

Q. 45. Was it intended to mean the same from your

Objected to by solicitor for complainant on same ground.

A. Yes.

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use?

### Cross-examination by Mr. Hopkins:

X Q. 1. What was the style of your concern at the time of the it that you referred to in your direct examination?

A. Maddox, Hobart & Co.

X Q. 2. What year was that?

A. As near as I can tell, it was along 1881, 1882, 1883. t be quite certain of that, you know.

X Q. 3. How long have you been acquainted with "Old Crow" nisky of W. A. Gaines & Company?

Objected to by solicitor for respondents as irrelevant, and as calling for an opinion.

A. Well, that is a pretty hard answer to make. I should say sometime in the early '70's, or possibly as far back as 1868; but I could not—that is too far to remember with any certainty.

X Q. 4. You have known W. A. Gaines & Co. for some time, have

you not?

A. Oh, yes, I knew the concern before it was W. A. Gaines & Co. I cannot at this minute recall the style, though.

X Q. 5. Gaines, Berry & Co.?

A. Gaines, Berry & Co.; yes, that is it.

X Q. 6. And do you recall Gaines, Berry & Co. as having been a producer of "Old Crow" whisky?

A. Yes.

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X Q. 7. You say suit was brought against your firm some time early in the eighties?

A. I think it was quite early in the eighties. X Q. 8. That was brought in Cincinnati?

A. I know one time I was in New York I was served with the notice there.

X Q. 9. Was the suit brought there in New York?

A. If there was a suit brought at all—I suppose the suit was brought—but the thing was settled very soon. As soon as I found there was going to be trouble about it we abandoned the brand and they withdrew their suit, if they had brought one—I am not sure, I only know I got service from it. After some correspondence we agreed to abandon the brand.

X Q. 10. Are you familiar with the leading price lists of the

whisky trade?

A. Now? Oh, yes.

X Q. 11. Please name the principal ones?

A. Those in Cincinnati, you mean? They are in Cincinnati, anyhow. I don't know of any large price lists,—there are circulars—but the only regular price lists I think come from Cincinnati, H. W. Voss & Co., W. C. Bliss & Co., and the J. W. Biies Co., and M. Durner & Co.

X Q. 12. Do you use those price lists?

A. I refer to them.

X Q. 13. When the words "Old Crow" appear listed in one of those price lists, whose whisky do they mean?

Objected to by solicitor for respondents, as irrelevant and incompetent.

A. That refers to the whisky made by W. A. Gaines & Co.

Redirect examination by Mr. A. Julius Freiberg:

R. D. Q. 1. Mr. Hobart, you said that a misunderstanding, or suit, if it was a suit, brought by Gaines & Company, was settled by abandoning the brand?

A. Yes.

R. D. Q. 2. Will you or can you state the reasons why you abanoned the brand?

Objected to by solicitor for complainant as immaterial and irreleant.

A. There are two reasons. In the first place I thought there would e more expense about it than it was worth; in the second place, we didn't want to be in the position of being charged with using

a brand that another person claimed the name of. I wrote to Paris, Alien & Co. that I would be perfectly willing to bandon it if they pressed their claims against other people, that ne brand had been in such general use we considered we were entled to use it; but if they proposed to stop the use of it, we were erfectly willing to abandon it; and they said they were, and we bandoned it on that ground.

R. D. Q. 3. Was it because you recognized their legal right to

ne brand?

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Objected to by solicitor for respondents as immaterial, irrelevant nd incompetent.

A. That question didn't come into my mind at all. They were ne distillers that were using the brand and we didn't care to enter nto a contest about it. The brand was not worth that to us.

R. D. Q. 4. You say you recognized Gaines, Berry & Co. as pro-

ucers of "Old Crow?"

A. Yes.

R. D. Q. 5. What sort of whisky did that mean?

A. Do you mean quality, or what?

R. D. Q. 6. I mean, as to whether it was two-stamp, or one-stamp? A. Oh, Gaines, Berry & Co. produced only two-stamp "Old Crow."

R. D. Q. 7. Then, by your answer do you mean to say, or do you ot mean to say, that when you recognized Gaines, Berry & Co. as roducers of "Old Crow," do you mean as exclusive owners of the ame "Old Crow" as applied to all whiskies?

Objected to by solicitor for respondents as immaterial, and inompetent.

A. Not at all—not at all. I simply believe that we had a right to se "Old Crow."

R. D. Q. 8. On what class of goods?

A. On rectified goods, or compound; but I didn't care, the brand asn't valuable enough to us to enter into a lawsuit.

#### 09 Recross-examination by Mr. J. L. Hopkins:

R. X Q. 1. What reason have you for believing you have a right use "Old Crow" or "Crow?"

A. Because it was generally used by the trade all through the ountry. I knew of so many houses using it, because I wrote to aris, Allen & Co., at that time that they had known of its use for a reat many years and had never entered any objection to it; I think urs was the first objection that I knew of.

R. X Q. 2. The houses that were using this brand were generally known as being counterfeiters and fakers of all legitimate brands of

Kentucky whisky, were they not?

A. No, they were not. The ethics of the trade are quite different now. That is very carefully watched now. Mida, of Chicago, publishes a book of brands that we use and refer to that now before taking up a brand. We never touch a brand—at that time it was not considered anything out of the way to use any brand we pleased, it was not considered anything disgraceful, or anything that was wrong.

R. X Q. 3. What we now call "piracy" is the trade was quite

generally indulged in?

A. What you call "piracy" now was very common then. R. X Q. 4. Particularly in Cincinnati, in rectifying houses?

A. I don't know about that. I don't know whether any more in Cincinnati than any other place. I only know that every house had the same brands. I recollect when I went into the business as a boy, there was a West Virginia brand of "Monongahela Rye" whisky, I don't believe there was a house that didn't use it. Originally it was started by some man in Pittsburg, meaning the Monongahela Valley whisky.

R. X Q. 5. You are referring to the Cincinnati houses in your last

answer?

A. I was referring to the Cincinnati houses.

510 Further redirect examination by Mr. A. Julius Freiberg:

R. D. Q. 9. In the early days, up to 1870, was the use of these brands regarded as "piracy?"

A. Not at all.

R. D. Q. 10. Why not?

A. Well, I don't think people had got up to that standard of business honor at that time; there was a different feeling about it than in the trade now. Now a house like James Walsh & Co., or our own, could not be induced to use a brand that belonged to another house, whether a registered brand or not.

R. D. Q. 11. I will ask you whether the general use of these brands involved a question of business honor, or not, and whether any par-

ticular name carried any particular significance with it?

A. Why, in some cases there was a good deal of signification to a

brand; but it was very much less than now-a-days.

R. D. Q. 12. Why were brands put on goods; did they indicate the origin?

A. Not at that time. There was too general use of them to indi-

cate any origin very much.

R. D. Q. 13. What was the condition of affairs as to the commonness of a brand with reference to business honor?

Objected to by solicitor for complainant, as incompetent and immaterial.

A. There was no sentiment then prevailing that the use of any brand was a matter of business honor, or in any way a violation of it.

R. D. Q. 14. Why do you use the word "piracy" in connection with that?

A. I say, it would now be regarded as "piracy"—not at that time.

R. D. Q. 15. Would it at that time have been so regarded by any one in the trade?

A. No, sir; I don't think so, by anybody at that time.

And further deponent saith not.

WILLIAM N. HOBART.

STATE OF OHIO,

Hamilton County, ss:

Sworn to and subscribed before me, this 16th day of May, A. D.,

SEAL.

1906.

NATHANIEL WRIGHT. Notary Public, Hamilton County, Ohio.

511 John T. Mayse, called as a witness, of lawful age, being first duly cautioned and sworn, was examined, deposed and testified as follows:

Direct examination by Mr. A. Julius Freiberg:

Q. 1. Please state your name, age, residence and occupation?

A. John T. Mayse; age, 31; Frankfort, Kentucky; business, assistant distiller.

Q. 2. Of what distillery?

A. George T. Stagg Company.

Q. 3. How long have you been engaged in the business of practical distiller?

A. I have been working at that distillery for fourteen years, a little over—pretty near fifteen now.

Q. 4. How long have you been connected with this Stagg distillery?

A. Well, off and on since 1895.

Q. 5. Are you familiar with the distillery premises of W. A. Gaines & Co., situated on Glenn's Creek, in Woodford county, Kentucky?

A. Yes, sir.

Q. —. Known as the "Old Crow?" A. Yes, sir.

Q. 7. Have you ever been in the plant?

A. I have.

Q. 8. Have you inspected it?

A. Not to make a thorough inspection of it; I did not go through an inspecting tour; but I have been through the place several times.

Q. 9. When you went through, did you take note of what you saw in the place?

A. Yes, sir.

Q. 10. When was that?

A. I don't remember the exact date.

Q. 11. Approximately, about when?

A. Oh, it was in September or October, 1895, I think it was.

Q. 12, 1905?

A. 1905, I think that was it; now, I don't remember positive; somewhere along there.

Q. 13. When you say you think it was, what year was it? Are you sure what year it was?

A. 1905.

512 Q. 14. You are sure it was 1905?

A. Yes.

Q. 15. You are not quite sure as to the month?

A. No, I don't remember the exact month, or date.

Q. 16. It was about nine months ago, was it?

A. Something like that.

Q. 17. Did you observe the method of mashing and fermenting used in the distillery at that time?

A. The last time I was through there it was not running.

Q. 18. You mean at the time you went through it, you mean in October, 1905?

A. It was not running on the day I went through.

Q. 19. Have you ever seen it running?

A. I have.

Q. 20. How lately? A. I don't remember.

Q. 21. Was it near about this time of October, 1905?

A. No, it was not that time.

Q. 22. Was it near about that time?

A. No, I have been through a good many times. I don't remember any—

Q. 23. Have you ever seen the method of mashing and fermenting in that distillery in operation?

A. Yes, sir.

Q. 24. Give us an idea how long ago that was—approximately, not exactly—the last time?

A. It has been about two or three years ago.

Q. 25. What was the method of mashing and fermenting used at that time?

A. Why, they mashed in an iron tub—had two iron tubs was mashing in.

Q. 26. How much did they hold?

A. I don't know the exact capacity of them.

Q. 27. About?

A. Oh, I don't know.

Q. 28. Did they hold a gallon, or a thousand gallons? A. Oh, they would hold more than a thousand gallons.

Q. 29. What was in the tubs?

A. They were mashing meal then, making a mash.

Q. 30. How did they do it?

A. Well, they used water and meal. Q. 31. Did they fill the tubs with water?

A. Which?

513 Q. 32. Did they fill the tubs with water?

A. Do you mean the mash tubs?

Q. 33. Yes?

A. No, they cannot fill them with water; put in just so much water, you know, and put in so much meal.

Q. 34. Did they put in as much water as they wanted in the tubs?

A. Yes, sir.

Q. 35. Then what did they do with reference to the temperature? A. Well, I don't know the temperature; every distiller has a different temperature to go by.

Q. 36. I didn't ask you what temperature; but did they bring

it up to a certain required temperature?

A. I suppose they did; yes, sir. Q. 37. Then what did they do?

A. It goes from there into the fermenters.

Q. 38. Then what—after it cools?

A. It goes from the mash tubs going into the fermenters, remains a certain length of time—

Q. 39. Then what happens?

A. Then it goes, taken from the fermenters, goes to the beer still.

Q. 40. Then what?

A. Then it is boiled in the beer still; comes out in what is termed "singlings;" then goes through another process of boiling, through another still, what they call "doubling still," then it comes out as whisky—what they call "whisky."

Q. 41. All this happened in the Crow plant at that time?

A. Which? At the time I was speaking of? Yes, when I went through it; that is the way all of them run.

Q. 42. Did they have a mashing floor?

A. They didn't at that time.

Q. 43. Did they use small tubs?

A. I didn't see any then.

Q. 44. You went through, and if they had been there you would have seen them?

A. I certainly would, I think, if they had any mashing floor. Of course there is a mash floor where they used to place the scalding tubs.

Q. 45. I am asking you if they have a mashing floor?

A. I said I don't know if you mean the way I would take it, they didn't have any little tub mash floor.

Q. 46. Did they scald the meal with hot slop?

A. I don't know. Q. 47. What?

A. I don't know.

Q. 48. Did they have any appliances in the distillery for doing that kind of work?

A. I didn't see anv.

Q. 49. Would you have seen such if it had been there?

A. I think I would.

Q. 50. Could they, with the tubs they had and used at the time you made this trip through the distillery we are talking about, make whisky by the sour mash formula?

A. No, sir.

Q. 51. By what formula could they make it by?

A. By the sweet mash formula. Q. 52. What is that, Mr. Mayse?

A. Well, sour mash is made by making it in little tubs, setting over 24 hours upon the floor; then it is dumped out the next morning and run into the fermenters.

Q. 53. That is sour mash?

A. Yes, sir.

Q. 54. Why could not that be done there?

A. They didn't have the appliances to make it, as I can see. Q. 55. Then with the appliances they had on hand could they, or could they not have made sour mash?

A. They could not with what they had on hand at that time.

- Q. 56. The large tubs that they used in mashing, what were they made of?
  - A. Iron.

Q. 57. Can they be handled as readily as small tubs?

A. No, sir.

Q. 58. It is a fact that they could not be used as readily as the small tubs?

A. They cannot be.

Q. 59. Has that anything to do with the reason why they could not make sour mash in that way?

515 A. Those tubs are fixed on iron foundations; they cannot

be moved, they are too large to be handled.

Q. 60. In order to make sour mash is it necessary that you should

have power to move the tub?

A. That I don't know. In making sour mash you have to roll the tubs along, little tubs made something like to hold a hundred gallons, something like that; about a bushel and a half of meal; that is about the way they make hand-made sour-mash.

Q. 61. In order to make hand-made sour mash?

A. Yes, sir.

Q. 62. Could the iron tubs that you speak of as having been in the distillery of the Old Crow be used to make hand-made sour mash?

A. No. sir.

Q. 63. How long before this last trip that you are now speaking of had you been in the distillery?

A. Oh, I think off and on the summer before that. Q. 64. Have you been in the distillery many times?

A. Oh, yes, I have been there several times.

Q. 65. Through it?

A. Yes, sir.

Q. 66. Have you ever seen those small hand-made sour mash tubs?

A. I have, yes, sir. Q. 67. When?

A. I don't remember the exact time.

Q. 68. Is it recently?

A. No, sir.

Q. 69. How far back?

A. It is, I suppose it has been ten years.

Q. 70. Ten years?

A. At least that long, if not longer.

Q. 71. But since the last ten years they have not had those tubs; is that a fact?

A. No, I didn't say that. Q. 72. What did you say?

A. I don't remember how many years it has been since they have abandoned using little tubs; I don't know, I was away.

Q. 73. You have been in that distillery on and off for how many

years?

A. Well, I don't know the exact number of trips that I went through there.

516 Q. 74. I did not say the number of trips; I said the number

of years passing over which you made trips?

A. Well, I cannot say that it was certain, because I was raised out on that creek, out there a boy; I have been in there a good many times off and on; been here and there, and at Frankfort off and on going out; that is the reason I cannot say positive.

Q. 75. You have, I believe, just said that you have not seen any hand-made sour mash tubs on your trips through that distillery dur-

ing the past ten years?

A. No, I didn't say that.

Q. 76. Now, what did you say? We have to get it right.

A. I cannot say exactly it is ten years; it may have been a little

later than that; I don't know.

Q. 77. Approximately how long? It might have been eight and a half; it might be nine and three-quarters; but how long is it, approximately, since you have seen any hand-made sour mash tubs in the Old Crow distillery?

A. I cannot say for certain; I don't know exactly how long it

has been.

Q. 78. What did you mean when you said in answer to my previous question that you had not seen any hand-made sour mash tubs in that distillery for ten years?

A. I meant that I knowed positive it was about ten years ago that I saw them in there, because I was living out there near the distillery.

Q. 79. Have you seen them there since?

A. I don't know; I cannot say; I don't remember.

Q. 80. Is that your answer?

A. I don't mean to say I have not seen them there in the last few years.

Q. 81. What do you mean, then? Tell the stenographer what is

the state of facts on that subject; what is the truth?

A. Well, you asked me the question of late. Do you mean in the

ten years?

Q. 82. I understood you to say before in answer to my question that you had been through that distillery off and on for a great many years?

A. Yes.

517 Q. 83. And have you observed things in the distillery? A. Yes, sir. Q. 84. I asked you how long it was since you saw the hand-made mash tubs, and you said you thought it was about ten years since you saw them; is that true?

A. Yes, sir.

Q. 85. Have you ever seen the sign of J. P. Williams, Rectifier and Wholesale Liquor Dealer, on the premises of the Old Crow Distilling Company?

Objected to by solicitor for complainant, as incompetent.

A. I cannot say that I have, not on that premises, I don't know about that.

Q. 86. Have you ever seen the sign of J. P. Williams, Rectifier and Wholesale Liquor Dealer?

Objected to by solicitor for complainant on same grounds as before.

A. Yes, sir.

Q. 87. Where have you seen it?

Objected to by solicitor for complainant on same ground.

A. In Frankfort.

Q. 88. Where in Frankfort?

Objected to as before.

A. In the alley going off Main street.

Q. 89. In the alley; on whose premises have you seen it?

A. I don't know whose premises it is on. Q. 90. What sort of a house is it on?

A. It is a brick house.

Q. 91. What was in the house?

Objected to by solicitor for complainant, as incompetent.

A. I don't know what is done in the house.

Q. 92. Is there any other sign on the house?

A. Yes, sir.

Q. 93. What is the other sign?

Objected to as before.

518 A. Sign is "J. P. Williams, Rectifier of Spirits, Wholesale Liquor Dealer."

Q. 94. Have you ever been in the house?

A. No. sir.

Q. 95. How far is the house from Old Crow distillery, or any of its buildings?

A. From the distillery out on Glenn's Creek I suppose it is about four miles and a half.

Q. 96. How about the store house of W. A. Gaines & Co.?

A. Well, that I cannot give you a very good answer to that.

Q. 97. Give us the truth; that is all we want?

A: That is what I am trying to tell.

Q. 98. Is it over the door leading to the alley entrance of the building occupied by W. A. Gaines & Company?

A. I don't know, sir. W. A. Gaines & Co. is not in the alley, their building.

Q. 99. What is the location of this building with reference to the

street?

A. It is about 125 feet in the alley from Main street.

Q. 100. It is in an alley, is it?

A. Yes, sir.

Q. 101. What is the name of the alley?

A. I don't know the name of the alley.

Q. 102. Between what two streets does the alley run?

A. It goes from Main around on St. Clair.

Q. 103. Is the alley round?

A. Yes, it makes a circle; here is Main street running in here. (Illustrating.) It goes out on St. Clair street.

Q. 104. What street is W. A. Gaines & Co.'s building on in Frankfort?

A. On the Main street.

Q. 105. On what?

A. Main.

Q. 106. How far is this building with J. P. Williams' sign on it from Main street?

A. About one hundred and twenty-five feet.

Q. 107. How far is it from W. A. Gaines & Co.'s property; how far is this building with the sign of Williams upon it from the W. A. Gaines & Co.'s property.

A. Well, now, that question I cannot answer; I don't know

519 how closely they are connected together in the rear.

Q. 108. Are they pretty closely connected in the rear?

A. I don't know for sure; but I think they are, because—

Q. 109. How close are they?

A. I don't know; I have not been ——

Q. 110. Have you ever been through there?

A. I never been back in there; no sir.

Q. 111. The W. A. Gaines & Co. building backs up on the alley, doesn't it?

A. I think so.

Q. 112. What did you mean by saying that they backed up to each other on the alley; I didn't understand you?

A. I don't know whether they touch back there or not; I don't

know.

Q. 113. Is the building with the sign J. P. Williams, Rectifier, Wholesale Liquor Dealer, the rear end of the building—near to the rear end of the building occupied by W. A. Gaines & Co., in Frankfort?

A. I don't know.

# Cross-examination by Mr. Hopkins:

X Q. 1. You were formerly a member of the firm of Laval & Mayes, were you not, Mr. Mayes?

A. Yes, sir.

X Q. 2. You did a little distilling business in the city of Frankfort?

A. Well, I was about a mile and a half from Frankfort.

X Q. 3. How far from the Old Crow distillery did you live at the times that you have referred to?

A. I think it was about three or four miles, something like that. Did you mean where I used to live formerly, reside?

X Q. 5. Yes.

A. About four or five miles.

And further deponent saith not.

JOHN T. MAYSE.

STATE OF KENTUCKY, Franklin County, 88:

Sworn to before me and subscribed in my presence this 14th day of May, 1906, by said John T. Mayse.

SEAL.

T. N. LINDSEY. Notary Public, Franklin Co., Ky.

My commission expires January 13th, 1910.

And also, Abraham Rheinstrom, of lawful age, being pro-520 duced, sworn, and examined, on the part of the respondent, deposeth and saith, to-wit:

Direct examination by Mr. A. Jules Freiberg:

Q. 1. What is your name, age, residence and occupation?

A. Abraham Rheinstrom; 61; Cincinnati, Ohio; occupation, wholesale liquors, manufacturing fruits, and one thing and another.

Q. 2. What is the name of your firm?

A. Rheinstrom Brothers.

Q. 3. How long have you been connected with that firm?

A. Since January, 1876.

Q. 4. With what firm were you connected prior to that time?

A. Freiberg & Workum.

Q. 5. Where is that firm located?

A. Here in Cincinnati; now on Front Street.

Q. 6. In what business?

A. Whiskies. Q. 7. Distillers?

A. Distillers and rectifiers.

Q. 8. Wholesale?

A. Yes, sir.

Q. 9. When did you begin your connection with that firm?

A. In October, 1862.

Q. 10. You terminated your connection with that firm in '76?

A. December 31, 1875.

Q. 11. In what capacity were you connected with the firm of Freiberg & Workum at the beginning?

A. I was a sort of a chief cook and bottle-washer; I kept the books, attended to the cash, shipping, and general office man.

Q. 12. Were you acquainted with the purchases made by Freiberg & Workum of whiskies of any kind?

A. Yes, sir.

Q. 13. To what extent?

A. Well, I knew everything that was purchased by them,—knew everything. There was nothing came in the house that did not come under my observation and handling.

Q. 14. Can you say the same with reference to sales made by Frei-

berg & Workum?

A. Yes, sir.

Q. 15. Did you have opportunity to know the contents of the packages which they shipped to their customers?

 A. Yes, sir.
 Q. 16. Have you ever heard of the brand or the name 521 "Crow"?

A. Yes, sir.

Q. 17. "Old Crow"? A. Yes, sir.

Q. 18. "J. Crow"?

A. Yes, sir.

Q. 19. When did you first hear of that name, if you remember?

A. Well, the date I don't remember; but when I first got to Freiberg & Workum's they had such a brand in use; that was there in 1862

Q. 20. Do you know of your own knowledge when the firm of

Freiberg & Workum was organized?

A. When it was organized? Well, I remember 1854. That is the information I had from them when I worked with them, when they started; of course, I wasn't there at the time.

Q. 21. Is that firm in existence to-day?

A. Yes, sir: it was '53 or '54.

- Q. 22. In what connection did you come into acquaintance with the use of the word "Crow"; that is to say, where did you see the word "Crow"?
- A. Well, when I was working for Freiberg & Workum they got orders for whiskies; some called for "Crow" whisky; some for "Brown" whisky; some "Shafer" whisky; and various brands that they used.

Q. 23. When you would ship a customer "Crow" whisky, ordinarily, what would be the nature of the whisky that you would send him,-two-stamp goods, or single stamp goods called blended?

A. At that time there was no stamps in existence; but we sold the

rectified whisky or what was called "Domestics."

Q. 24. Blends?

A. Well, it is rectified domestic goods; it would not be what is unders'ood to-day as "blends"; that was not understood at that time to be blends.

Q. 25. Would it be what is to-day called "straight whisky"? A. No, it was what is known as rectified, domestic, whisky; that was, of course, flavored with some other material.

522 Q. 26. I will ask you whether when the word "Crow" was used in the trade, either by your customers in your house, or by the trade generally, the name indicated any particular piace, county, country, or creek, from which that whisky originated?

Objected to by solicitor for complainant, as incompetent.

A. I was not familiar with anything as far as brand "Crow" is concerned except what was used by Freiberg & Workum; I never heard or knew of any particular locality or creek or county, I never heard that in connection with "Crow."

Q. 27. You never heard any in connection with Crow. Have

you ever heard of Glenn's Creek before to-day?

A. No. sir.

Q. 28. What was the general conception at that time in the trade as to the meaning of the word "Crow" in general?

Objected to by solicitor for complainant, as incompetent, calling for hearsay.

A. As to the conception of the general trade? As far as my remembrance was at that time, or what I can remember, is only in connection with the domestic whisky that I was connected with, of Freiberg & Workum. They handled that brand in certain whiskies that they branded "Crow" whiskies.

Q. 29. Was any objection ever made while you were in the employ of Freiberg & Workum up to 1876, on the part of any one, to

the use of this name "Crow"?

Objected to by solicitor for complainant, as incompetent, calling for hearsay.

A. Not that I remember.

Q. 30. I will ask you whether or not it was common practice with Freiberg & Workum to insert into these barrels which you marked "Crow" whisky which did not come from Woodford county, Kentucky?

Objected to by solicitor for complainant as irrelevant and immaterial.

523 A. We only used it on domestic whisky; that is, whisky made from spirits and flavored; otherwise called "rectified" whisky.

Q. 31. Not necessarily Kentucky whisky?

A. No, sir; they never used it on any Kentucky whisky.

Q. 32. I will ask you what is this book that is before you, Mr. Rheinstrom?

Λ. This is the sales book of Freiberg & Workum, which is all in my hand-writing.

Q. 33. From what period to what time?

A. It starts in May, 1866, and runs to October, 1869,

Q. 34. What do these entries here made by you represent, Mr. Rheinstrom?

A. They represent sales made by Freiberg & Workum, as well as

regular journal entries of debits and credits, bills receivable, and so forth.

Q. 35. Made by you as original entries in the regular course of

business?

A. Yes, made by me as original entries.
Q. 36. I will ask you whether this book shows any sales of whisky called "Crow" during a period beginning May, 1866, and ending October, 1869?

A. It does.

Q. 37. I will ask you to refer to such an entry?

- A. July 27, 1866, Forcheimer Brothers, page 49 of this book, there is an entry of a sale of ten half barrels and five barrels of Crow.
- Q. 38. What does this entry represent, that is to say, what was the nature of the whisky covered by that entry?

A. It was domestic or rectified whisky.

- Q. 39. I will ask you if there are any other entries covering "Crow"?
- A. Yes, there is another entry dated August 14, 1866, page 58, S. Kaufman, showing a sale of ten barrels of Crow.

Q. 40. What was the government tax exacted in those days?

A. I think it was about two dollars at that time.

Q. 41. Are there any other entries covering sales of Crow?

A. Yes, there is an entry, Fechheimer & Workum, August 15, 1866, 10 barrels Crow; L. Barber & Son, August 30,
 1866, 5 barrels Crow; Thomas Blighe, August 31, 1866, 5 524barrels Crow; Fechheimer & Workum, September 17, 1899, 10 barrels Crow; S. H. & E. Block, October 10, 1899, 5 barrels Crow.

Q. 42. I notice that in this last statement of sales to Block the

goods are called "Crow's."

- -. The brand was "Crow," and we called it that way "Crow's." The next entry is Fechheimer in the book, & Workum, October 20, 1866, 25 barrels of Crow; next, November 2nd, 1866, Focheimer Bros., 10 barrels and 10 half barrels of Crow; November 14, 1866, Killen & Blum, 10 barrels of Crow; November 16, 1866, Troost & Co., 1 barrel Crow; July 31, 1868, Bode & Doscher, 15 barrels Crow; August 4, 1868, Fechheimer & Workum, 12 barrels Crow; August 13, 1868, Fechheimer & Workum, 25 barrels Crow.
- Q. 43. I will ask you whether there were other sales of Crow during this period not included in the items that you have gone over?
- A. That I could not remember without going over the books. I have not gone through every item in the book.

Q. 44. Is every item in this book true?

A. Yes, sir.

Q. 45. And represents a true sale or transaction?

A. Yes, sir.

Q. 46. Of these various transactions showing sales of whisky called "Crow" specified by you, I will ask you whether any of them comprehend whisky made in Woodford county, Kentucky?

A. No. sir.

Q. 47. I will ask you whether such sales as these sales of Crow by your firm were generally known to the trade?

Objected to by solicitor for complainant, as incompetent.

A. As far as I know the trade that Freiberg & Workum had connection with, that trade understood what this Crow whisky was, Of course, whether the trade in general understood that, that I cannot say; that I do not remember.

525 Q. 48. Did Freiberg & Workum during the period of your connection with them have any complaint from an outside

house as to its use of the word "Crow"?

Objected to by solicitor for complainant, as immaterial and irrelevant.

A. I don't remember that they had any.

Q. 49. Now, Mr. Rheinstrom, I will ask you what was the custom of the trade with reference to the use of brands either burned in the barrel, or labelled on the barrel or package, during the period of your connection with Freiberg & Workum; I mean, as to the general or universal use of names on the part of one house or another?

Objected to by solicitor for complainant, as irrelevant and immaterial.

A. The houses at that time, they aimed to make use as far as I remember of their own brands; but they were used as and by a great many houses by varying the initials; they used the same names; as we had "J. Shafer," and somebody else had "V. Shafer." We had "V. A. Brown," and somebody else had "D. Brown." Freiberg & Workum, I think, called theirs "J. Crow"; somebody else might have had "S. Crow." They differed in that way.

Q. 50. They aimed not to interfere with each other?

Objected to as before.

A. They never made any objection, as I remember.

Q. 51. How was the use of these names in this way regarded by the trade generally?

Objected to by solicitor for complainant, as irrelevant and immaterial.

A. More or less general property, as an ordinary trademark.

Q. 52. By "ordinary" you mean "universal"?

A. Yes, sir, the general designation of certain whiskies,

Q. 53. Will you introduce this book that I have shown you and examined you as to, and make it a part of your deposition, marking it as "Exhibit A, to Rheinstrom Deposition"?

A. Yes. sir.

Said book is so marked and made a part hereof.

 $\mathbf{Q}.$  54. To indicate the sales of Crow by Freiberg & Workum during that period?

A. Yes, sir.

Q. 55. Said sales being sales of whisky which you have described as not the product of Woodford county, Kentucky?

A. Yes, sir.

Q. 56. But simply domestic rectified goods?

A. Yes, sir.

Q. 57. I will ask you whether the term "Old Crow" or "Crow" in some form, was ever used in whisky that had not been rectified?

Objected to by solicitor for complainant as irrelevant and immaterial.

A. Yes, sir. That is, not by Freiberg & Workum. You asked me whether—

Q. 58. Whether the term "Old Crow" or "Crow" was not used on whisky that was not rectified whisky at the time?

A. I think so; yes, sir.

Q. 59. Whisky that did not necessarily come from Woodford county, Kentucky?

Q. 60. Somewhere in Kentucky?

A. But the domestic whisky branded "Crow," of course, did not come from Kentucky.

Cross-examination by Mr. J. L. Hopkins:

X Q. 1. Mr. Rheinstrom, are you acquainted with the "Old Crow" whisky of W. A. Gaines & Co.?

A. By reputation.

X Q. 2. How long have you been acquainted with it in that manner?

A. Well, I could not recall how long; good many years.

X Q. 3. Do you recollect the firm of Gaines, Berry & Co., predecessors of W. A. Gaines & Co.?

A. Yes, I remember the name.

X Q. 4. Have you ever dealt in the "Old Crow" whisky of W. A. Gaines & Co.?

527 Objected to by solicitor for respondents, as immaterial.

A. Not extensively; may have had—we have bought some few barrels, I guess, that we have handled during our career.

X Q. 5. Are you familiar with the manner in which the "Old Crow" whisky of W. A. Gaines & Co., is listed in the price currents of the whisky trade?

Objected to by solicitor for respondents, as immaterial and incompetent.

A. I know it to be listed as "Crow" whisky.

X Q. 6. You know it to be a fact, do you not, Mr. Rheinstrom, that where the words "Old Crow" appear in those price currents, that they refer to the W. A. Gaines & Co. whisky?

A. Of course the price currents of to-day quote that as Crow, of course; but at the time that this book applies there was no such thing as price currents.

X Q. 7. But there have been price currents for many years, have there not?

A. Yes, those price currents go back as far as in the eighties.

X Q. 8. What are some of the principal price currents of the trade? A. Biles—Durner-

X Q. 9. Voss?

A. Voss.

X Q. 10. And where the words "Old Crow" appear in those price lists, they indicate whisky of W. A. Gaines & Co., do they not?

Objected to by solicitor for respondents, as immaterial.

A. I think so.

X Q. 11. I notice in connection with some of the items that you have referred to here a whisky which is entered as "Keller." Was that a straight whisky?

A. I think that was a straight whisky.

X Q. 12. At the time of these transactions were Freiberg & Workum the owners of the Bowen brand?

A. Yes, sir.

X Q. 13. Did they have an extensive sale for that brand? 528 A. Yes, sir.

X Q. 14. At any time when you were associated with Freiberg & Workum, were they represented in the city of St. Louis by William Mida?

A. They were, in the seventies.

X Q. 15. That is the same William Mida who publishes "Mida's Criterion," at Chicago?

A. Yes, sir.

X Q. 16. Did you make any of the sales for Freiberg & Workum during the period covered by this book yourself?

A. I may have been in the office when customers would come in

and leave an order.

X Q. 17. But you did not go out of the city in making sales?

A. No, sir.

X Q. 18. You made no sales, did you, to I. & L. M. Hellman, of St. Louis, yourself?

A. No, sir. X Q. 19. You didn't visit St. Louis for the purpose of selling goods?

A. No. sir.

X Q. 20. You had no knowledge at that time that the firm of I. & L. M. Hellman were making a rectified whisky and selling it as "Bowen" whisky, did you?

Objected to by solicitor for respondents, as immaterial.

A. No. sir.

X Q. 21. Were you acquainted with the "Magnolia" whisky during this period?

A. Yes, sir.

X Q. 22. By whom was that whisky made and sold?

A. S. N. Pike & Co.

X Q 23. Of Cincinnati? Were you acquainted with the Arnold whisky during this period?

A. I don't remember the name.

X Q. 24. Do you remember the brand "Arnold Spring"?

A. No, sir.

X Q. 25. Have you ever visited the distilleries of Woodford county, Kentucky?

A. No, sir.

X Q. 26. Are all of the entries in this book in your hand-writing?
A. Yes, sir.

529 X Q. 27. You were in sole charge of the books during that period?

A. Yes, sir.

X Q. 28. Does this book contain the original entry of all sales made by Freiberg & Workum during the period covered by it?

A. Yes, sir.

X Q. 29. Do you know how long Freiberg & Workum continued to produce this rectified whisky distinguished as "J. Crow?"

A. I do not. The brand was a straight line; I think it was "J.

Crow," or "J. Crow Bourbon."

### Redirect examination by Mr. A. Julius Freiberg:

R. D. Q. 1. In what quantities did I. & M. Hellman, of St. Louis, purchase Bowen whisky of Freiberg & Workum, large, or small?

A. Their purchases were quite extensive.

R. D. Q. 2. Of Bowen?

A. Of Bowen.

R. D. Q. 3. Was the Bowen whisky bottled in those days?

A. No, sir.

### ABRAHAM RHEINSTROM.

STATE OF OHIO,

Hamilton County, 88:

Sworn to and subscribed before me this 16th day of May, in the year of our Lord, 1906.

[SEAL.]

NATHANIEL WRIGHT, Notary Public, Hamilton County, Ohio.

530 STATE OF OHIO, County of Hamilton, ss:

I, Nathaniel Wright, a notary public within and for said county, duly commissioned and qualified in the State of Ohio, do hereby certify that in pursuance of the within notice attached hereto, came before me, at my office in the Union Trust Building in the City of Cincinnati, State of Ohio, and thereafter as adjourned to the office of A. Julius Freiberg, in said Union Trust Building, and the residence of Abraham Rheinstrom, at 3550 Washington avenue, in said City of Cincinnati, upon the dates as noted in the foregoing, the said adjournments being duly had and taken by agreement of the parties, the said Nathaniel S. Reeder, William N. Hobart, John T.

Mayse, and Abraham Rheinstrom, who were by me severally sworn to testify the whole truth of their knowledge touching the matter in controversy aforesaid, that the depositions of said witnesses were taken in shorthand and transcribed by Douglas A. Brown, an expert stenographer, in pursuance to the agreement of the parties by their counsel, and by him reduced to typewriting as aforesaid also by agreement of the parties, and as to the witnesses Reeder, Hobart and Rheinstrom, said witnesses subscribed and swore to their depositions as aforesaid, respectively, in my presence; that as to the aforesaid deposition of John T. Mayse, by stipulation of the parties by their counsel said deposition after being transcribed as aforesaid was mailed to Mr. T. Noble Lindsey, a notary public of Frankfort, Kentucky, and before whom said witness Mayse appeared and subscribed and swore to this deposition aforesaid which was then duly returned by mail to me by agreement of the parties, and was attached to and with the depositions of the remaining witnesses aforesaid as part hereof.

I further certify that all of said depositions were taken pursuant to the notice and agreement of the parties by their counsel, on the day between the hours and at the place in that behalf first aforesaid, and their depositions are now herewith returned.

Given at Cincinnati, in the County of Hamilton, State of Ohio,

this 16th day of May, 1906.

SEAL.

NATHANIEL WRIGHT, Notary Public, Hamilton Co., Ohio,

My commission expires October, 1908.

On to-wit: on the 10th day of January, A. D. 1905, the following deposition on behalf of defendant, was filed in said cause, which said deposition is in words and figures as follows, to-wit:

In the United States Circuit Court in and for the Eastern Division of the Eastern Judicial District of Missouri.

No. 5096.

W. A. GAINES & COMPANY

ABRAHAM M. HELLMAN et al.

It is hereby stipulated between the parties to the above mentioned cause that the deposition of E. L. Charropin, taken on the part of the defendants in the City of St. Louis on the 6th day of October, 1904, in a suit then pending in the Circuit Court of the City of St. Louis between these same parties, and involving the same subject matter, may be read in evidence at the trial of this case with the same force and effect as if it had been taken in this cause, and a copy of 532 said deposition so taken, duly certified by the notary public

before whom the same was taken may be filed in this cause. Dated 19 Nov., 1904.

JAMES L. HOPKINS, Sol's for Complainant. KLEIN & HOUGH,

Sol's for Defendants.

Depositions of witnesses produced, sworn and examined on the 6th day of October in the year of our Lord, One Thousand Nine Hundred and Four, between the hours of eight o'clock in the forenoon and six o'clock of the afternoon of that day at the office of Messrs. Klein and Hough, 902 Rialto Building, Southeast corner of Fourth and Olive streets, in the city of St. Louis and State of Missouri, before me, Charles E. Weller, a Notary Public within and for the City of St. Louis and State of Missouri, in a certain cause now pending in the Circuit Court of the City of St. Louis, State of Missouri, between W. A. Gaines & Company (a corporation) Plaintiff, and Abraham M. Hellman and Moritz Hellman (co-partners as A. M. Hellman & Company) Defendant-. James L. Hopkins, Esq., appearing for the Plaintiff, and Jacob Klein, Esq., for defendant-.

EMIL L. CHARROPPIN, of lawful age, being produced, sworn and examined on behalf of the defendants, deposeth and sayeth as follows:

Direct examination by Judge Klein:

Q. What is your age?

A. I am sixty-two years old last September.

Q. Where do you live?

A. I live in Covington, Louisiana. Q. How long have you lived there? A. About two years and a half.

Q. What is the occasion of your being in St. Louis? Why did

you come to St. Louis now?

A. I came to St. Louis because a son of mine had an operation. He is at Mullanphy Hospital. I had a telegram from Dr. Grindon. Dr. Mudd performed the operation.

Q. Do you know the firm of A. M. Hellman & Co.?

A. Yes, sir, done business with them.

Q. Do you know the predecessors of that firm?

A. Very well. I have traveled for them.

Q. Who were the predecessors of the present firm?

A. I. & L. M. Hellman. Isaac Heliman and Louis M. Hellman.

Q. Were you ever in the employ of the old firm?

A. Yes, sir.

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Q. When did you go into their employ?

A. In 1866.

Q. Do you remember the month?

A. I do not.

Q. Was it early or late in the year?

A. I think it was late. I am certain I traveled for them in November and before that, but how much before I could not say.

Q. You were traveling salesman, you say, for them?

A. I was traveling salesman for them. Q. How long were you in their employ?

A. I believe it was in 1870, about the end of it, probably December, but it is within a few months of that, I am certain.

Q. During the time that you were there did either member of

the firm die?

- A. Yes, sir, Isaac Hellman died in 1867, about a year after I was there.
  - Q. Do you remember about the time of the year he died?

A. No, I do not.

Q. Were you present in St. Louis at the time of his death?

A. I nursed him, helped to nurse him.

Q. Where was the partner of Louis M. Hellman at that time?

A. No. 112 Pine street, St. Louis.

534 Q. You mean that was the firm's place of business? A. Yes, sir.

Q. Where was L. M. Hellman when Isaac died?

A. He was in Europe.

- Q. In what part of the country did you travel for the firm of I. & L. M. Hellman?
- A. At first I traveled through Illinois and some parts of Missouri, and then afterwards I traveled in the south as far as New Orleans.

Q. What states did you travel in?
 A. Tennessee and Arkansas, Mississippi and Louisiana.

Q. What goods did you sell as the traveling salesman for them? What did you sell for them?

A. Liquors, whiskies, brandies, gins, etc.

Q. Do you remember the brands of whiskies that you sold during that time for them?

A. Oh, yes, sir.

Q. Just mention the names of the brands?

A. Well, there was Nectar, Planter's Favorite, Crow, Arnold, Rohrer, and there was Bowen and Pepper.

Q. Do you remember about the Crow brand?

A. Perfectly.

Q. What was that whiskey?

A. That was a blend that was made between spirits, from spirits and straight goods.

Q. Did you know how it was made?

A. Yes, sir, I knew the quantity that was put in of spirits and of the straight whiskey.

Q. Did you sell this Crow brand of whiskey during the time that you were in the employ of Hellman?

A. Yes, sir.

Q. And from what time did you begin to sell that?

A. Well, about as soon as I went with them.

Q. Was that one of the brands which they had in their house at the time when you came there?

A. Yes, sir.

Q. How were the brands indicated? How did they indicate the brand?

A. The brand on the barrel?

Q. You mean by a brand on the barrel?
A. I did not catch your question.

Q. How was the brand indicated?

A. I always called it Crow.

Q. Was there anything on the barrels which showed that it was Crow whiskey?

A. Yes, sir, it was Old Crow.

Q. Was there any mark on the barrels to show that?
A. It was Old Crow Bourbon as far as I can recollect.

Q. Was there any mark on the barrels to show what kind of whiskey was in the barrels?

A. All that I can recollect is Old Crow Bourbon; whether the name Hellman or not was on it I don't know.

Q. I want to know whether the brand was on the barrel?

A. Yes, sir, the brand was on the barrel.

Q. Now you say, Mr. Charroppin, that you left the employ of the firm about 1870?

A. Yes, sir.

Q. In the latter part of the year?

A. Yes, sir.

Q. Where did you go then?

A. I went into partnership with Mr. J. J. Capdevielle. Q. Where did you go into partnership with him.

A. When I left the house I went in partnership with him.

Q. Where was it? At what place? A. At Baton Rouge, Louisiana.

Q. How long were you in partnership with him?

A. Until about two months before I went in partnership with C. J. Barrow. That was in June, 1872, so it must have been two months before June.

Q. That would be in April?

A. About.

Q. You were in partnership with Mr. Capdeville until April, 1872?

A. Yes, sir, about that. I don't recollect exactly, but it is very close to that.

Q. Now in June, 1872, you went in partnership with C. J. Barrow?

A. Yes, sir.

Q. Where did you carry on business with him?

A. Carried on business with him until October, 1874.

Q. At what place?

A. At Port Island, opposite Baton Rouge, West Baton Rouge also.

536 Q. Port Island was in West Baton Rouge, was it?

A. Yes, sir, it was known as West Baton Rouge at that time.

Q. And you remained in partnership with Mr. Barrow until how long?

A. Until October, 1874.

Q. And then what did you do?

A. Then I came to St. Louis and staid awhile and then went back into business, in January, 1875, for myself.

Q. Where?

A. In the same place, in Port Island.

Q. And how long did you remain in business there?

A. Until 1892.

Q. Then you moved to Covington, Louisiana?

A. Yes, sir.

Q. Now what business was the firm of Charroppin & Capdeville in?

A. Country store. General merchandise.

Q. Did they deal in liquor?

A. Yes, sir.

Q. What business was the firm of Charroppin & Barrow in?

A. Same thing, country store.

Q. And what business did you conduct alone?

A. The same thing.

Q. Then during all that time, did you sell liquor?

A. Yes, sir.

- Q. Whiskey? A. Yes, sir.
- Q. Did you purchase any whiskies from I. & L. M. Hellman and A. M. Hellman & Company?

A. Yes, sir.

Q. What kind of whiskey did you buy from them?

A. Well, I can't exactly recollect. I recollect when I was with Capdeville I bought Arnold's and Pianter's Favorite. That is the only two whiskies that I can recollect. I bought several other brands, though, because we used to sell by the barrel in a small way. We took the hundred dollar stamp with the barrel also, but the exact brands I can't recollect.

Q. Do you remember whether you purchased during that time any Crow whiskey?

A. I do not.

Q. Do you remember purchasing any Crow whiskey at all?

A. Oh, yes, sir, for many years.

Q. During that time did you ever come to St. Louis? A. Yes, sir.

Q. Did you call at the place of business of Hellman?

A. Always, when I was here.

Q. And you say you purchased the Crow whiskey from them for many years?

A. For many years, yes, sir.

Q. And was it marked on the barrels in the same way?

A. Yes, sir, they were marked in the same way. I don't recollect when I traveled for them all the brands that I sold, but I recollect selling Crow whiskey. I am certain of selling Crow whiskey. I

am certain we sold the Crow whiskies and I am certain of the way it was made, but I was hardly ever in St. Louis when I traveled, I was always on the road. When I came to the city I didn't stay hardly any in the store.

Q. Are you certain that it was called Old Crow whiskey?

A. I am certain it was branded Old Crow whiskey. It was called Old Crow whiskey.

Q. Old Crow Bourbon?

A. Old Crow Bourbon, yes, sir. Bourbon is the name.

- Q. Do you remember when Mr. A. M. Hellman came into the firm, or became connected in any way, either as employee or otherwise with the firm of I. & L. M. Hellman?
  - A. Yes, sir, he came here as an employee.

Q. When was that?

A. It was in the same year that I came.

Q. Before or after?
A. I can't recollect.

Q. You don't remember now whether he was already there or whether he came after you came?

A. I don't recollect. One trip I came there and he was there and that was when I first went with the house.

Q. And he was there then.

A. Well, he was there, but it was a very few months before or after. That is the only time I know.

Q. You remember once coming and finding him there early after you went into the employ of the firm?

A. Yes, sir.

538 Q. And he was then in the employ there? A. He was there in their employ, yes, sir.

Q. A young man? A. A young man.

Q. Do you remember whether he could speak English at that time?

A. Well, no, he couldn't speak much English, no, but I think he spoke a little English. We got along with him as far as I can recollect.

Q. Do you remember whether he was in St. Louis when his brother Isaac died?

A. No, he was not there.

Q. Do you know where he was at that time?
A. Weil, yes, sir, I think he was in Fort Scott.

Q. Did he come to St. Louis after Isaac died?

A. Yes, sir, he came to St. Louis after.

Q. And you have seen him there since? You saw him when he came back?

A. Oh, yes, sir.

Q. And you have known him ever since?

A. I have known him ever since.

Q. And later the firm of I. & L. M. Hellman was changed to the firm of A. M. Hellman & Company?

A. Exactly.

Q. You know that fact?

A. Yes, sir.

Q. Now, Mr. Charroppin, how long did you purchase—for how many years past, while you were in business for yourself, or in partnership, did you purchase from Hellman the Crow whiskey?

A. During the time I was in partnership?

Q. For the whole time I mean, after you left their employ?

A. I can't say, when I left I had kept it for a number of years without missing it at all, but how long I can't say. It is a good many years, though.

Q. For a good many years you continued to buy that whiskey?
A. I bought it from them and sold it for a good many years,

ves, sir.

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Q. And during the time that you were in their employ you sold it wherever you could?

A. Yes, sir, oh yes, I sold it where I could. Q. Do you remember any of your customers?

A. No, I recollect I sold some in Port Gibson and sold some in Plaquemine. I sold to William Cahn and Barrett Brothers, and I think L. Kiefer.

Q. Where were they? What place?

A. Port Gibson, Mississippi. I think I sold it to them, but I don't recollect. I sold to a great many people, but I can't recollect the names certainly.

Q. Is Mr. Cahn still living?

A. He is still living, yes, sir. I heard about him when I was in New Orleans three or four weeks ago.

Q. Where is he now?

A. I suppose at the same place.

Q. Port Gibson?

A. Yes, sir, a friend of mine told me. We had been speaking about him.

Q. Are Barrett Brothers still living?

A. I think they are. Charlie Barrett is dead, but the others are living still.

Q. With whom did you have your dealings with Barrett Brothers? Was it Charlie Barrett or the others?

A. It was Barrett Brothers, the firm name.

Q. What man did you sell to? Charlie?

A. Charlie Barrett is the only one that I sold to, but there are three members in the firm.

Q. Mr. Kiefer, was he living at Port Gibson?

A. He was living at Port Gibson.

Q. Do you know whether he is still living?

A. I suppose not. He is a pretty old man, Louis Newman, his son-in-law, bought for him.

Q. Where is he now?

A. He was in New Orleans. I saw him some three or four years ago in New Orleans.

Q. Was he in business there?

A. Yes, sir, he was in business on Poidras street. The name

wasn't out, but he was in the house there, but what connection he had with it I did not know. I didn't ask him. He was the buyer of the house.

Q. Beside Port Gibson vou mentioned some other place, 540

did you not?

A. I sold at Plaquemine. Well, I sold most everywhere, it seems to me.

Q. Do you remember anybody at Plaquemine?

A. I recollect, but I don't know who I sold it to. There is Edward De Sobry. He is the only one living.

Q. Where is he living now?

A. He is living close to Plaquemine on a plantation. I saw him not very long ago.

Q. Do you remember a place called Woodville, Mississippi?

A. Yes, sir.

Q. Did you sell any there?

A. I think I did.

Q. Do you remember who was the party? A. Do I recollect who I sold to there?

Q. Yes, sir. A. No, I do not.

Q. Do you remember whether you sold any at Helena, Arkansas?

A. Yes, sir. Q. Who was they there?

A. Well, I must have sold some there. There is a Frenchman, I couldn't be certain, but I sold him a lot and I know his name, too, but I can't place it now, and he is living too, I think.

Q. Was that Mr. Mengoz? A. Yes, sir, Peter Mengoz. Q. Is he still in Helena?

A. He has a farm a few miles from Helena. He has retired from business now.

Q. And you remember selling him Old Crow whiskey?

A. No, I don't recollect selling anybody positive, you know, but I recollect—I am positive I sold Old Crow to many people, but which ones I can't recollect positively, but I believe I sold him also. I sold it to many, many people, but I don't recollect to whom. We have many brands and I must have sold him about that grade of goods. He bought several brands from us.

Q. Do you know a place called Donaldsonville, Louisiana?

A. Yes, sir.

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Q. That is right near Baton Rouge, isn't it?

541 A. It is between Baton Rouge and old New Orleans. is on Bayou Forche.

Q. Do you remember anybody that you sold liquor to there?

A. Yes, sir, there was Victor Maurin, Joseph Gaudran. They are both dead. But the same name I saw in the paper. And there is Christian Kline. He was sheriff after that. He might be living.

Q. Do you remember how he spelled his name?

A. K-l-i-n-e.

Q. These men were all in the liquor business, were they?

A. I sold them liquors.

Q. And is Christian Kline still living?

A. I don't know. I say I think he is still living. He is about my age.

Q. You think he is still in Donaldsonville?

A. I suppose so, because he lived there all his life, and he married there. He might be living, but the others are dead.

Q. Do you remember a man by the name of Loeb?

A. Henry Loeb, ves, sir.

Q. Was he there in Donaldsonville?

A. Yes, sir, he was there in Donaldsonville.

Q. Did you sell him any?

A. I suppose he is dead, but there is a clerk of his that has a large dry good- store there that is living. I saw him about four or five vears ago.

Q. You don't remember his name?

A. I do not.

Q. Do you remember a man by the name of Israel there?

A. Oh, yes, Max Israel. He died long ago. He died of liver complaint.

Q. Did he live there at that time?

Yes, sir, he lived there at that time.

Q. Did you deal with him?

A. Yes, sir. Q. You sold him? A. I sold him, yes, sir.

Q. Besides those places, do you remember now any other places?

A. Besides those places? A. Yes, sir.

Q. Do you remember whether you sold any at Natchez, Mississippi?

A. I sold liquors in Jackson, yes, sir.

542 Q. That is, Jackson, Tennessee?

A. No. I didn't sell at Jackson, Tennessee, but Jackson, Mississippi, but I can't recollect any names.

Q. Natchez?

A. Yes, sir.

Q. Do you remember that?

A. Oh, yes, sir. At Natchez I sold several orders. I can't recollect the name now. There was an old man, I know his name so well, too.

Q. You don't recollect as to the name of that old man?

A. No, I am trying to think now.

Q. Do you remember the place called St. Joseph, Louisiana?

A. Yes, sir.

Q. Where there any customers of yours there?

A. Yes, sir, I didn't sell many goods there, though.

Q. Well, generally you sold among all your customers the Old Crow whiskey which Hellman & Company was then handling?

A. Well, I sold to some of them, yes, sir. I sold right and left, but I don't remember. I didn't sell to each one, of course.

Q. Old Crow was one of the brands you sold during that time?

A. Yes, sir, it was a brand that was a bourbon and fairly cheap. It was cheaper than Rohrer, cheaper than Arnold, and generally people took that with some finer goods.

Q. And you certainly remember that it was a brand which was in the house at the time you went into the employ of the concern, in

1866?

A. Yes, sir, the first trip that I took the name was given to me of those brands.

#### Cross-examination by J. L. Hopkins:

Q. You referred in your direct testimony to a brand named Pepper. Was that Pepper Oscar Pepper, or was there any other word in combination with Pepper?

A. I don't know. But when I first went with the house I am certain we sold Pepper, but what Pepper it was I don't know. I don't

think I ever sold any myself. It was a high-price goods. 543 Q. Do you know whether any of that Pepper Whiskey was used by the Hellmans in preparing this Old Crow?

A. Oh, no, no; it wasn't a Pepper. I think that was a lot of whiskey that they bought, but I don't think they kept it regularly; I don't think they kept it right along.

Q. That is the Pepper you are referring to?
A. Pepper. They had samples of it, but I don't think they kept it right along. I don't think they have it now.

Q. Do you recollect whether that whiskey came from Oscar Pepper's distillery or not?

A. No, there was several Peppers, which one it was, I don't know.

Q. Had you been in the liquor business before you entered the employ of Hellmans?

A. Yes, sir. Q. Where? A. Peoria, Ill.

Q. Had you been acquainted with any of the Kentucky whiskies before you were at Peoria?

A. Kentucky whiskeys? Well, I don't know. Q. Had you sold any straight whiskeys?

A. Well, yes; those days when I was in Peoria they used to sell liquors without stamps, you know. There was no tax, and when there was a tax the first brand that was put on, it was a stencil that the inspector would put on. Twenty cents was the tax.

Q. While you were at Peoria, did you ever sell any Old Crow

whiskey?

A. No. Q. Had you ever heard of the Old Crow whiskey made in Kentucky before you entered the Hellman's employ?

A. No. Q. How long after you entered Hellman's employ was it before you heard of the Old Crow whiskey made in Kentucky?

A. Well, "made in Kentucky"-I never made that distinction, but Old Crow whiskey, I don't believe I heard of it except what Hellman sold, until I saw Emil Schafer in Yazoo City. He is living there now; I saw him summer before last, and he had a bottle of Old Crow whiskey.

Q. You mean Old Crow whiskey that was not Hellman's?

A. That was not Hellman's.

Q. Do you know what straight whiskey was used by the old firm of I. & L. M. Hellman when you entered their employ as a base of the Old Crow whiskey?

A. No. I don't know what brand they made it from.

Q. Do you know whether they used any of the whiskey from Oscar Pepper's distillery, or this poor whiskey that you refer to in making the compound sold as the Old Crow whiskey?

A. No, I don't know.

Q. You don't know what name of whiskey they sold?

A. No, but I believe they used poor whiskey as they got it. I don't think they used any blend. If I understand it right, they used a heavy body of whiskey to make the Old Crow.

Q. But where that brand was, or what brand was used, you don't

know?

A. I don't recollect. I may have recollected at the time, but I can't recollect that I ever did know. I paid no attention to the details, but I know the quantity that was put in.

Q. You state that you were in the employ of I. & L. M Hellman

as least as early as November, 1865?

A. Yes, sir, I am certain it was in the month of October also.
Q. What is your recollection as to whether you were there is September?

A. It might have been. I am not certain.

Q. Are you certain that you were not there as early as August?

A. In August? No, I am not certain. I don't think it was in August.

Q. It is your impression, then, that the summer was pretty well

over before you entered their employ?

A. Well, I do know that I was there in November, 1866, and I do know that I must have been there a little time before, but how long I don't know; it is a short while.

Q. During the year 1866, can you testify positively that you ever sold any of this Old Crow whiskey for Hellmans?

A. During the year 1866? No, I don't think I can. I had it for sale, but that is only a short time, you know, during those months.

Q. And you can not testify positively that you sold any of it in the year 1866?

A. No. O, I could, for a few months afterwards; within six months after I came, I am certain I sold it, but the first few months, I couldn't recollect that. That would bring it to 1867.

Q. While you remained in the employ of I. & L. M. Hellman, did you meet any other Old Crow whiskey in competition in your terri-

tory? A. No.

Q. And you did not know of the brand "Old Crow" being used by anybody except your firm?

A. No.

Q. After you went into business for yourself, did you ever use any of the periodicals devoted to the liquor interests, or magazines, or whiskey price lists issued for the whiskey trade by the various dealers?

A. No.

Q. You had nobody's prices, but did all your buying from Hellman?

A. Yes, I bought nearly all. All whiskeys I bought from them.

Q. How many of these other brands that you have referred to that were being sold by I. & L. M. Hellman were blends or compounds made by them?

A. The Crow and the Arnold were the only ones that I can recol-

lect, or that I knew of.

Q. Did you ever do any of the buying for I. & L. M. Hellman of their straight whiskeys?

A. No.

Q. Who did that buying when you first entered the employ of that house?

A. I couldn't tell you. I suppose Mr. Isaac Hellman. never at the house there any time. I was always in the country.

Q. Did you ever sell for them in the city trade? A. City trade? No, I never sold the city trade.

546 Q. You were simply traveling salesman for the house on the road in the territory that you have mentioned?

A. Yes, I went once or twice to Carondelet. That was a different town then, but I didn't do very well there, so I went South.

# By Judge Klein:

Q. You remember about the Rohrer whiskey?

A. Yes, sir.

Q. Was that made by Hellman & Co., or did they buy that?

A. I think they bought it.

Q. They bought that? A. I think so; pretty certain of it.

Q. Do you remember whether that was used in making the Old Crow?

A. No, I can't remember.

Q. You can't remember which brand they used in making the Old Crow?

Q. When do you expect to go home?

A. As soon as I can get off. Tomorrow morning is the time appointed.

Signature waived.

### Certificate.

I, Charles E. Weller, Notary Public within and for the City of St. Louis, State of Missouri do certify that in pursuance of the annexed notice came before me at the law office of Messrs. Klein & Gough, No. 906 Rialto Building in the City of St. Louis and State last aforesaid Emil L. Charroppin, who was by me duly sworn to testify the whole truth of his knowledge touching the matter in controversy aforesaid; that he was examined and his examination reduced to writing by me in shorthand by consent of counsel, and that it was then and there agreed by said counsel that my transcript of said shorthand notes without the signature of said witness might be read in evidence

upon the trial of said cause with the same force and effect as 547 if the same had been signed in my presence by said witness at the time and place of taking the same.

I further certify that the foregoing is a true and faithful transcript of my shorthand notes, taken as aforesaid.

In witness whereof I have hereunto set my hand and affixed my notarial seal, this eighth day of October, A. D. 1904.

My commission expires May 9th, 1908.

[SEAL.] CHAS. E. WELLER, Notary Public, City of St. Louis, State of Missouri.

I, Charles E. Weller, Notary Public within and for the City of St. Louis and State of Missouri do hereby certify that the foregoing is a true and faithful transcript of the deposition of Emil L. Charroppin, taken at the office of Messrs. Klein & Hough, 902 Rialto Building, City of St. Louis, State of Missouri, on the sixth day of October, A. D. 1904, and the same is herewith filed to be read in evidence upon the trial of the case of W. A. Gaines & Co., vs. Abraham M. Hellman et al., now pending in the United States Circuit Court in and for the Eastern Division of the Eastern Judicial District of Missouri, in accordance with the stipulation hereunto annexed.

[SEAL.] CHAS. E. WELLER, Notary Public, City of St. Louis, Mo.

And afterwards, to-wit: on the 6th day of May, A. D. 1907, the following deposition on behalf of defendants was filed in said cause which said deposition is in words and figures as follows, to-wit:

In the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouria

548 No. 5096, In Equity.

W. A. Gaines & Co., Complainant, vs. Max Kahn, Admr., et al., Respondents.

Deposition of a witness produced, sworn and examined by agreement of counsel, on the 29th day of April, 1907, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, at the law office of Klein & Hough, 902 Rialto Building, southeast corner of Fourth and Olive streets, in the City of St. Louis, State of Missouri, before me, Arthur E. Mooney, a Notary

Public within and for the City of St. Louis, State of Missouri, in a certain cause now pending in the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, wherein W. A. Gaines & Co. are complainants and Max Kahn, Administrator, et al., are respondents on the part of the respondents.

Present: J. L. Hopkins, Esq., counsel for complainants, and Luther E. Smith, Esq., counsel for respondents.

John S. Morrin, of lawful age, being produced, sworn and examined on the part of the respondents, deposes and says as follows:

# Direct examination by Mr. Smith:

Q. What is your name?

A. John S. Morrin.

Q. Where is your residence?

A. I am living at present at Kansas City, Missouri.

Q. What is your age?

A. My next birthday is 48. Q. What is your business?

A. Wholesale distilling and wholesale liquor trade.

Q. Have you ever been in business in the city of St. Louis?

A. Yes, sir.

Q. When?

A. I came here the 1st of July, 1903.

Q. What was the name of the firm that you were connected with? A. William H. Lee & Co.

Q. What was your connection with that firm?

A. I was president of the firm. Q. It was a corporation?

549 A. Yes, sir.

Q. I will ask you whether you had occasion to and did buy whisky under the name of "Old Crow" from the complainants in this case, W. A. Gaines & Co., during the time that you were connected with the firm of William H. Lee & Co.?

A. We bought from Paris, Allen & Co.

Q. Did you purchase whisky under the name of "Old Crow" purporting to have been made by W. A. Gaines & Co.?

A. Yes, sir.

Q. Was that the kind of goods that you had in mind when you mentioned that you bought from Paris, Allen & Co.?

A. Yes, sir.

Q. Do you know what tank whisky is?

A. I was offered some tank whisky by Paris, Allen & Co., said to be stored in Frankfort, Kentucky, at the place where the "Old Crow" distillery was managed or conducted, or from where the whiskies were shipped by W. A. Gaines & Co.

Q. Was this tank whisky supposed to be "Old Crow" whisky?

A. It was offered as "Old Crow" whisky, yes.

Q. Did you receive any of this so-called "Old Crow" tank whisky at your place of business in St. Louis?

A. We received sample bottles, yes. Q. Did you examine the same?

A. We did.

Q. What did you discover in connection therewith?

Complainant's counsel objects to the question on the ground that no foundation has been laid for examining the witness as an expert.

A. That it was a very poor article of whisky, and not such as we desired and expected to receive as "Old Crow" from W. A. Gaines & Co.

Q. How long have you been in the liquor or whisky business?

A. Since November, 1880, I first became connected with it then.

Q. Have you examined samples of whisky during that time.

A. Yes, sir. Q. You have had frequent occasions to pass upon the 550 quality of goods in your business?

A. I have had.

Q. Have you made purchases of whisky as the result of your examination of samples?

A. I have.

Q. Is that true throughout all the periods that you have men-

tioned from 1880 on down?

A. There was quite a number of years that I was not a purchaser, but I was interested in determining the quality of whisky, and in educating myself in the quality by comparison so as to get the fullest possible knowledge of whisky.

Q. That is true of the 27 years that you speak of?

A. Yes, sir; it is.

Q. What did you do after you found that the samples purporting to be "Old Crow," in your judgment were not "Old Crow" whisky?

Complainant's counsel objects to the question as not founded upon any testimony which the witness has given.

A. I showed the sample to Mr. H. E. Blood, I called his attention to the fact that it was not good whisky.

Q. Who was Mr. H. E. Blood? A. The man who came to call on us representing "Old Crow" whisky, selling "Old Crow" whisky.

Q. What did you mean by calling his attention to the fact that

it was not good whisky?

A. I meant to say poor in quality and unfit for our use, and that it could not be sold as genuine "Old Crow" whisky.

Q. Did you subsequently receive any of this so-called tank whisky?

A. We received a letter admitting that the sample was bad, and we received a letter explaining why it was bad.

Complainant's counsel moves to strike out the answer as not responsive to the question.

Q. You will not be permitted to give your recollection of the contents of the letter; if you have the letter in your possession you may produce it. You state that you received a letter with reference to this sample of tank whisky about which you made

erence to this sample of tank whisky about which you ma

551 complaint; have you that letter?

A. Yes, sir.

Q. Will you produce it?

A. This is the letter.

The witness here produced a letter dated New York July 29th, 1903, addressed to William H. Lee & Co., St. Louis, signed, Paris, Allen & Co., and bearing at the top of the first page the typewritten initials "E. B."

Q. I will ask you if you are able to tell what the significance of the two letters "E. B." is at the top of this letter?

A. The significance of it is that the letter was dictated by Edson

Bradley, that is the significance of the letter to me.

Q. Who was Edson Bradley?

A. He was interested in Paris, Allen & Co., and W. A. Gaines & Co., as I take it the head of both firms in a way, the man who dictated the policy, so far as I know.

Q. Are you acquainted with Mr. Bradley personally?

A. I have met him, some years ago.

Q. Will you read this letter into the record, so that it may be a part of your testimony in the case?

A. I will. (Reading:)

"Office of Paris, Allen & Co., Importers, 45 Broadway,

Old Crow and Hermitage, J. A. Keller "Chicken Cock" and A. Keller Whiskies.

P. O. Box 544. E. B.

New York, July 29th, 1903.

William H. Lee & Co., St. Louis, Mo.

"Gentlemen: We have a letter from Mr. Blood informing us that you have received the sample of the 1890 Old Crow in tank in Frankfort, Ky., and that you are not pleased with it, the whisky seeming to be thin and dingy in color.

"A sample of this same whisky was sent to us from Frankfort, and we are not surprised that you don't like it, for it shows up very badly. The trouble is that it was drawn from the very bottom cock in one of the copper tanks and some of the sediment came with it and the sample is not bright.

"Of course your experience has taught you that the quality of the whisky cannot be judged from a riley sample, for it always appears

thin and lacking in character under such circumstances.

"We have a couple of barrels of this whisky that were sent on from Frankfort, Kentucky, a while ago, in a lot which we required for a high grade blend, and that we can therefore send you a sample

in good order, which we have done to-day.

"We consider the tank lots of whisky of the highest quality and we guarantee that on delivery they would uniformly turn out so, and that you must ignore the Kentucky sample, which did not in any respect represent the goods.

"Hoping that you will receive these samples in due time and that you will examine same, and we think that you will find them

perfectly satisfactory in every respect.

Hoping we may hear from you regarding the same, we remain, with regards.

'Yours very truly,

"PARIS, ALLEN & CO.

"W. H. L. & Co. 2."

Respondents' counsel offers in evidence the foregoing letter, and asks that it be marked Defendants' Morrin Exhibit A., which is accordingly done.

Complainant's counsel objects to the offer of the letter by counsel for respondents on the ground that it is foreign to any issue in this case and not a communication from the complainants.

Q. I will ask you if you subsequently had any further negotiations with reference to this so-called tank whisky, "Old Crow" tank whisky?

A. Yes, sir. Q. What was next done by you with reference to this so-called tank whisky?

A. The next thing that happened is we got 89 barrels for 553 "Old Crow" whisky that was in the original package, and

it was bad quality, shipped from New York, held there six days after the stamps were put on it, although we were telegraphing for it, and when it came the whisky was so bad as to demoralize the corporation of William H. Lee & Co., which had been organized about thirty days, and I went to New York to try to set things right, I went there with a proposition that I would buy any amount up to 500 barrels of 1890 "Old Crow" and have it shipped in the Custom House in St. Louis, and everything was framed up to prevent me from doing that, and the tank whisky was offered to me as set forth in a long proposition here.

Complainant's counsel moves to strike out the sentence in the foregoing answer, "although we were telegraphing," as relating to sec-

ondary and incompetent evidence.

Complainant's counsel also moves to strike out the sentence beginning, "Everything was framed up," as being incompetent, irresponsive to the question and grossly impertment.

Q. Mr. Morrin, I will ask you whether you bought any tank whisky, so-called "Old Crow" tank whisky while you were in New York on the trip that you last mentioned?

A. I did not.

Q. Did any one representing W. A. Gaines & Co., or the owners

of W. A. Gaines & Co.'s so-called "Old Crow" whisky, treat with you in reference to the purchase of tank whisky on that trip in New York?

Complainant's counsel objects to the question as being duplex in form, and in so far as it calls for negotiations with persons owning "Old Crow" whisky irrelevant and immaterial.

A. Mr. Bradley did and Mr. Blood did.

Q. I will ask you whom you mean by Mr. Bradley and Mr. Blood,

respectively?

A. I mean Mr. Bradley, of the firm of Paris, Allen & Co., 554 and W. A. Gaines & Co., and Mr. Blood, the salesman who visits this section as selling agent of "Old Crow" whisky; salesman, I should say, I suppose.

Q. Mr. Edson Bradley, is he an officer in the complainant com-

pany manufacturing whisky which they call "Old Crow"?

A. I understand that, I understand it that way.

Q. Now, what was said to you by Mr. Edson Bradley with reference to the so-called "Old Crow" tank whisky on this trip to New York?

A. A great deal was said about it, we talked quite a while, to the effect that they wanted to sell us about 600 barrels of it to use in our bottling.

Q. I will ask you whether Mr. Bradley's proposition was put in

the form of a letter?

A. Yes, it was put in the form of a proposition that was handed to me.

Q. By whom was that letter handed to you?

A. H. E. Blood.

Q. Have you that letter with you?

A. I have.

Q. Will you produce it and read it?

A. I will (reading):

"Office of Paris, Allen & Co., Importers,
45 Broadway,
Old Crow and Hermitage,

J. A. Miller 'Chicken Cock' and A. Keller Whiskies.

P. O. Box 544. EB.

New York, Aug. 17th, 1903.

Mr. Harry E. Blood, Mansion House, Fishers Island, N. Y., via New London, Ct.

"Dear Sir: I have seen Mr. Pyatt and find that the stock of Spring 1893 Old Crow Bourbon is all tax paid here in New York. The tax was paid on it on the dock when it arrived from Bremen in order that we might store in our warehouse and save the storage item.

"There are 106 barrels of this whisky. This is our entire stock of

this age and closes that matter.

555 "This is the only Old Crow Bourbon that we have older than 1899 excepting the Fall 1890 tank lots in the bottling house of W. A. Gaines & Co., Frankfort, Ky. I told Mr. Morrin that I thought we had some older lots of goods, but Mr. Pyatt tells me that the stock slate has not recently been corrected, and that all these old fragmentary older lots have been closed out.

"In view of the great scarcity of old whiskies, and also for the reason that we can give Mr. Morrin a very much better bargain, I suggest that he provide for his bottling of Old Crow by securing the

following lots of goods:

600 bbls. tank lot Ky.; 300 bbls. July 1899; 300 bbls. Spring 1900; 600 bbls. per annum bottling supply for the years 1904 and 1905.

600 bbls. Dec., 1899, bottling supply for year 1906; 600 bbls. Spring, 1901, bottling supply for year 1907; 600 bbls. Spring, 1903,

bottling supply for year 1909.

It is my idea that for the years 1904 and 1905 they should blend the old tank lot in Kentucky and the July, 1899, and Spring, 1900, for bottling purposes. The above arrangement will then give them, as you see, whisky averaging eight years old for the first two years.

A seven-year-old whisky for the next and six-year-old whisky for all the following years, thus gradually tapering down the age until

they get to a standard six-year-old goods.

"Mr. Morrin, in our conversation on Saturday, told me that it would be a conservative estimate to figure on 300 barrels per annum for the whiskies which they would sell in bulk in addition to the Old Crow bottling which I have provided for above.

"I, therefore, suggest that in addition to the above whiskies he take 300 barrels of each year from 1899 to 1903, inclusive, dividing it up between Old Crow and Hermitage in such proportions as he thinks

best.

"As I promised Mr. Morrin, P. A. & Co. will give him in writing an agreement to take back within one year any part of this whisky which he may decide has been bought in excess of

his business requirements, but P. A. & Co. shall also have the right at any time within that year to call back any portion of these whiskies which they may need for extraordinary reasons in their own business. It is manifestly only fair that an arrangement of this kind should be made.

It is my belief that the above will not fully meet the requirements of W. H. Lee & Co. and Morris Powers Merc. Co., for it will be seen that I have made no provision for increase in the business which Mr.

Morrin now has in sight.

"In regard to the Fall 1890 Old Crow in the tanks in Frankfort, Ky., Mr. Pyatt and I have been over this question very carefully, and we will sell this whisky to W. H. Lee & Co. at \$2.95, that is to say, 5 cents per gallon less than we are obliged to charge for the Spring 1893. In addition to this they will save from 2 to 2½ cents per gallon in the freight. A further very large saving will be made

through the smaller loss by soakage and evaporation in transit for these are, as you know, full barrels, and the loss is much less than another barred about one-third empty, to say nothing of the shorter journey. I think we would be very safe in estimating on the average a saving of one-half gallon per barrel on this item, or about 4 cents per gallon. This would make a total of 11 cents per gallon for the Fall 1890 as compared with the Spring 1893, and, of course, the whisky being three years older, is an additional great advantage, especially for their fine bottling of Old Crow.

"Of course, this tank whisky costs us a great deal more money, but for the reason which you understand, we are very desirous of selling it and are, therefore, willing to make this very low figure.

"Mr. Morrin will, of course, take into consideration the increasing cost of these tank whiskies if he buys them and carries them himself, and to meet this point, we are going to offer him some-

557 thing which we would not think of doing with any other house in the country, solely because we want to help him put the very best possible goods into his bottling, especially at the beginning of this business.

"This whisky, as you know, is in tin lined copper tanks, so that

there is no loss in evaporation.

"We also have it in our own bottling house in Frankfort, so that it costs us nothing for storage. The only item that we have to pay on it is the insurance, and, of course, we are losing interest on the

money invested.

"Now, in order to make this proposition easy for Mr. Morrin, we will agree to carry these goods up to two years free of all storage, interest, and insurance charges with the understanding, of course, that it should be delivered from time to time during this interval in reasonably regular shipments, so that the average time that we are obliged to hold the whole lot shall not exceed one year. This would mean 100 barrels, delivered every four months, which is just about the rate, as I figure it, that they would require the goods if they blended them half and half with the younger whiskies. This would give them 200 barrels every four months, which would make 2,000 cases, or at the rate of 6,000 per annum.

"By the above arrangement they will get this old whisky regauged in the barrel at the time each shipment is made, so they will lose nothing on carrying charges and evaporation for the whole two

years' time.

"In regard to all the whiskies that are in bond, we will, whenever Mr. Morrin desires, ship carload lots of same from distillery in bond to St. Louis or Kansas City, so that they may carry same in stock there and withdraw it as they require it. We should not, however, wish them to take more than a carload at a time for each place.

"Mr. Morrin also understands that certain formalities, giving a bond, etc., must be gone through with in order that these in bond shipments to general bonded warehouses can be

made.

"It is, in fact, our desire that every possible facility for this business should be afforded them.

"In regard to the terms on the purchases, I think these details will have to be talked over a little more fully, but in a general way, we will, of course, carry all of the bonded goods if they remain in the distillery warehouses for any reasonable length of time, taking their four months' notes, renewable at intervals, with interest at six per cent, payable at the time of each renewal, we holding the warehouse receipts and policies of insurance as collateral to these notes.

"For all the purchases of W. H. Lee & Co. we should have the en-

dorsement of the Morrin Powers Merc. Co.

"As I told Mr. Morrin on Saturday, we will allow them this year

\$1,800.00 for advertising.

"I wish you would show this letter to Mr. Morrin and talk over these matters fully with him and let me know his views. It is possible that I may leave town before he comes to the city again, as I understand him to say that he would not be back until the end of the week. If this should happen, however, it will make no difference as we talked over general questions quite fully, and anything further that he wants to discuss with me can be done by mail just as well. Mr. Pyatt will be here in any event to see him personally when he comes. Of course, I may also be here.

"Very truly yours,

"E. BRADLEY.

"P. S.—Since writing the above we find that we are all sold out of the Spring 1902 Crow, consequently we were obliged to scratch out, as you will notice on the list, and make the Spring 1903 1200 barrels instead of 600."

Respondents' counsel offers the foregoing letter in evidence and asks that it be marked Defendants' Morrin Exhibit B, which is accordingly done.

559 Q. I will ask you whether or not subsequent to the date of receiving this letter you purchased any so-called Old Crow tank whisky?

A. I did not.

Q. I will ask you whether or not, up to and during the time that you were connected with the corporation known as Wm. H. Lee & Co., in St. Louis, you knew that W. A. Gaines & Co. carried, in the name of one of their employes, a United States Internal Revenue Rectifier's license in Frankfort, Kentucky?

Complainants' counsel objects to the question as irrelevant and immaterial.

A. That information came to me somewhat about the time I became connected here, or a little later, I don't know just when.

Q. Did you know about it at the time this tank whisky negotiation

was on?

A. Well, I was learning things pretty fast about that time. I don't know in just what order they came, or how much, it was a kind of an awakening period for me.

Q. Up to the time that you came to St. Louis you had not known it, up to the time that you became connected with William H. Lee & Co.?

A. No, I think not.

Q. I will ask you how long you have known Mr. J. L. Hopkins, counsel for complainants in this case?

A. About ten years.

Q. I will ask you whether you talked with Mr. Hopkins at or about the time suit was filed by W. A. Gaines & Co. against A. M. Hellman & Co. with reference to that suit?

A. I talked with Mr. Hopkins about this suit in connection with

some other matters after he became counsel for Gaines & Co.

Q. Do you know how he happened to be called into this case?

- A. I was instrumental in securing Mr. Hopkins' services for that firm.
  - Q. State what you did?

A. In what matter?

Q. State in what way you were instrumental?

A. W. H. Lee & Co. had a letter or two letters from them saying that we were interested in their process in maintaining their brands of whisky and asking us to assist them—I believe you have that letter here, I don't remembe.—to assist them in looking up evidence and things of that kind, and Mr. Blood came here and complained of their counsel, and I had suggested Mr. Hopkins to them once in San Francisco, we had trouble out there, and he could not find Mr. Hopkins, said he had never heard of him; then Mr. Blood complained of his counsel here and I suggested Mr. Hopkins, I think I made an appointment, at least I went up to the office with him and introduced him and in a short time afterwards I understood Mr. Hopkins was counsel for the Old Crow people.

Q. Did you talk to Mr. Hopkins about the so-called "Old Crow" tank whisky, which W. A. Gaines & Co. were selling or trying to sell

you?

A. I did.

Q. State what was said?

A. Well, there was a good deal said on that subject.

Q. As near as you can recollect state what was said then?

A. Mr. Hopkins telephoned me and asked me to come there and said he had a complaint from New York as to the way Lee & Co. were handling "Old Crow." I thought Mr. Hopkins was fair and friendly, and I was as candid as I could be. I said, "Here is the condition I found here," I explained to Mr. Hopkins about my coming here and buying this business, about this tank proposition coming up, about the bad lot of whisky being shipped from New York, and how the firm down there was alarmed, and I said, "Now, I am trying to do the best I can, we have got to have good whisky, the firms and shippers and all that down there, they have got to give good results, and here is what I am offered when I try to buy whisky of Gaines & Co.; when I got 89 barrels it was unfit for use. They have a rectifier's license at Frankfort, Kentucky; it was bought as a high-

priced bill of goods and I got a bill of lading and find it is

tax paid one day and the bill of lading was issued the next day, their high-priced whiskies, supposed to be straight, are held by the rectifying house over there, as I understood it." Mr. Hopkins says: "That tank business is a damned bad thing, and they have got to stop it." I told him they were pretty hard people to stop doing anything, and he asked me—suggested to me that I see George Berry, that it was injuring George Berry, who had a big interest with W. A. Gaines & Co.

Q. Who is George Berry?

A. I never met him. I am not sure that is his name, but there is a Mr. Berry whose father, I understand, was interested over there in California. He lives there and in a way is largely interested in the "Old Crow" distillery, and in the goods sold by the distillery, and I understand was not so much interested in Paris, Allen & Co. as in the tank whisky and rectifying part of it.

Q. I will ask you if you, at or about the time of the conversation which you have last mentioned, had any conversation with Mr. Hopkins with reference to the right or title of W. A. Gaines & Co. in and

to the words "Old Crow?"

A. Mr. Hopkins and I had two conversations that referred to that matter.

Q. Will you relate the first of those conversations, stating first about when and where it took place?

A. Well, now, there is one conversation that I remember, one remark that took place on the street later on.

Q. In St. Louis?

A. Yes, sir.

Q. Was that the first in point of time?

A. No, I think not; there was something said about this time that I don't just recall fully, but I remember of one remark particularly because of the way it impressed me, in the next conversation.

Q. Give the substance of what you recall?

A. Of the one I recall?

Q. Yes.

A. The second conversation?

Q. Yes.

A. I met Mr. Hopkins on the street and asked him if he would act for us in a dispute over a brand of whisky claimed both by William H. Lee and a Cincinnati firm, and he said yes. I asked if he was a high-priced lawyer and he said he would attend to it for us, I said, "How are you getting along with the Hellman matter," he said "I find our claim has been all butchered up by the lawyers and I will have to build a title to the "Old Crow."

Q. Was there anything further said as to how or in what manner

he would build a title?

A. Well, I was not interested particularly, only that I had been on friendly terms for a great many years with Mr. Ladd in Kansas City, and I paid more attention to the reflection on he lawyers than I did to the matter because I was not particularly interested, that is the way it was impressed on my mind that the lawyers' work had not been properly done and he had to take the matter up and fix it up

and put it right. I had suggested the Kansas City attorney, Mr. Ladd, to Paris, Allen & Co., they had employed Mr. Ladd at my suggestion, and they employed Mr. Hopkins, and I placed that remark at the time just in that way, I remember it particularly because of the way it came out.

Q. Do you recall what, if anything, was said at the other conversation that you mentioned in reference to not having any title to "Old

Crow"?

A. I prefer not to say, I put a lot of those things out of my mind, and if it had not been for the other case I would have dropped those things long ago because they are unpleasant and disagreeable and I have not tried to remember them.

Q. I would like to have your best recollection on that?

A. I couldn't give you my recollection of it, I don't just feel like trying to remember it. As I say there were so many unpleasant things connected with this, I put them on the shelf and I hoped never to hear from them again.

Q. Can't you give the substance of the conversation? A. It was in keeping with this same statement.

563 Q. Well, just state what it was as near as you can recall the substance?

A. It was to the effect—now you understand I had been interested and I started with the idea that was given me that their title ran back to 1835, when I paid any attention to it, that the "Old Crow" people had the right as far back as 1835 and it developed from time to time that they changed and shifted it, I cannot place those things exactly and I did not try to. In the case in Kansas City there was a question and Mr. Ladd came to my office and I was anxious—I was interested in "Old Crow" as the highest-priced whisky, I was interested in having "Old Crow" prevailing in the market, and when Mr. Ladd came to me about those matters we went over them, and he, not being in the whisky business, and being an attorney, I tried to give him as fully as I know what information I had, the information that I got from Mr. Blood about the time that it went to 1835; after I got along I think that was abandoned, so I have just a recollection of haziness all the way through.

Q. Can't you give the substance of that conversation, as near as

you can recall it, that one that you have not vet given?

A. The recollection is just about the same generally as the statement made at this time on the street.

Q. And what was that?

A. Well, to the effect that the legal work had not been properly done, or that the title had not been properly established or something of that kind, and his work was to do that.

Q. Was there anything said as to how the title would be built up?

A. No, I don't place that.

Q. Was there anything said about litigation? A. There was litigation going on.

Q. But with reference to building up the title?

A. I understood he had taken legal efforts to build up the title.

Q. Any title would be built up by litigation?

A. Something of that kind.

Q. Did you know Mr. E. C. Homan in his lifetime? 564

A. Yes, sir, I knew him very well.

Q. Who was Mr. Homan, what was his business?

A. He was a salesman representing "Old Crow" whisky in the western country.

Q. Did you ever talk with Mr. Homan about A. M. Hellman & Co. using the words "Old Crow"?

Complainants' counsel objects to the question because the testimony all shows who E. C. Homan was and by whom he was employed, and the testimony will show hereafter, as the witness is well aware, by whom Mr. Homan was employed and the fact that he was not at any time in the employ of W. A. Gaines & Co., and the guestion is therefore irrelevant and immaterial for any purpose as against these complainants.

Complainants' counsel also objects to the question as calling for

hearsay evidence.

A. Yes. Q. I will ask you whether or not Mr. Homan ever told you that A. M. Hellman & Co. had agreed to discontinue the use of the words "Old Crow"?

Complainants' counsel objects to the question as irrelevant and immaterial and as calling for hearsay testimony.

A. No.

Q. State what was said by Mr. Homan in relation to A. M. Hellman & Co.'s use of the words "Old Crow"?

Complainants' counsel objects to the question as irrelevant and immaterial and as calling for hearsay testimony.

A. He said that Mr. Homan claimed that he had a right to an "Old Crow" brand.

Q. Was there anything else said?

Complainants' counsel makes the same objection.

A. He spoke of Hellman being defiant and bitter against the whisky trust.

565 Q. Anything else said about the words "Old Crow"?

Complainants' counsel makes the same objection.

A. I don't recall just now anything special.

Cross-examination by Mr. Hopkins:

Q. Were you, or were you not, aware that Mr. E. C. Homan was in the employ of Paris, Allen & Co. of New York?

A. I was aware that he was in their employ and a stockholder in some of their different affairs, different firms.

Q. You were president of W. H. Lee & Co. at the time of the institution of the action by W. A. Gaines & Co. against William H. Lee in this court, were you not?

A. What action do you speak of?

Q. Do you know of any action having been brought by W. A. Gaines & Co. against W. H. Lee & Co. when you were president of W. H. Lee & Co.?

A. I don't recall any action brought while I was the owner of it. Q. You are the same John S. Morrin who was defendant in that

case, are you not?

A. If you will tell me the time the case was brought, or the particular case, I will know just what to say to you, what answer to make.

Q. Have you any recollection of having been served with an injunctive order issued at the instance of W. A. Gaines & Co. by this court in relation to the transactions had by William H. Lee & Co. in regard to what was sold by it under the name of "Old Crow"?

A. Oh, that was the case brought after the business had been actually sold, there was some case of that kind, I believe it was dis-

missed afterwards, or something.

Q. You are the same John S. Morrin who was defendant in a libel suit brought by Henry E. Blood in this court, are you not?

A. I am.

Q. You are the same John S. Morrin who testified in a case of W. A. Gaines & Co. against the E. Whyte Grocery, Fruit and Wine Co. in the Circuit Court of Jackson County at Kausas City, Mo.?

A. Yes, sir.

Q. Were you present when the testimony of T. W. Manning was taken in this case?

A. I was.

Q. The whole difficulty between you and Paris, Allen & Co. which culminated in the conversation between you and myself, to which you have referred related to your substitution of spurious whisky in

bottling under the name of "Old Crow." did it not?

A. The whole difficulty came from them trying to impose on us spurious tank whisky and shipping us 89 barrels of very bad whisky which was very much less valuable than what we were charged for, and which they would not take back, or acknowledge the bad quality of, and which made my associates down there feel that they were dealing with people who were thoroughly unreliable in every respect.

Q. Wasn't that merely a pretext under which you were substituting other distilled spirits and bottling it under the name of "Old

Crow"?

A. I made every effort to get straight "Old Crow" here in the custom house and get it in some way so that I could get the value of our money; no man ever tried harder than I did to get what was right and do what was right, and no man ever had a harder proposition put before him, or noose put around the neck of two firms and ruined them than I have.

Q. You used that as your excuse for substituting other whisky

and bottling it under the name of "Old Crow," did you not?

A. I did not substitute, I am not the bottler and rectifier, or stock man of the house, I asked Paris, Allen & Co. to send some man here to know everything that we did, and they did not send a reliable man to find out about it, I could have told them everything that went on the inside of W. H. Lee & Co.

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Q. As president you could not prevent the counterfeiting of "Old Crow" whisky on the premises of Lee & Co., is that your position?

A. My position is that we did not design and did not attempt in any way to counterfeit or infringe or to use spurious whisky,
 Q. As a matter of fact you did, though, didn't you?

A. I am not the bottler there, I didn't fill the orders there, Q. As a matter of fact you knew that William H. Lee & Co. was

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bottling spurious whisky under the name of "Old Crow," didn't you?

A. As a matter of fact I knew they were putting out the best "Old

A. As a matter of fact I knew they were putting out the best "Old Crow" whisky sold in the United States and which brought the best price and gave the best satisfaction.

Q. You knew, as a matter of fact, it was not the "Old Crow" of W. A. Gaines & Co., and knew, as a matter of fact, that it was not

what W. A. Gaines & Co. furnished, didn't you?

A. I know, as a matter of fact, that I told the secretary of W. H. Lee & Co., "You must buy sufficient 'Old Crow' and furnish to the bottling department 'Old Crow' whisky to bottle;" these were my instructions to the secretary of the firm. I did not carry the warehouse receipts, and only one month of that time did I tax-pay any whisky, but my instructions were every time to put it out straight and put it out in a satisfactory way. I wish to add to that answer that the first month we were in business here I ordered for the use of W. H. Lee & Co. 129 barrels of "Old Crow" whisky, the month of July, 1903, and the next month I went to New York to buy from 1 to 500 barrels of straight whisky and send it to the Custom House to avoid having it shipped by this rectifier, or shipped from their rectifier in the house in New York.

Q. When did you sever your connection with William H. Lee &

Co.?

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A. I sold my stock there the first of July, 1905.

Q. Prior to your becoming connected with W. H. Lee & Co. how long had you been acquainted with the "Old Crow" whisky of W. A. Gaines & Co.?

A. I had used it some years prior and had known something of

it for a great many years.

Q. Can you state approximately how long?

A. Oh, it was away back in the '80's, I don't know just what date, it was quite a good many years.

Q. Are you familiar with the standard price lists used in the whisky trade of the United States?

A. Yes, sir.

Q. Can you name some of those price lists?

A. Yes, there is J. W. Biles' and W. C. Biles' list, Voss's list, and several others.

Q. Whenever "Old Crow" whisky is listed in those price lists it means the whisky of W. A. Gaines & Co., does it not?

A. That is the way I understand it.

Q. You are still in the wholesale liquor business, are you?

A. Yes, sir. Q. Actively?

A. Not as actively as formerly.

Q. What is the style of your house?

A. The Morrin-Powers Mercantile Co. is one of our firms.

Q. Any other that is engaged in the wholesale liquor business?

A. No, not in the wholesale liquor business.

Q. Does that concern deal in "Old Crow" whisky of W. A. Gaines & Co.?

A. I believe the secretary is buying some of their goods and

handling some, some of their case goods.

Q. When the suit of W. A. Gaines & Co. against William H. Lee & Co. and yourself and others was instituted did you investigate to ascertain whether the charges of the bill of complainant were founded on anything that had been done in the business of W. H. Lee & Co.?

A. I was told that Mr. Bradley said that he was surprised that Morrin sold out without asking him, and he had not got through with Morrin, and when that suit was brought I felt it was something to impress the new firm who were interested in another distillery, I felt that way about it, I felt there was very little at the foundation of it, and felt that it was not brought in good faith.

Q. So that you did not investigate, is that correct, and you do not know until this day whether or not the charges of that

569 do not know until this day whether or not the charges of that bill were true, or whether or not W. H. Lee & Co. were packing and delivering on the reputation of the "Old Crow" whisky of W. A. Gaines & Co.?

A. I was very sure that that suit was brought as a matter of spite work against the new stockholders who were competitors of the "Old Crow" Distillery.

Signature waived.

This closes the testimony for respondents.

United States of America,

Eastern Division of the Eastern

Judicial District of Missouri, ss:

STATE OF MISSOURI, City of St. Louis:

I, Arthur E. Mooney, a Notary Public within and for the State and City aforesaid, and duly qualified under the laws of the United States to take depositions for use in the Circuit Courts of the United States, do hereby certify that on the 29th day of April, 1907, I was attended at the office of Klein & Hough, 902 Rialto Building, by J. L. Hopkins, Esq., counsel for complainants and Luther E. Smith, Esq., counsel for respondents, and the witness John S. Morrin, who was of sound mind and lawful age, and who was by me carefully cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and his deposition was by me reduced to writing in shorthand in the presence of the witness and from his statements.

I further certify that it was then and there agreed in my presence

by said counsel that my transcript of said shorthand notes might be read in evidence in said cause without the signature of said deponent, with the same force and effect as if said transcript had been subscribed by deponent in my presence.

570 I further certify that the foregoing is a true and faithful transcript of said shorthand notes so taken, and that the same has been retained by me for the purpose of sealing up and directing the same to the clerk of the court as required by law.

And I further certify that the reasons why said deposition was taken was that the said witness resides at Kansas City, Missouri, more than 100 miles from the place where this cause is to be tried.

And I further certify that I am not of counsel or attorney to either of the parties, nor am I interested in the event of the cause.

And I further certify that the fee for taking said deposition, \$18.00, has been paid to me by counsel for respondents, and the same is just and reasonable.

In testimony whereof, I have hereunto set my hand and official seal at the City of St. Louis, State of Missouri, 3rd day of May, 1907. My commission expires November 2, 1909.

[SEAL.] ARTHUR E. MOONEY, Notary Public, City of St. Louis, Mo.

On April 18, 1907, the following deposition on behalf of the complainant was filed in said cause, which deposition is in words and figures as follows, to-wit:

In the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

No. 5096. In Equity.

W. A. Gaines & Company, Complainant,

Max Kahn, Administrator of the Estate of the Late Abraham M.
Hellman, Deceased, and Moritz Hellman, Respondents.

571 Stipulation.

It is hereby stipulated and agreed that the testimony of Edson Bradley may be taken on behalf of the Complainant at 908 Washington Loan & Trust Building, Washington, D. C., on Tuesday, April 2nd, 1907, at the hour of two o'clock in the afternoon before any duly qualified Notary Public. This deposition to be taken in shorthand by a competent stenographer and thereafter transcribed and signed.

JAMES L. HOPKINS, Attorney for Complainant. KLEIN & HOUGH, Attorneys for Respondents. U. S. Circuit Court, Eastern Division of Eastern Judicial District of Missouri.

No. 5096. In Equity.

### W. A. GAINES & COMPANY

VS.

MAX KAHN, Administrator of the Estate of the Late Abraham M. Hellman, Deceased, and Moritz Hellman.

Deposition taken on behalf of the complainant in rebuttal under and in pursuance of the provisions of the 67th Rule in Equity and of the Revised Statutes of the United States, in accordance with the stipulation which is hereto attached and herewith returned, at 908 Washington Loan & Trust Building, Washington, D. C., on Tuesday, Apr. 2, 1907, at two o'clock in the afternoon, before E. H. Parkins, Examiner-in-Chancery and Notary Public in and for the District of Columbia, acting as Special Examiner by consent of parties.

572 Present: James L. Hopkins, Esq., for complainant, Luther Ely Smith, Esq., (of Klein & Hough), for respondents.

EDSON BRADLEY, a witness produced on behalf of the complainant, being first duly sworn, deposes and says as follows in answer to interrogatories by Mr. Hopkins:

Q. 1. You are the same Edson Bradley who testified on complainant's prima facie proofs in this case?

A. I am.

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Q. 2. Are you familiar with the suit heretofore had between W. A. Gaines & Co. and E. Whyte Grocery, Fruit & Wine Co. in the State courts of Missouri, beginning in the Circuit Court of Jackson County and terminating in the Kansas City Court of Appeals, the opinion of that court being reported in 17 Mo. Appeals, 507?

Mr. Smith: Counsel for respondents objects on the ground that the question is immaterial and irrelevant to any issue in this case, and not proper matters on rebuttal.

A. I am.

Q. 3. At the time — the pendency of that suit and throughout its pendency did you keep the same relationship to W. A. Gaines & Co. as an officer which you now keep?

A. I did.

Mr. Hopkins: Counsel for complainant offers in evidence a certified copy of the record in the Kansas City Court of Appeals in the case of W. A. Gaines & Co., against E. Whyte Grocery, Fruit & Wine Co., the same being duly certified under Act of Congress, and sks that the same be marked "Complainant's Exhibit, Record in

W. A. Gaines, vs. E. Whyte Grocery, Fruit & Wine Co., 107 Mo.

App. 507," which is accordingly done.

Mr. Smith: Counsel for respondents objects to the said record offered in evidence on the ground that it is irrelevant and immaterial to any issue in this case; that it is improper matter to

be offered in rebuttal; that the matters and things deter-573 mined in the said case of W. A. Gaines & Co. vs. E. Whyte Grocery, Fruit & Wine Co. can have no bearing whatever upon the issues in this case, and the matters and things testified to in the said case, as they appear in this record, cannot be properly introduced in evidence in this case by this method.

Q. 4. Are you the same Edson Bradley whose testimony appears in the exhibit record of the Whyte case just offered in evidence at page 24 thereof?

A. I am.

Mr. Smith: Counsel for respondents objects on the ground that it is immaterial and irrelevant and that this is not the proper method of introducing in evidence any facts which may have been testified to in any other or previous case by this witness, or by any other witness. And further objects on the ground that this is not proper matter in rebuttal.

Q. 5. In the testimony of Timothy W. Manning, offered for the respondents, he refers to employment by W. H. Lee & Co. of St. Louis. I will ask you to state if William H. Lee, whose testimony appears in the exhibit record in Gaines vs. Whyte Grocery, Fruit & Wine Co., at page 113, is the same William H. Lee referred to by the said Manning in his testimony?

Mr. Smith: Objected to by counsel for respondents on the ground that this is not proper matter in rebuttal.

A. Yes, the same man.

Q. 6. Were you acquainted with William H. Lee in his lifetime?

Mr. Smith: Objected to for the same reason.

A. Yes, I knew him very well.

Q. 7. How long did your acquaintance with him continue?

Mr. Smith: Objected to for the same reason.

A. I think I have known him since about 1875 or '6. Perhaps a little longer.

574 Q. 8. Did that acquaintance continue until the time of his death?

Mr. Smith: Objected to for the same reason.

A. Yes.

Q. 9. How long since did Mr. Lee die, about?

Mr. Smith: Objected to for the same reason.

A. Well. I should think it was about six years ago, but I do not remember distinctly.

Q. 10. What was the character of the business relationship between William H. Lee & Co. and Paris, Allen & Co. in regard to transactions in the Old Crow whisky of W. A. Gaines & Co., and how long did that relationship continue?

Mr. Smith: Objected to for the same reason.

A. Paris, Allen & Co. sold Lee very large quantities of Old Crow whisky over a period of twenty-five or thirty years. He was one of

their largest customers for that brand of whisky.

Q. 11. During that time did you ever have any personal knowledge or information of any such traffic in spurious whisky under the name Old Crow by William H. Lee, as is described in the testimony of Manning?

Mr. Smith: Objected to as irrelevant, incompetent and improper matter in rebuttal, and not embodying in the question the statements of the witness, Manning, which this witness is asked to contradict.

A. Never. I believe that Mr. Lee was thoroughly honest.

Q. 12. Were you acquainted with Mr. Lee's bottling of the Old Crow whisky of W. A. Gaines & Co.?

Mr. Smith: Objected to as irrelevant and immaterial and improper matter in rebuttal.

A. Yes, I was very familiar with it.

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Q. 13. Did you have personal knowledge of the character of the whisky which he employed in that bottling and as to its identity with the genuine Old Crow whisky of W. A. Gaines & Co.?

575 Mr. Smith: Objected to as irrelevant, immaterial and improper matter in rebuttal.

A. I know that he bought large quantities of Old Crow whisky and that the volume of his sales of whisky bottled under that brand corresponded closely to the quantities of the genuine whisky delivered to him from the bonded warehouse of the Old Crow distillery. I have also several times been in his place of business in St. Louis and have been personally conducted by Mr. Lee through his bottling plant and was shown by him his books showing his sales of Old Crow, and also his government records showing the quantities of Old Crow that he had from time to time dumped for bottling. Mr. Lee was very proud of his business in that brand and showed me these things in corroboration of his repeated statements that he never bottled anything but fully aged genuine Old Crow from W. A. Gaines & Co.'s distillery under the Old Crow label.

Mr. Smith: Counsel for respondents moves to strike out the answer on the ground that it is not responsive to the question, and on the further ground that it contains voluntary statements by the witness not called for by the question.

Q. 14. Did you ever have, from any source, any knowledge or information that W. H. Lee & Co., during the lifetime of Mr. W. H.

Lee, was applying a burning brand reading "J. Crow Bourbon, Paris, Ky.," to any whisky?

Mr. Smith: Objected to as irrelevant and immaterial and as not proper in rebuttal.

A. No; I never heard of such a thing.

Q. 15. Are you acquainted with Paris, Ky., and the distilleries in that vicinity?

Mr. Smith: Objected to as irrelevant, immaterial and improper in rebuttal.

A. Yes.

Q. 16. Can you state whether or not there has been any Bourbon whisky produced in or near Paris, Ky., under the name of Crow or J. Crow at any time during your connection with the Old Crow distillery of W. A. Gaines & Co.?

Mr. Smith: Objected to for the same reason.

A. No, there never has been any such whisky produced in that place in that period.

Q. 17. Did you ever during your visits to the place of business of William H. Lee see such a brand or impression from it?

Mr. Smith: Objected to for the same reason.

A. No.

Q. 18. Did you ever hear of such a brand prior to the taking of Mr. Manning's testimony in this case?

Mr. Smith: Objected to for the same reason.

A. Never.

Q. 19. The respondents have offered in evidence as Respondents' Exhibit Manning A, an impression from a stencil reading "Pure Old Crow Bourbon, 1858." Did you have any knowledge of the use of such stencil by William H. Lee & Co. at any time?

Mr. Smith: Objected to for the same reason.

A. No.

Q. 20. Subsequent to the death of William H. Lee please state whether the bottling of Lee's Old Crow, being the Lee Co.'s bottling of W. A. Gaines' Old Crow whisky, was continued; and if so, by whom?

Mr. Smith: Objected to for the same reason.

A. It was continued by a corporation, W. H. Lee & Co., in which

a man by the name of Morrin was the principal man.

Q. 21. Was the Morrin to whom you refer John S. Morrin, whose testimony is embodied in Complainant's Exhibit, Record in W. A. Gaines & Co. v. E. Whyte Grocery, Fruit & Wine Co., at page 117?

Mr. Smith: Objected to as irrelevant, immaterial and improper matter in rebuttal. Further objected to on the ground that it is improper to attempt to introduce in evidence any matters

or things contained in the testimony of the witness, Morrin, or any other witness in another case, in this manner.

A. Yes, that is the same man.

Q. 22. In the testimony of Mr. Manning I find a reference to a transaction between Paris, Allen & Co. and William H. Lee & Co. during the lifetime of William H. Lee in reference to what the witness calls "tank whisky." Please state what transaction, if any, was had between those parties concerning a whisky known as "tank whisky," describe what the whisky was, and the character of the

transaction, fully.

A. Mr. Lee purchased a considerable quantity of old whiskies, a portion of which, at least, I sold him personally in the office of Paris. Allen & Co. in New York. These whiskies were contained in very large copper tanks in one of the free warehouses of W. A. Gaines & Co. at Frankfort, Kv. These whiskies were all of them whiskies that had been exported to foreign countries at the expiration of the bonded period. They were stored abroad in Bermuda and in St. Thomas, in the Danish West Indies. They were abroad many years and were held for the purpose of providing stock for the bottling of W. A. Gaines & Co., which at that time was done out of bond, the present law permitting the bottling of spirits in bond having not been passed at that time. These whiskies were eventually brought back to the United States in accordance with law and the internal revenue tax was paid on same when they were landed in New York City. In accordance with the universal custom of W. A. Gaines & Co. in this connection, these whiskies, which were in very old barrels, on an average not more than one-third full, were concentrated and put into a smaller number of full barrels, and were then

578shipped to Kentucky, and in order to save further loss by evaporation were placed in the large copper tanks to which I have referred. Just about the time when these last lots of old whiskies were so stored the law authorizing the bottling of whiskies in bond was passed, and thereupon the preference of the consumer and the dealer for bottled in bond whiskies caused that form of W. A. Gaines & Co.'s bottling of their Old Crow and Hermitage whiskies to almost entirely supersede the old form or the tax-paid bottling. This large stock of old whiskies in these tanks being all tax-paid could, of course, not be bottled in bond, and it became necessary then to sell them in barrels. The natural purchasers of these goods were. of course, the large bottlers of Old Crow and Hermitage, and the whisky was sold to them, and in almost every instance was bottled. Those who bottled the Old Crow were, of course, sold the Old Crow whisky, and those who bottled the Hermitage were sold the Hermitage whisky. The quantity was large and several years were required to dispose of it all. W. H. Lee & Co. were one of the large buyers. Mr. Lee bought, as I have said, at least one lot from me personally in New York and expressed himself as very glad to get it; and he thereafter, if I remember right, ordered further lots of the same whisky.

Mr. Smith: Counsel for respondents moves to strike out the an-

swer on the ground that it is not responsive to the question, contains volunteer statements by the witness not called for by the question, is irrelevant and immaterial, and contains hearsay statements.

Q. 23. Did you ever hear any complaint from William H. Lee & Co. as to the quality of that whisky?

Mr. Smith: Objected to as irrelevant, immaterial and not proper in rebuttal, and as calling for hearsay statements.

A. No.

Q. 24. Did Paris, Allen & Co. at any time sell to William H. Lee & Co. any whisky as Old Crow whisky which was not the genuine Old Crow whisky of W. A. Gaines & Co.?

Mr. Smith: Objected to as irrelevant, immaterial and improper in rebuttal.

A. Never.

Q. 25. I call your attention to the photograph of the glass sign heretofore offered in evidence on behalf of defendants, the sign and photograph reading "Celebrated Crow Bourbon," and having a reproduction of a barrel with a crow perched upon it, and will ask you to state what the reproduction of that barrel upon the sign shows in regard to the manner in which the wording or lettering is placed upon the head of the barrel.

Mr. Smith: Objected to as calling for a conclusion of the witness, and on the further ground that the question is indefinite and obscure. The glass sign speaks for itself and requires no interpretation by this witness, and any interpretation which may be made by him will be irrelevant and immaterial to any issue in this case, and not proper matter in rebuttal.

A. It shows unmistakably that the branding of the barrel was with a fire brand. That is to say, that the letters were burnt into the head of the barrel and not painted or stenciled thereon.

Q. 26. When were whisky barrels first branded with burning

brand?

Mr. Smith: Objected to as improper matter in rebuttal.

A. I cannot answer that question, as I have no knowledge of that

subject.

Q. 27. Is there anything in the language embodied in this glass sign and reproduced in the photograph which would indicate to the trade any association on the part of I. & L. M. Hellman of any title to or ownership in the mark Old Crow or Crow?

Mr. Smith: Objected to on the ground that the sign speaks for itself and requires no interpretation at the hands of this witness, and any interpretation which this witness may give is irrelevant and immaterial and not proper matter in rebuttal, and also as leading.

A. No. Such a sign could be used with perfect propriety for the advertising of the genuine Old Crow whisky distilled by W. A. Gaines & Co. by any handler of that brand.

Mr. Smith: Counsel for respondents' moves to strike out all of the witness' answer except the word "No," for the reason that it is not responsive to the question.

Q. 28. Are you familiar with the leading periodical price lists used in the wholesale liquor trade of the United States?

Mr. Smith: Objected to as irrelevant, immaterial and not proper in rebuttal.

A. I am.

Q. 29. I hand you a publication dated January, 1904, and bearing the name of W. H. Voss & Co., and ask you to state if you are familiar with that publication?

Mr. Smith: Objected to as immaterial and irrelevant and not proper in rebuttal.

A. I am. It is the monthly price list of one of the most prominent brokerage firms in the whisky business in the United States.

Q. 30. I call your attention to the item of page 18 of that periodical, which you have just identified, reading "40 Old Crow spr. 96 1 50" and ask you to state what the significance of that item is to the traders and dealers in whisky in the United States.

Mr. Smith: Objected to for the same reason.

A. It conveys the information that the brokers named have an inquiry for forty barrels of Old Crow whisky distilled by W. A. Gaines & Co. in their Old Crow distillery in Woodford County, Ky., and made in the spring of 1896, and that the customer making the

inquiry offers \$1.50 per gallon in bond on a basis of the original capacity gallons of the barrel. No other whisky than W. A. Gaines & Co.'s distillation could be meant, as none other was ever quoted in any broker's price list in the country.

Mr. Smith: Respondents move to strike out the answer on the ground that the "inquiry" is incompetent and immaterial for any purpose in this case. And further moves to strike out the last sentence of the answer as being a voluntary statement of the witness, a conclusion and immaterial.

The witness resumes his answer:

In looking again at the broker's list I see that I am mistaken in my statement that this is an inquiry and an offer to buy 40 barrels of Old Crow whisky. It is, in fact, an offer to sell by the brokers 40 barrels of the whisky of the age and at the price I have named.

Mr. Smith: Counsel for respondents moves to strike out the correction to the answer, for the reason that the so-called quotation "offer to sell" is incompetent and immaterial to any issue in this case.

Mr. Hopkins: Counsel for complainant offers in evidence the publication referred to by the witness in his next two preceding answers and asks that the same be marked "Complainant's Exhibit, Voss' Price List," which is accordingly done.

Mr. Smith: Counsel for respondents objects to the price list offered in evidence on the ground that it is incompetent, immaterial and

irrelevant to any issue in this case, and that it is not proper matter in rebuttal.

Q. 31. I hand you another publication, entitled "William C. Biles & Co., Cincinnati, Ohio, Whisky Price Current, Vol. 7, No. 8, July 10, 1899," and ask you if you recognize this publication; and, if so, please state what it is and what the significance is of the words "Old Crow" appearing near the top of page 15 and the figures following the words "Old Crow." By which I mean the significance of these words and figures to the minds of persons engaged in the whisky trade in the United States.

582 Mr. Smith: Counsel for respondents objects on the ground that the entry in the price list referred to is incompetent, irrelevant and immaterial to any issue in this case, and is not proper in rebuttal.

A. I am very familiar with this price list. It is one of the monthly issues of William C. Biles & Co. of Cincinnati, one of the most prominent whisky brokers of the country. On page 15 of this price list appears at the top of the page near a list of whisky brands the brand Old Crow, and at the bottom — the same page a list of various lots, aggregating 160 barrels, of ages running from 1891 to 1898, of Old Crow whisky, which are offered for sale at the prices named in the price list. The Old Crow whisky referred to in that list is the Old Crow of W. A. Gaines & Co., distilled in their Old Crow distillery in Woodford County, Ky. It is the only Old Crow whisky ever quoted by whisky brokers, and would be so understood by any whisky dealer in the country.

Mr. Smith: Counsel for respondents moves to strike out the answer of the witness on the ground that it is not responsive to the question, that it contains volunteer statements by the witness, and that it is a conclusion and not a statement of facts.

Mr. Hopkins: Counsel for complainant offers in evidence the publication identified by the witness and asks that the same be marked "Complainant's Exhibit, W. C. Biles' Price List," which is accordingly done.

Mr. Smith: Counsel for respondents objects on the ground that it is incompetent, irrelevant and immaterial to any issue in this case, and as not proper in rebuttal.

Q. 32. I hand you a publication entitled "Biles' Semi-Monthly Whisky Price List of Feb. 9, 1907," and ask you to state if you can identify this publication, and if so, state what it is and the significance of the words "Old Crow" whether those words appear upon page 17?

Mr. Smith: Objected to as irrelevant, immaterial and not proper rebuttal.

A. This is one of the regular semi-monthly price lists of one of the largest whisky brokerage and commission houses in the country. It quotes on page 17 various ages of Old Crow whisky, which is the Old Crow whisky of W. A. Gaines & Co., and

is so understood by all dealers in whiskies in the United States, and no other Old Crow whisky is ever quoted by brokers.

Mr. Smith: Counsel for respondents moves to strike out the answer as containing volunteer statements by the witness, as containing a conclusion, and as being irrelevant, immaterial and not proper rebuttal.

Mr. Hopkins: Counsel for complainant offers the publication last identified by the witness in evidence and asks that the same be marked "Complainant's Exhibit, J. W. Biles' Price List," which is accordingly done.

Mr. Smith: Counsel for respondents objects on the ground that the said price list is incompetent, irrelevant and immaterial and is

not proper rebuttal.

Q. 33. Have you read the version of the defendants' witness, John T. Mayse, of the process employed by W. A. Gaines & Co. in the production of its Old Crow whisky? If so, place state whether or not the account given by the witness is accurate.

Mr. Smith: Counsel for respondents objects to the question on the ground that it is an improper method of attempting to disprove any facts or things testified to by the witness, Mayse, and further objects to the characterization of the witness' testimony as "version."

A. It is entirely inaccurate and makes statements in regard to the method of manufacture employed which are entirely untrue.

Q. 34. Please point out particulars in which the statements of the witness, Mayse, are at variance with the facts and the truth.

Mr. Smith: Counsel for respondents objects to this method of examination on the ground that it is not a proper way in which to secure testimony as to facts.

A. In the first place he says that when he visited the Old Crow distillery of W. A. Gaines & Co. they were mashing in a large iron tub, using water and meal. Such a thing was never done at the Old Crow distillery at any time during its He further says, or suggests, that small wooden handmashing tubs were not in use at the Old Crow distillery at the time he visited it. He does not say that they were not used, but says that he saw no such tubs. As a matter of fact, there never has been a time during the existence of the distillery of W. A. Gaines & Co. when they did not use small hand-mash tubs. The witness further says that there was no little tub mash floor at the Old Crow distillery when he visited it. This is absolutely false, for there has never been a time during the history of the Old Crow distillery when there was not a very large small tub mash floor. The Old Crow distillery has always been and is today a hand-made sour mash distillery. using the small hand tubs in accordance with the original, old-time process.

Mr. Smith: Counsel for respondents moves to strike out the answer on the ground that it is an improper and novel method of

testifying to the facts in a case and, as given, the answer is irrelevant, immaterial and improper in rebuttal.

Q. 35. Please state whether or not it is possible for W. A. Gaines & Co. to ascertain whether or not a bottler of whisky under the name Old Crow has in his possession for the purpose of that bottling the genuine Old Crow whisky of W. A. Gaines & Co.

Mr. Smith: Counsel for respondents objects to the question as immaterial, irrelevant and not proper in rebuttal, and as calling for the conclusions of the witness.

A. This is absolutely impossible unless W. A. Gaines & Co. has access to the bottling establishment of the bottler, for the reason that practically every wholesale liquor dealer in the United States 585 has in his possession at different times genuine Old Crow whisky distilled by W. A. Gaines & Co., the greater portion of which was not bought direct from W. A. Gaines & Co., but was purchased from other dealers, or on the open market through brokers. This condition of things makes it possible for any bottle of whisky bearing the words Old Crow to be the genuine Old Crow whisky of W. A. Gaines & Co., although W. A. Gaines & Co., or any person known to that company, had not sold any Old Crow whisky There is only one way in which W. A. Gaines & Co. can obtain knowledge of spurious bottlings under its trade-mark. that is to say, by physical examination of the whisky contained in the bottles, and as only a very small percentage of these bottlings can ever come to the notice of W. A. Gaines & Co., it makes it a very difficult matter for them to detect these spurious bottlings.

Mr. Smith: Counsel for respondents moves to strike out the answer as containing volunteer statements of the witness and as being a conclusion.

Q. 36. Please state whether at any time any claim of ownership in the trade-mark Old Crow, or in the secret process whereby the Old Crow whisky is produced, has been made against W. A. Gaines & Co. by the heirs of James Crow or by the heirs of Oscar Pepper.

Mr. Smith: Objected to as improper matter in rebuttal, as irrelevant and immaterial to the issues in this case, complainant by its own pleadings being precluded from claiming any trade-mark rights prior to the year 1867, and it further appearing in complainant's bill that the trade-mark was open to adoption in the year 1867.

A. No such claims have ever been made.

Q. 37. Referring to an alleged conversation between the late Abraham M. Hellman and Mr. E. C. Homan, concerning which testimony has been taken by the defendants, I will ask you to state whether or not Paris, Allen & Co. had any communication concerning that conversation from Mr. Homan. If so, in what form the communication was and what the nature of that communication was.

Mr. Smith: Counsel for respondents objects on the ground that this is improper in rebuttal; and for the further reason that the matter has been covered by this witness in his examination in chief and no testimony has been given with reference to Mr. Homan since this witness last testified in this case.

A. Mr. Homan never made any written communication to Paris, Allen & Co. on that subject, but on his return to New York City he told me personally that he had charged Hellman with having put up spurious imitations of W. A. Gaines & Co.'s Old Crow whisky and that Hellman had agreed that he would never do it again.

Mr. Smith: Counsel for respondents moves to strike out the response for the reason that it is hearsay, and that both Mr. Abraham M. Hellman and Mr. Homan have since died, and it does not appear from the witness' answer that anyone else was present and heard the conversation except witness and the late Mr. Homan.

Direct examination closed.

Cross-examination by Mr. Smith:

X Q. 38. Mr. Homan was succeeded by Mr. Blood, was he not?

A. Yes, sir.

X Q. 39. And Mr. Homan was the agent of W. A. Gaines & Co., was he not?

A. No, sir; he was a salesman for Paris, Allen & Co. of New York.

X Q. 40. Mr. Blood was the agent of W. A. Gaines & Co., was he not?

A. No, sir; never.

X Q. 41. You are as certain of that as you are of anything else you have said, are you?

A. Yes.

X Q. 42. You have not at any time heretofore spoken of Mr. Blood as agent of W. A. Gaines & Co., have you? 587

A. I do not think so. He never was an agent of W. A.

Gaines & Co.

X Q. 43. You have identified an exhibit inroduced by your counsel, Mr. Hopkins, it being the record in the case of W. A. Gaines & Co. against E. Whyte Grocery, Fruit & Wine Co. You remember giving your deposition in that, do you not?

A. I remember that I gave a deposition in that case.

X Q. 44. You testified to the facts as they were at that time, did you not?

A. I certainly intended to do so.

X Q. 45. I call your attention to the answer on page 29 of that record, in response to this question: "Will you state if you know what bottle that is?

A. This bottle was forwarded to me by plaintiff's agent, Harry E. Blood, on July 3, 1900, from Kansas City, Mo." I will ask you if that is the same Mr. Blood we have been referring to?

A. Yes, that is the same Blood, but he was never the agent of W. A. Gaines & Co. I probably confused the plaintiff in the case with the firm of Paris, Allen & Co. of New York, of which I am a member, and to which firm Blood forwarded the sample in question by express, and when I say in the testimony the bottle was received at my office I referred to the office of Paris, Allen & Co. in It was natural that I should make the mistake for the reason that Paris, Allen & Co., or rather I, in my dual capacity as a member of that firm and as an officer of W. A. Gaines & Co., have always personally examined and passed upon bottles of whisky which were suspected of being spurious. The fact is, as I have stated, however, that Mr. Blood never was an agent of W. A. Gaines & Co., but was, and is today, a salesman for the house of Paris, Allen & Co.

X Q. 46. I call your attention to a statement a little further down on the same page of the same record: "This writing was in the handwriting of Harry E. Blood, the plaintiff's agent, and this handwriting is well known to me." You are also mistaken

588 in making that statement, are you not?

> A. I make exactly the same explanaion of that. It was

a confusion of terms in my expression.

X Q. 47. Then when you stated that Harry E. Blood was the agent of plaintiff, that is of W. A. Gaines & Co., you did not correctly describe his position?

A. No, I didn't.

X Q. 48. As a matter of fact, Paris, Allen & Co. and W. A.

Gaines & Co. are very close to one another, are they not?

A. They are. Two of the members of the firm of Paris, Allen & Co. own a majority of the stock of the corporation, W. A. Gaines & Co., and both are officers of that company.

X Q. 49. Do you remember the year when this conversation with

Mr. Homan took place?

A. No, I cannot remember. It was a good many years ago.

X Q. 50. Do you remember Mr. Homan at that time telling you of seeing a glass sign bearing the words Crow in Mr. Hellman's place of business and that Mr. Hellman had said that that sign had been handed down to him by his brother? Do you remember anything about that?

A. No, I haven't any recollection of that at all.

X Q. 51. Do you remember any report by Mr. Homan to the effect that Mr. Hellman claimed that he had a prior right to use the

words Old Crow?

A. No, I don't remmember that. My recollection is solely that Mr. Homan reported an infringement by Hellman and that Hellman had agreed never to do it again. And I had always believed that that was the end of the matter until we got the information upon which the present suit was brought.

X Q. 52. You first employed Mr. E. S. Robert in this case, did

you not?

A. Well, now, I have only an indistinct recollection of it. I

think there was a lawyer by that name somewhere or other, but I cannot remember.

X Q. 53. How did you come to change from Mr. Robert to Mr.

Hopkins?

A. Mr. Hopkins was our aftorney in San Francisco and went to St. Louis, and we had much confidence in his ability as a trade-mark lawyer, and I suppose the case was given to him solely on that account. I don't remember any other reason.

X Q. 54. Do you remember any interchange of affidavits which

took place between the parties while Mr. Roberts had the case?

A. Yes, I have an indistinct recollection of it, but don't remember the details. I am a very busy man and do not give much time to

these things.

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X Q. 55. Do you remember that affidavits were submitted tending to show that the house of Hellman had continuously used the trade-mark Old Crow for whisky from 1863 down to the then present time?

A. No, I don't remember the nature of any of them. The whole thing is very indistinct in my mind in the beginning of this case.

X Q. 56. Mr. Robert's attitude on the question of a settlement had nothing to do with his discharge from the case, did it?

A. I don't remember anything of that sort at all.

X Q. 57. You have no recollection of the reasons which prompted the change of attorneys except the fact that Mr. Hopkins had moved to St. Louis?

A. No, I don't remember anything further than that. I have

no recollection about it.

X Q. 58. The trade-mark Crow or Old Crow was registered by W. A. Gaines & Co., a partnership, of 1882, was it not, in the Patent Office in Washington?

A. I don't remember the exact dates.

X Q. 59. You were a witness in that proceeding?

A. That is very likely, but I don't remember the exact date.

X Q. 60. You recall, however, that there was a registration about April, 1882?

A. Yes, about that time.

X Q. 61. There was another registration of the trademark Crow or Oid Crow for whisky in June, 1904, was there not, after this suit was filed?

A. About that time, yes.

590 X Q. 62. This suit was filed in the fall of 1904. Why was there a new registration in the year 1904?

A. I have a very indefinite idea that it had to do with changes in the laws. It was done under the advice of our attorney, Mr. Hopkins.

X Q. 63. Didn't your attorney, Mr. Hopkins, advise you that it was necessary to conduct a campaign in order to establish your title

to the words Crow or Old Crow as a trade-mark?

A. No, sir; he didn't do anything of the kind. We had had many years of similar campaigning before we knew Mr. Hopkins.

X Q. 64. What change in the law was there at that time which necessitated a new registration?

A. That is a technical question which was, no doublt, explained to me at the time, but which I have forgotten. We rest entirely upon our attorney in matters of that kind.

X Q. 65. Do you recall that it was deemed necessary to register the trade-mark anew in June, 1904, and you did register it anew at that time?

A. I think it was deemed expedient. I don't think it was ever represented to me as necessary. I think there was a registration about that time.

X Q. 66. Well, this new registration under the direction of Mr. Hopkins was shortly after you placed this case in his hands, was it not?

A. That I don't remember. I think it was, but I don't remember exactly.

X Q. 67. It was in the same year?

A. Even that I can't answer positively. I think it very likely.

X Q. 68. When did you first send this whisky over to the Danish West Indies and Bermuda which you brought back and placed in tanks?

A. I think the first shipments were made about 1881, or, possibly, a year or two earlier.

X Q. 69. How long did you leave it over there before you brought it back?

A. Varying periods of time, depending upon our require591 ments. Some was left there as long as fifteen years. Some
was brought back after it had been there four or five years.
We brought it back, as we thought we would require it, anticipating
our needs by perhaps six months or so, as the steamship communications were irregular and uncertain.

X Q. 70. Couldn't you find a market for it in the original pack-

age?

A. Yes, we sold more or less of it that way, but the bulk of this whisky was intended for bottling and reserved for that purpose, and was used for the purpose up until the bottling in bond law was passed. I refer, of course, to the bottling of W. A. Gaines & Co.

X Q. 71. That is what is generally known as distillery bottling?

A. No, that wasn't known as the distillery bottling. That is now
the bottling in bond which is bottled in the warehouses on the distillery premises. This old bottling was in Frankfort in the free
bottling house of W. A. Gaines & Co.

X Q. 72. When did you first build these copper lined tanks?

A. I should say fifteen or sixteen years ago. X Q. 73. And you have used them ever since?

A. The majority of them was discontinued four or five years ago. One or two had a little whisky remaining in them up to not very long ago, when the last of it was disposed of.

X Q. 74. It required a good deal of persuasion to induce Mr. Lee to buy this tank whisky, didn't it?

A. No. On the contrary, he was very much pleased to get it, for the reason that we offered it to him at very low prices, as we were desirous of cleaning up the lot, as we knew that we would in the future bottle practically none of it ourselves, owing to the bottling in bond business having superseded it.

X Q. 75. When was it that you sold this tank whisky to Mr. Lee?

A. Oh, I cannot remember that.

X Q. 76. Approximately.

A. I couldn't even tell you approximately. It was some little time before his death and he has been dead for some five or six years.

592 X Q. 77. Well, was it before the bottling in bond law went

into effect?

A. No, it was just about that time. It was when we saw that the bottling in bond business was to be the distillers' method of distributing in bottles for the future, and that this large stock of old whiskies would not be needed for our old form of bottling.

X Q. 78. You were a strong advocate of that law?

A. Very, and had a good deal to do with passing it.

X Q. 79. How long after that law went into effect did you con-

tinue to carry whisky in these copper lined tanks?

A. I have told you that the last part of that stock was carried up to comparatively recent times. I don't remember just when we sold the last of it, but it was not very long ago.

X Q. 80. Did you have difficulty in getting rid of it?

A. No, not when you consider how very old the whisky was and how little demand there is for such old, high-priced goods.

X Q. 81. That is, except in the original package?

A. It made no difference whether it was in the original package or not. From W. A. Gaines & Co. our customers would take the whisky in the original package or in any other way we would give it to them. They only desire to know that it comes direct from us and has never been out of our control, or the control of Paris, Allen & Co.

X Q. 82. It makes this difference, that in the original package they could see for themselves the age, whereas in any other package

there is nothing to indicate the age.

A. That would be true if the goods came from others than ourselves, but with us our guarantee is equivalent to the government's always with all our customers.

X Q. 83. Well, there is nothing like having sublime confidence,

Mr. Bradley.

A. I have it. You don't know us.

X Q. 84. You are not on very friendly terms with Mr. John S. Morrin, are you?

593 A. I am not on any terms with him whatsoever. I haven't seen him in a very long time.

X Q. 85. You tried to sell him some of this tank whisky, didn't you?

A. No, we never tried to sell it to him. We offered it to him.

X Q. 86. Don't you really mean that you offered him such in-

ducements that he could not afford to decline them?

A. No, the situation was like this: If Mr. Morrin was bottling genuine Old Crow and intended to do so for the future, it was absolutely necessary that he should supply himself with an adequate stock of the whisky, and knowing, as we did, the condition of the market and the supply of the goods, and that it would be practically impossible for him to secure the quantity of whisky he required unless it was done at that time, we gave him full information and advice and offered him the goods that he would need

X Q. 87. You were actuated, then, purely by philanthropic mo-

tives in that matter?

A. No. The bottling business of W. H. Lee & Co. in Old Crow had been a large one and we naturally wanted to see it continued, and we dealt with Mr. Morrin in this matter just as though he had intended to continue it in the bottling of genuine Old Crow. We naturally wished to do what we could to aid in the largest possible distribution of our brand.

X Q. 88. And you preferred at that time to have Mr. Morrin, or the firm of William H. Lee & Co., of which he was an officer, take this tank Old Crow off your hands rather than Old Crow in original

packages. Is not that a fact?

A. It is not a fact. In order to give him the quantity he would require and still not deplete too much our own holdings of bonded goods we had to offer him the tank whisky or nothing.

X Q. 89. And you were very anxious to have him take "some-

thing" in Old Crow?

A. Of course, we were.

594 X Q. 90. The firm of William H. Lee & Co, was indebted to you at that time, was in not?

A. Yes, they still owed us money, I think.

X Q. 91. I mean the corporation of which Mr. Morrin was an officer was indebted to you?

A. Yes, I think they owed us a good deal of money.

X Q. 92. In other words, they were under heavy obligations to you and would naturally be influenced a good deal by your recommendations?

A. No, evidently they were not influenced, because they bought very sparingly.

X Q. 93. In the meantime they had grown wise.

A. You may know that. I have no knowledge on the subject.

X Q. 94. Isn't it true that Mr. William H. Lee at the time you succeeded in selling him tank whisky was also heavily in debt to you?

A. He owed us just about the average that he had for many years. His business was very large in our brands, and he necessarily owed us considerable, but I never considered it an excessive amount in proportion to his means and business.

X Q. 95. You knew that Billy Lee had his own formula for

bottling Old Crow?

A. No, I didn't know that he had any formula about it. He

bottled the genuine whisky. I have no knowledge that he added anything to it except water to reduce the proof to marketable strength in accordance with universal custom with all whiskies.

X Q. 96. Don't you know that his bottling of Old Crow was cur-

rently called for in St. Louis under the name Billy Lee?

A. I don't know anything of the sort. It was known as Billy Lee's Old Crow or Billy Lee's bottling of Old Crow, which, of course,

was the fact.

X Q. 97. Don't you know that at clubs, hotels and other places where his bottling was sold that it was seldom, if ever, called for by the name of Old Crow, but was practically always called for by the name of Billy Lee?

A. No, I don't know that. I never lived in St. Louis.

595 X Q. 98. There was a suit subsequently filed by W. A. Gaines & Co. against William H. Lee & Co. and others, wasn't there?

A. Yes.

X Q. 99. This suit related to the bottling of Old Crow whisky?

A. Yes, to the bottling after Mr. Morrin came into possession of the business.

X Q. 100. This suit has since been settled out of court and dis-

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A. Yes.

X Q. 101. Has W. A. Gaines & Co. bottled any Old Crow except bottled in bond goods since the bottled in bond law went into effect?

A. Oh, yes. We bottled quite largely, not only on our own account, but for customers, including W. H. Lee & Co. We still sell a small amount of the old bottling out of bond, but not much. Most of our out of bond bottling is for our customers.

X Q. 102. Do you bottle for any customers here in Washington? A. Not to my knowledge. I think not. We sell, I think, some

of our own bottling to Washington dealers.

X Q. 103. The To-Kalon Wine Co. handles your goods here?

A. I don't know.

X Q. 104. Cornwall handles your goods?

A. I think so.

X Q. 105. Shea handles your goods, doesn't he?

A. I think they have done so. I don't know whether they do now or not.

X Q. 106. Is that your bottling or their bottling?

A. I could not tell you.

X Q. 107. Do you supply the labels for their bottling?

A. Those details in my business seldom come to me. They are at-

tended to by my partners in New York.

X Q. 108. I understand you to say that at the present time the entire product of your Woodford County distillery is hand-made sour mash whisky?

A. Yes, that is correct.

X Q. 109. You not merely have some small tubs at your Woodford County distillery, but all of the mash which goes into the beer stills has passed through the small tubs?

A. That is correct.

X Q. 110. And that no whiskey comes out of that distillery which has not been hand mashed, as that term is generally understood among distillers?

A. That is correct.

X Q. 111. What is your yield for Bourbon?

A. That is a question which has nothing to do with this matter, and I don't care to answer it.

X Q. 112. You have already answered it 4.20 in your testimony

in New York.

A. I presume it is about that. Somewhere in that neighborhood. X Q. 114. Don't you know that that is much larger than you can possibly get out of a hand mash?

A. Not if you understand your business.

X Q. 114. Isn't it a fact, Mr. Bradley, that while you do have some small tubs there and do put through some hand mash goods, that the great bulk or the larger part, of your goods from that distillery is machine mashed?

A. Why, the proposition is absurd. All of our goods goes through

the tubs always.

X Q. 115. Mr. Bradley, how many men do you employ to stir

the small mash tubs?

A. I cannot tell you. We employ whatever number may be necessary. It is quite a large gang. Our capacity has been very greatly increased and, of course, the number of men changes in proportion, so that I could not answer that question. Whatever number are needed we, of course, employ.

X Q. 116. You always run on the ninety-six hour period?

A. Always.

X Q. 117. You never have had a seventy-two hour fermenting period?

A. Never since the distillery has been in existence.
X Q. 118. How many small mash tubs have you?

A. That I cannot answer either.

X Q. 119. What is the capacity of each tub?

A. That I can't answer either. They are larger than they ser many years ago. When the capacity of the house has increased we increased them to some extent. As far as could be done and enable the men to handle them.

X Q. 120. Would they hold fifty bushels?

A. They wouldn't hold three bushels.

X Q. 121. When was the last time you went to that distillery?

A. About four and a half months ago. X Q. 122. Was it in operation then?

A. Just starting.

X Q. 123. Did you see the mash tubs being operated by hand?

A. Certainly.

X Q. 124. Any mechanical power employed at all?

A. Not in the mash tubs. We have large iron tubs in which meal and the slop are run preliminary. The two are mixed together thoroughly and then are run into small hand tubs. That is absolutely

necessary in so large a quantity in order to get a thorough mixture of the liquid and the meal. It would be impossible to handle so large a quantity otherwise. After the tubs have stood over in the ordinary way the mash is then broken up by hand, is turned into a so-called mash breaker, which finely pulverizes every particle of this mash, and is then run again into these large iron tubs for the purpose of holding the temperature of the mash to the best point for the introduction of the malt and the rye. Those temperatures are controlling in the question of proper saccharification of the mash. Then the mash is run to the fermenters after running through the pipe coolers in the customary manner. That is, broadly, the process at the Crow and that is the process of all the old-time distilleries, with the mere use of mechanical power after the thorough mixing of the ingredients and the controlling of the temperature, but all the mash, every particle of it, is held in the small tubs and broken up in the small tubs by hand.

X Q. 125. Then, as a matter of fact, the mashing or the thorough mixing of the materials is not done by hand at all, but is done by mechanical power, if I have understood your description

correctly?

A. That is perfectly true.

X Q. 126. Then in the sense in which the term "hand mash" was used in the old days your Old Crow made in the manner described

by you is not hand mashed or hand made?

A. No, that is not so. The process is identical with that of the olden times in its purpose and in its results. Absolutely the same. There is no more change in the old-fashioned process by our methods than could be considered were the grain we use handled by an elevator instead of by hand to place it in the bins of the distillery. Every step of our process, as to its results and effects, is the identical, old-time, hand-made, sour mash method.

X Q. 127. There would be no particular virtue in your goods if the grain were elevated by hand rather than by elevator, would there?

A. Certainly not.

X Q. 128. Is there, then, any particular virtue in your goods by reason of the fact that you break up the mash by hand instead of by

mechanical power?

A. No, it has nothing to do with it. The essential point in the control of the quality is the standing of the mash in the small tubs where a certain amount of lactic fermentation occurs and in the further use of slop both in the mashing and in the filling up of the fermenters, which certainly produce very decided and different flavors from those resulting from the so-called sweet process. The mashing by hand is, in fact, a sentimental question. It is one which has come down from the early days when mechanical means were not available for the distillery, but the manipulation by hand certainly does not in any way influence the quality.

X Q. 129. There is no virture, then, in the goods by reason of be-

ing hand-made?

A. None whatever, except the designation hand-made and the practice of that process carries with it the standing of the mash in

the small tubs, and that does very materially influence the quality and flavor.

599 X Q. 130. Then, if I have understood your description correctly, the only feature of the old hand-made process that you preserve is that you let the mash stand for a certain period in the small tubs. It is not stirred by hand, but is stirred by machinery. It is broken up in the small tubs by hand, but it might as well be broken up by mechanical power. Is that correct?

A. No, you have misunderstood me very materially.

X Q. 131. Please point out wherein I have misunderstood you.
A. It is not alone in the standing of the mash in the small tubs that the old-time sour mash process is followed. There are a num-

ber of other steps in the process.

X Q. 132. If you will pardon me for interrupting you, I was not attempting to point out the features of the sour mash process, but

of the hand-made process.

A. I understand you perfectly, but you don't grasp my point. The hand-made process necessarily carries with it the other details of the operations. For example, the use of slop must necessarily occur; then the mash must stand in the small tubs; the slop must again be used in the filling up of the fermenters with slop; and then there must be, what I have not yet mentioned, the yeasting back from fermenters in active fermentation to the freshly filled fermenters. All of those steps go with the hand-made process and are important points in the process. In all of these our process complies at the Old Crow distillery.

X Q. 133. Isn't it true that the term hand-made ordinarily conveys the idea to the public and to the trade that the mash has been

stirred by hand rather than by machinery?

A. Yes, of course, it refers to the manipulation of the mash in small tubs by hand, but not necessarily every step of that process, so far as the practical results are concerned. As I have illustrated, the handling of the grain in an elevator instead of by hand, which has only been done in comparatively recent times, would not change the

hand-made process, nor would the mixing together of the in-600 gredients, provided the essential steps were adhered to; those,

in other words, which affect the results.

X Q. 134. Then, although the term hand-made means mash stirred by hand, you continue to use that term with reference to your goods, notwithstanding the fact that you do not stir the mash by hand?

A. We do stir it by hand.

X Q. 135. I understood you to say that you broke it up by hand,

but stirred it by machinery.

A. It is all handled by hand labor in small tubs from beginning to end, just as it was in the old days, except that we mix the ingredients before they go into the little tubs.

X Q. 136. The mixing which was formerly done entirely by hand you now do in large tubs by machinery, although you may there-

after stir it to some extent by hand in the small tubs?

A. Yes, just as we grind our meal by steam power instead of by water power, or by horse power, as was done many years ago

X Q. 137. And you apply the term hand-made to your goods, although what the trade and the public have regarded as the essential

feature of hand-made is not observed in your distillery?

A. Your statement is incorrect. The public and the trade do not view the matter in that way. These are technical questions and concern only the results and the performance of the steps in the way I have described. The changes have in no way affected either the process or the results of the process.

X Q. 138. Don't you think it an advantage to put your goods out

under the name of hand-made?

A. I think it an advantage to call them by the name which they are entitled to bear and the name which they have always properly borne, naturally. If we were to represent the goods as not handmade we would be making false representations, as they are handmade.

X Q. 139. You stated that there was a certain sentiment connected with the hand-made; that there was really no virtue in it at all.

A. No, I didn't. I said that the mere use of manual labor 601 in place of power had no value, but inasmuch as the use of manual labor carries with it the all-important step of the standing of the mash in the small tubs, it is very important.

X Q. 140. Couldn't you still let it stand in the small tubs and have a mechanical mixer such as they have done at the O. F. C. dis-

tillery?

A. Yes, and it would then be a sour mash whisky, but not a hand-made whisky. Old Crow has always been a hand-made whisky, and we naturally follow the old process.

X Q. 141. Then you get the same results, the same quality of goods, whether the power is applied by hand or by mechanical means?

A. If the process is identical you would in the same distillery get the same results.

X Q. 142. You label your goods hand-made?

A. Certainly.

X Q. 143. Authorize all bottlers to label it hand-made?

A. Certainly.

X Q. 144. You spoke a little while ago of Mr. Lee's selling genuine Old Crow. What do you mean by genuine?

A. Whisky distilled by W. A. Gaines & Co. It is the only genuine

Old Crow.

X Q. 145. You spoke of doing bottling in bond. You, I believe, label your bottled in bond goods stating that the government guarantees the purity of the contents.

A. Yes.

X Q. 146. You so testified before the Sub-Committee of the Ways and Means Committee in 1902 when the Adams bill was under consideration in Congress?

A. Yes.

X Q. 147. You know, as a matter of fact, that the government does not guarantee the purity?

A. I don't know anything of the sort. It does guarantee the pur-

ity. It guarantees that the whisky is bottled in its absolutely pure condition as it comes from the still, and consequently it guarantees its purity. How can it be otherwise?

X Q. 148. That is a syllogism which I will not now debate with you. There is no test made by the government as to whether or not the goods contain any impurities or is free from im-

purities, is there?

A. What has that got to do with it? X Q. 149. Please answer my question.

A. Certainly they make a test.

X Q. 150. What test, if any, is made when the goods are run

from the receiving cistern into the barrel?

A. Their test consists in their continuous control of the manufacture and of the materials from the time the grain enters the distillery until the whisky is deposited in the bonded warehouse under the government's officers' control. It would be impossible, therefore, for anything but pure, unadulterated whisky to get into the bonded warehouse except by bribery of the government's officers.

X Q. 151. What is your understanding of the word "pure"?

A. Any article which is not deleterious to health is, under the popular interpretation, considered pure, or one which is in its original state without having had added to it any substance which is not natural to this original product.

X Q. 152. Don't you think it has any reference to being reason-

ably free from impurities?

A. I don't know what you call impurities. I suppose coffee, which contains a poisonous principal, might be considered impure. I don't so consider it. My definition that I have given you is the best I can give you.

X Q. 153. Do you know what fusel oil is?

A. Yes.

X Q. 154. Do you find much of that in your whisky?

A. A very small amount. None that is injurious to the health of the drinker.

X Q. 155. That is an impurity, isn't it?

A. No more than the impurities contained in coffee, tea or beef. Uric acid is in beef and poisons in almost every substance that we eat and drink.

X Q. 156. It is a poison, isn't it?

A. Yes, and so are some of the constituents of nearly all our foods and drinks.

K Q. 157. What effect, if any, has storage of whisky upon fusel oil?

A. There is a very wide difference of opinion on that subject. My own belief is that it has but little effect upon it. Some chemists claim that it considerably diminishes in quantity with the aging of spirits. I have sometimes held that view, but recent investigations have somewhat changed my mind. I rather think there is very little diminution in the quantity of fusel with age.

X Q. 158. You held that view when you testified in New York in

this case?

A. Yes, that was at that time my impression.

X Q. 159. What had caused you to come to that conclusion, Mr.

Bradley, at that time?

A. I had observed in analyses of whiskies an apparent tendency to diminish of the fusel oil as the age advances. I am now, however, satisfied that the analyses were not accurate. That my conclusions were not well founded.

X Q. 160. Were those analyses of Old Crow whisky?

A. Some of them, and many others.

X Q. 161. Who made them?

A. I don't remember all of the people. Some were made by a man by the name of Lasche and some by chemists in New York and elsewhere, and of a good many brands.

X Q. 162. Now, when did you change your views with reference to

the non-effect of age upon the elimination of fusel oil?

A. I have gradually come to that conclusion from the investigations of chemists, and also from the fact of the inconsistency which I found in the analyses, great numbers of them, which came to my knowledge.

X Q. 163. You mean analyses which came to your notice since

you testified in this case before?

A. Yes; I have had a great many made of other brands of whisky than my own.

X Q. 164. Who made these analyses?

A. I don't remember the names of the chemists.

604 X Q. 165. About how many analyses do you think there were?

A. I think there have been several dozens of analyses.

X Q. 166. Made under your direction?

A. No, not directly.

X Q. 167. Now, what chemists' opinions have had influence upon

you in this manner?

A. I was largely influenced by the report of the South Dakota Pure Food Commission, although that was only one of many reports that I have seen that tended me to decide that the whole question was so indefinite that it was useless to have any decided opinion upon the subject.

X Q. 168. Do you remember when it was that you saw this South

Dakota report?

A. No, I can't.

X Q. 169. Since you testified before?

A. Yes.

X Q. 170. Do you remember his name?

A. No, I have forgotten it.

X Q. 171. Would it be Shepard?

A. That don't sound familiar to me.

X Q. 172. Smail? A. Smail it may be.

X Q. 173. Was it in an official report?

A. I think it was.

X Q 174. Do you think it was within the last six months?

A I should think it was, probably.

X Q. 175. Then, it was probably the last official report of the chemists of the Pure Food Commission?

A. That I can't say. I never say but the one.

X Q. 176. How did this report come to your attention?

A. That I can't say. I think I received it in the mail, but I don't know who sent it to me.

X Q. 177. Was it in connection with any investigation of your own whiskies?

A. No.

X Q. 178. It came to you as a profess of general interest?

X Q. 179. Can you mention any other chemists whose views came to your knowledge since you last testified?

605 A. No; the ones I referred to are the ones who made the analyses, but I have forgotten the names. It seems to me that one of them was named Sparks of New York.

X Q. 180. In what way did you see his views expressed?

A. His reports were simply the analyses and by comparison of all that were available to me I arrived at this very definite conclusion, that the whole matter was indefinite; that the analyses were impossible to conduct accurately. At any rate, I could explain the inconsistencies in no other way.

X Q. 181. Was Mr. Sparks employed by you? A. No.

X Q. 182. Do you remember his initials and address? A. John C. Sparks, 16 Beaver Street, New York.

X Q. 183. Your views on the subject of fusel oil as expressed when you testified before coincided with those of Dr. Wylie, chief of the Bureau of Chemistry of the Agricultural Department?

A. I don't know whether they did or not. I should hope they did, for I consider him a very wise man. I have not the pleasure of his acquaintance, but I know many people who do know him, and I think he must be a man of a good deal of learning and experience.

X Q. 184. That is in view of his recent paper upon the question

of what is whisky?

A. No, not at all. Purely as a chemist. I have friends in the George Washington University who know him well, and I judge from their regard for the man that he must be a man of great ability.

X Q. 185. You say you don't know him personally?

A. No, I have never met him.

X Q. 186. You are thoroughly familiar, however, with his position in the whisky controversy, are you not?

A. No, I wish I were. We are all waiting with much anxiety to know just what it is. He seems to be very reticent of late.

X Q. 187. What anxiety, Mr. Bradley, do you have on the sub-

606 A. All the questions as to branding of compounded whiskies, of course, must rest upon the final decision of the Agricultural Department. As I am the largest compounder in the United

States, I naturally would like to hear something about it.

X Q. 188. You testified in your deposition in New York that under government regulations you compounded your spirits as whisky.

A. I didn't say that I did it. I said that the Distilling Company

of America did it, of which I am an officer.

X Q. 189. Do you continue to do it since the 1st of January?

A. I really don't know. That isn't in my department, nor have I any supervision over that part of the business. It is in the hands of Mr. Cardeza, the President of the Standard Distilling & Distributing Company.

X Q. 190. You don't know, then, how the goods produced by the Distributing Company of America have been branded since the Pure

Food Law went into effect?

A. No. In my personal business they have been branded compounds.

X Q. 191. What goods do you refer to?

A. I mean mixtures of neutral spirits and whisky. X Q. 192. Do you call them "whisky, a compound?"

A. No; they are branded a "Compound of Whisky and Other Distilled Spirits,"

X Q. 193, Do you do any compounding or branding in Frankfort?

A. No, sir.

X Q. 194. Where do you do your compounding?

A. In New York City.

X Q. 195. You mean Paris, Allen & Co. do?

A. Yes, sir. I presume you refer to the compounding of neutral spirits and whisky, of course. That is all done in New York.

X Q. 196. W. A. Gaines & Co. are closely connected with the Ken-

tucky Distilleries and Warehouses Company?

A. They have no connection with it whatsoever. I personally am

the President of it.

607 X Q. 197. Why do you carry a rectifier's and wholesale liquor dealer's license in the name of J. P. Williams at

Frankfort?

A. W. A. Gaines & Co. do a very large business in tax paid whiskies from their warehouses in Frankfort, Ky., which are not on the distillery premises, and they must, therefore, have a wholesale liquor dealer's license. They also in their bottling business out of bond in Frankfort require a rectifier's license, by reason of the dumping of large quantities of whiskies and the filtering of same through the so-called "Rheinstrom" filter. That is why the rectifier's license is taken out. Both of these licenses are taken out in the name of Williams instead of W. A. Gaines & Co., in order to facilitate the business and in order that Williams may sign all government papers required, he being at all times on the spot, whereas very frequently none of the officers of W. A. Gaines & Co. are in Frankfort. This is a very old custom of my concern and that is the explanation.

X Q. 198. Then you discharge your goods on Form 52-C from

the distillery as disposed of to J. P. Williams?

A. Correct.

X Q. 199. In other words, in Frankfort, J. P. Williams is W. A. Gaines & Co.?

A. In a sense that is so. He is the figurehead in whose name their bottling and free whisky business is done.

X Q. 200. Do W. A. Gaines & Co. carry any wholesale licenses in

Frankfort?

A. They have done that at times, but my impression is that at present they have no license except that of Williams, but still I am not sure of that.

X Q. 201. And you don't compound any Old Crow whisky in

Frankfort under that license?

A. No, nor at any other place. Examination closed.

EDSON BRADLEY.

It is stipulated that the exhibits filed in connection with this deposition may be separately filed with the Clerk of the Court by complainant's counsel.

U. S. Circuit Court, Eastern Division of Eastern Judicial Dis-608 trict of Missouri.

No. 5096. In Equity.

## W. A. GAINES & COMPANY

Max Kahn, Administrator of the Estate of the Late Abraham M. Hellman, Deceased, and Moritz Hellman.

DISTRICT OF COLUMBIA, 88:

I. E. H. Parkins, Examiner-in-Chancery and Notary Public in and for the District of Columbia, acting as Special Examiner by consent of parties, hereby certify that the above witness, Edson Bradley, was by me first duly sworn to testify the truth, the whole truth and nothing but the truth; that his deposition was taken down by me stenographically in the presence of witness and from his statements and afterwards transcribed upon a typewriting machine, and when completed read over by said witness and subscribed by him in my presence; that said deposition was taken pursuant to the annexed stipulation between counsel at my offices in the Washington Loan & Trust Building, Washington, D. C., beginning at two o'clock in the afternoon on Tuesday, Apr. 2, 1907, and concluded on the same day; that the parties were represented at the taking of said deposition by their respective counsel as set forth; that the several exhibits recited were offered in evidence and marked as specially noted in the foregoing deposition; and that I am not counsel or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof, I have hereunto set my hand and official seal this 15th day of April, A. D. 1907.

[SEAL.]

E. H. PARKINS,

Examiner-in-Chancery and Notary Public, D. C.

On May 17th, 1907, a Motion to Expunge exhibit from proofs was filed in said cause, which said Motion is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

No. 5096. In Equity.

W. A. Gaines & Company, Complainant, vs. Moritz Hellman et al., Defendants.

Come now defendants in the above entitled cause, and move the Court to expunge from the files in this case, the record in the case of W. A. Gaines & Co., vs. E. Whyte Grocer, Fruit & Wine Company, hereofore tried in the Circuit Court of Jackson County,

State of Missouri, and thereafter appealed to the Kansas 609 City Court of Appeals, and decided by that Court in an opinion reported in volume 107 Mo. App. Reports, at page 508, which record and opinion in printed pamphlet form, was offered in evidence as complainant's Exhibit, Record in W. A. Gaines & Co., vs. E. Whyte Grocer, Fruit & Wine Company, 107 Mo. App. 507, at the time of the taking of the deposition of Edson Bradley in Defendants by their counsel, at the time the said exhibit was offered in evidence, noted on the record their objection to the introduction of said exhibit on the ground that it was irrelevant and immaterial to any issue in the case, that it was improper to be offered in rebuttal, that the matters and things determined in the case of W. A. Gaines & Co. vs. E. Whyte Grocer, Fruit & Wine Company, can have no bearing whatever upon the issues in this case, and the matters and things testified to in the said case, as they appear in the said record, cannot be properly introduced in evidence in this case by this method.

And it further appears that defendants herein were not parties to the said suit, and had no opportunity to examine or cross-examine witnesses in said case, and the matters and things therein set out,

took place between other parties.

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Wherefore the testimony there given is incompetent against these defendants, and the judgment in the said case is not binding upon these defendants in favor of complainant; and the said exhibit should be stricken from the files and expunged from the record in this case.

KLEIN & HOUGH, Attorneys and Solicitors for Defendants. Received a copy of within motion this 17th May, 1907. JAMES L. HOPKINS. Solicitor for Comp'ts

And on June 24, 1907, the following order was made in said car to-wit:

No. 5096.

W. A. Gaines & Company, Complainant,

MAX KAHN, Administrator, etc., et al., Defendants.

The Court having fully considered the motion of said defendan expunge from the files complainant's exhibit, entitled "Record W. A. Gaines & Company vs. E. Whyte Grocer Cempany in Kar City Court of Appeals," doth

Order that said motion be and the same is hereby overruled which ruling said defendants by their counsel now and here exe June 24th, 1907.

DAVID P. DYER, Judge

610 And afterwards, to-wit: On June 24th, the following furt proceedings were had and appear of record in said cause, wit:

No. 5096.

W. A. Gaines & Company, Complainant,

Max Kahn, Administrator of the Estate of Abraham M. Helln Deceased, and Moritz Hellman, Respondents.

Interlocutory Decree and Order of Reference.

This cause came on to be heard this 29th day of May, 1907, u the Bill, Answer and Replication thereto and upon the Cross-l Answer and Replication thereto, and the proofs taken in the ca and was argued by counsel on behalf of the Defendants as well a the Complainant, and due consideration being had thereof, it is,

Ordered, Adjudged and Decreed that the Cross-Bill of the Response ents Max Kahn, Administrator of the Estate of Abraham M. F. man, deceased and Moritz Hellman, be, and the same is hereby missed at the costs of the said Respondents; and it is further orde adjudged and decreed, and this Court by virtue of the power i vested, does Order, Adjudge and Decree that the Respondents I Kahn, Administrator with the will annexed of the Estate of Abral M. Hellman, deceased, and Moritz Hellman their agents, serve and employes, be, and they are hereby forever and perpetually joined and restrained from making advertising for sale, selling, k ing on hand for sale, or in any manner dealing in any whisky distilled and produced by the Complainant, W. A. Gaines & C pany, at its Old Crow Distillery in Woodford County, Kentucky, and bearing the names "Crow," "Old Crow," "P. Crow" or "J. W. Crow," or any other combination of words or letters containing the word "Crow," or bearing the pictorial representation of a crow; and from in any manner selling or passing off upon the public any whisky not made and produced by the Complainant, W. A. Gaines & Company, as and for the whisky made, produced and sold by the Complainant under its trade-mark consisting of the words "Old Crow" and it is further,

Ordered, Adjudged and Decreed by the Court that this cause be referred to Clifford B. Allen as Master in Chancery of this Court, to take, state and report unto this Court a full, true and complete account of all of the transactions and dealings of the Respondents, and each of them since the 1st day of January, 1896, in whisky not made or produced by the Complainant, and falsely marked or sold as, or under the name of, "Crow" whisky or "Old Crow" whisky, and

that the said Master in Chancery shall assess against the said
611 Respondents, and each of them, in addition to the profits
found by him to be realized by them in the said transactions,
the damages sustained by the Complainant by reason of the said

transactions of the Respondents.

And it is further ordered, adjudged and decreed by the Court that the Master be clothed with full power to examine as well the parties as any other witness, orally or upon written interrogatories, under oath, in the premises, and do require the production of all vouchers, papers, and other documents pertinent and proper in the premises; and that he state a full account in the premises upon the basis of this decree. And that he be clothed with all the usual powers and authorities of a Master in all things touching the premises.

And upon said hearing the Complainant having submitted to the Court a Supplemental Bill, and its petition for leave to file said Supplemental Bill and to make The Hellman Distilling Company (a Missouri corporation) a party Respondent hereto, and it appearing to the Court from the evidence that said Hellman Distilling Company is a necessary and proper party Respondent hereto, the said petition is granted and the Complainant is given leave to file said Supple-

mental Bill.

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And all further orders and decrees are reversed for the consideration of the Court.

DAVID P. DYER, Judge.

And afterwards, to-wit: On June 27th, 1907, a Motion to revoke order permitting complainant to amend amended bill, was filed in said cause, which is in words and figures, as follows, to-wit:

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

No. 5096. In Equity.

W. A. GAINES & COMPANY, Complainant,

VS.

MAX KAHN et al., Defendants.

Come now defendants in the above entitled cause, and show to the Court that heretofore, on the 24th day of June, 1907, complainant herein, without previous notice to these defendants, or either of them, or their counsel, made application to the Honorable D. P. Dyer, Judge of this Court, for leave to amend its amended bill herein, by striking out the figures "1903" in line 30 on page 6 thereof, and inserting in lieu thereof the figures "1896"; and the Court thereupon granted complainant's application and permitted complainant to amend its amended bill as aforesaid.

And defendants show to the Court that defendants then and there by their counsel, excepted to the action of the Court in granting said leave and permitting said amendment to said

amended bill.

And defendants further show to the Court that said leave to amend was improvidently granted, and that complainant has not complied with the rules of equity in this behalf provided, and particularly with Rule 29 thereof, in that complainant did not present to the said Judge an affidavit with the proposed amendment was material and could not, with reasonable diligence, have been sooner introduced into the bill, and that the said application was not made for the purpose of vexation or delay; and for the further reason that due notice of the presentation of said application to the Court was not given to defendants, or either of them, or their counsel.

Defendants' counsel were presented before the Judge at said time, for the purpose of making objections to the form of decree submitted by complainant's counsel, and had no notice of any intention on the part of complainant's counsel to make application for leave to make

any amendments to the amended bill.

Defendants further show to the Court that this cause was submitted to the Court after oral argument and upon briefs, on May 29th, 1907, and the Court thereafter, on the 14th day of June, 1907, announced its decision herein upon the merits, and the said application by complainant for leave to amend its amended bill was made on the 24th day of June, 1907, ten days after the Court had announced its decision, and directed counsel to prepare the form of the decree to be thereafter entered of record.

And defendants further show to the Court that it appears by the records of the Court, that on the 4th day of January, 1905, depositions of witnesses on behalf of defendants, were filed in this cause, which depositions included the testimony given by defendants' wit-

nesses Urner, Liemke, Heron, Hobbs and Hugo, and in said depositions were set forth the facts with reference to the use of the words "Crow" and "Old Crow" in application to whisky by defendants and the predecessors in business of defendants, and also the notice given by the late Abraham M. Hellman to the agent for the sale of complainant's "Old Crow" whisky in the year 1896, that defendants claimed the exclusive right to use the words "Old Crow" in application to whisky.

Defendants further show to the Court that it appears by the amended bill herein, which complainant, on the said 24th day of

June, 1907, asked leave of Court to amend, as aforesaid was
613 not filed in this Court until the 3rd day of March. 1905, which
was two months after the filing of the said depositions herein,
and more than two months after complainant and its counsel were
fully advised and informed of all the facts with reference to the said
notice to complainant by the late Abraham M. Hellman in 1896, and

all the other facts testified to by the said witnesses with reference to the use of the words "Crow," and "Old Crow" by defendants, in ap-

plication to whisky.

And defendants further show to the court that the amendment operates to the prejudice of defendants in that by such amendment at this time, the defendants are deprived of making defenses under their answer, which was filed to complainants' amended bill before said amendment was allowed to be made on June 24th, 1907, and that said answer being drawn in reference to the date 1903, and not with reference to the date 1896, as the date from which the complainant was seeking an accounting, and if said date had originally appeared as 1896, the defendants would have been entitled to plead the statute of limitations for any accounting for any period prior to five years before the filing of this suit, and also a plea of laches with reference thereto.

Wherefore, it appearing from matters of record in this court that the said application for leave to amend complainants' amended bill herein, was improvidently granted, defendants move the court to set aside its order permitting such amendment to be made, and to further direct and require that complainants' amended bill, in line 30 on page 6 thereof, be restored to its original reading, and the figures

"1903" be inserted in lieu of the figures "1896."

KLEIN & HOUGH, Solicitors for Defendants.

Received copy this 26th day of June, 1907.

JAMES L. HOPKINS, Of Counsel for Complainant.

On said June 27th, 1907, a motion to set aside decree, was filed in said cause, which motion is in words and figures, as follows, to-wit:

(Motion to Set Aside Decree.)

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

No. 5096. In Equity.

W. A. Gaines & Company, Complainant,

MAX KAHN et al., Defendants.

Come now the defendants in the above entitled cause, and move the court to set aside so much of the decree heretofore entered in this case on, to-wit the 24th day of June, 1907, as provides for an accounting by defendants herein, of the profits which defendants have derived from the sale of whisky under the name "Crow" or "Old Crow."

And for grounds of this motion defendants show to the court that it clearly appears from the proofs in this case, that defendants and their predecessors in business have, beginning with the year 1863, continuously to the present time, marked, branded, and stamped the words "Crow" and "Old Crow" upon packages containing whisky, and have applied said words to whisky, and that complainant has long known and been advised of, and familiar with the use of the words "Crow" and "Old Crow" by defendants in connection with and in application to, whisky and said use has been open, public and notorious, and complainant has at all times neglected, omitted, and failed to take any action in connection therewith, but has acquiesced in said use by defendants.

Wherefore complainant is not in equity entitled to an accounting, and so much of the court's decree herein as authorizes and permits an

accounting herein, should be set aside.

KLEIN & HOUGH, Solicitors for Defendants.

Rec'd copy this 26th day of June, 1907.

JAMES L. HOPKINS, Of Counsel for Complainant.

And afterwards, to-wit, on July 1st, 1907, the following proceedings were had and appear of record in said cause, to-wit:

(Motion to Set Aside Decree Denied.)

No. 5096.

W. A. Gaines & Company, Complainant, vs.

Max Kahn, Administrator, etc., et al., Defendants.

The court having fully considered the motions filed by said defendants to set aside the interlocutory decree herein and to revoke the order permitting amendment to the amended bill of complaint, doth

Order that said motion to set aside said decree be denied, and that said motion to revoke be sustained so that the form of the amended bill prior to the substitution of the figures "1896" for "1903" shall stand as the form of the amended bill in this cause.

DAVID P. DYER, Judge.

July 1st, 1907.

And afterwards, to-wit: on July 6th, 1907, the following proceedings were had and appear of record in said cause, to-wit:

5096.

W. A. Gaines & Company, Complainant, vs.
Max Kahn et al., Defendants.

Order Amending Decree.

It appearing to the court that in and by the decree heretofore entered in this cause, on to-wit the 24th day of June, 1907, it was ordered, adjudged and decreed that this cause be referred to Clifford B. Allen as Master in Chancery in this court, to take, state and report unto this court, a full, true and complete account of all the transactions and dealings of the respondents, and each of them, since the 1st day of January, 1906, in whisky not made or produced by the complainant, and marked and sold as and under the name of "Crow" whisky or "Old Crow" whisky;

And it further appearing to the court that such accounting should not be permitted or granted prior to the 1st day of January, 1903,

It is hereby ordered, adjudged and decreed that the said decree heretofore entered in this cause be, and hereby is modified and amended by striking out the date in words and figures as follows, to-wit: "January 1st, 1896," and inserting in lieu thereof, the date in words and figures as follows: to-wit "January 1st, 1903," so that the said accounting shall be limited to and include transactions only from January 1st, 1903.

DAVID P. DYER, Judge.

(Order Correcting Record.)

5096.

W. A. Gaines & Company, Complainant, vs.
Max Kahn et al., Defendants.

It appearing to the court that the motion heretofore filed by respondents herein, on to-wit: the 27th day of June, 1907, to modify

the decree heretofore entered in this cause on the 24th day of June, 1907, by setting aside so much of said decree as permitted the taking of an accounting of the transactions and dealings of respondents, and

each of them, in whisky not made or produced by complainant, and marked and sold and under the name of "Crow" or "Old Crow" whisky, was inadvertently styled,

"A motion to set aside decree," and was so entered on the records of this court, and was so denominated by the court in overruling said motion:

It is hereby ordered and adjudged that the records of this court be, and the same are hereby, amended, so that the said motion be

styled and designated.

"A motion to modify decree by setting aside that portion of same permitting an accounting," and that said motion shall be so styled and designated whereever entries with reference to same appear upon the records of this Court.

DAVID P. DYER, Judge.

# Granting Appeal.

And afterwards, to-wit: on July 23rd, 1907, the following further proceedings were had and appear of record in said cause, to-wit:

## No. 5096. In Equity.

### W. A. Gaines & Company, Complainant, vs. Moritz Hellman et al., Defendants.

Whereas on the 24th day of June, 1907, it was ordered, adjudged and decreed by the Court that defendants herein, and each of them, be enjoined from making, advertising for sale, selling, keeping on hand for sale, or in any manner dealing in any whisky not distilled and produced by the complainant W. A. Gaines & Company, at its Old Crow Distillery, in Woodford County, Kentucky, and bearing the names "Crow," "Old Crow," "P. Crow," or "J. W. Crow," or any other combination of words or letters containing the word "Crow" or

bearing the pictorial representation of a crow; and

Whereas in and by said decree entered upon the same date, it was ordered and adjudged by the Court that this cause be referred to Clifford B. Allen as Master in Chancery, to take, state and report to this Court a true and complete account of all the transactions and dealings of defendants, and each of them, in whisky not made or produced by complainant and marked and sold as or under the name of Crow whisky or Old Crow whisky, and that the said Master in Chancery assess against the said defendants, and each of them, in addition to the profits found by him to have been realized by them in the said transactions, the damages sustained by the complainant

by reason of the said transactions of the defendants; and
Whereas on the 19" day of July, 1907, defendants herein
filed their petition for appeal from the interlocutory order

of injunction heretofore entered herein, and from the order of Court dismissing their cross-bill, and have also filed their Assignment of Errors and their Appeal Bond in the sum of Five Hundred (\$500.00) Dollars; and

Whereas, said petition for appeal is herewith allowed and said

appeal bond is approved;

Now, therefore it is ordered that the Clerk of this Court make and certify to the Circuit Court of Appeals for the Eighth Judicial District, a full, true, complete and duly authenticated transcript of the record, proceedings and papers in this cause.

DAVID P. DYER, Judge.

Received filed and entered July 23", 1907.

JAMES R. GRAY, Clerk.

The said Assignment of Errors, Petition for Appeal and Appeal Bond are respectively in words and figures as follows, to-wit:

(Assignment of Errors.)

In the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri.

No. 5096. In Equity.

W. A. Gaines & Company, Complainant, vs.

Moritz Hellman et al., Defendants.

Come now the said defendants in the above entitled cause, and file this, their Assignment of Errors, in the appeal this day prayed for in this cause, and say that the errors which they asserted and intend to urge in the United States Circuit Court of Appeals for the Eighth Judicial Circuit, are the following:

I.

The Circuit Court erred in adjudging and decreeing that the complainant was entitled to an injunction against the defendants and each of them, enjoining them and each of them from making, advertising for sale, selling, keeping on hand for sale, or in any manner dealing in any whisky not distilled and produced by the complainant W. A. Gaines & Company, at its Old Crow Distillery, in Woodford County, Kentucky, and bearing the names, "Crow," "Old Crow," "P. Crow," or "J. W. Crow," or any other combination of words or letters containing the word "Crow" or bearing the pictorial representation of a crow.

618 II.

The said Circuit Court erred in adjudging and decreeing that

complainant was entitled to an accounting under its amended bill herein, and in decreeing that the account should be taken, and in referring the cause to a master to take and state an account.

#### III.

The said Circuit Court erred in adjudging and decreeing that the cross-bill of these defendants should be dismissed.

#### IV.

The said Circuit Court erred in admitting in evidence over defendants' objection, complainant's exhibit, the record in the case of W. A. Gaines & Company vs. E. Whyte Grocery, Fruit & Wine Company (107 Mo. App. 581) and in overruling the motion of these defendants to expunge said exhibit from the record.

#### V.

The said Circuit — erred in admitting improper evidence in behalf of complainant over the objections of these defendants.

#### VI.

The said Circuit Court erred in declining to consider proper evidence offered on behalf of these defendants.

MORITZ HELLMAN AND MAX HELLMAN,

Administrator of the Estate of Abraham M. Hellman, Deceased, By KLEIN & HOUGH,

Their Solicitors.

DAVID P. DYER, Judge.

(Petition for Appeal.)

In the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri.

No. 5096. In Equity.

W. A. Gaines & Company, Complainant,

MORITZ HELLMAN et al., Respondents.

Come now defendants in the above entitled cause, and conceiving themselves aggrieved by the interlocutory decree entered in the above entitled cause on the 24th day of June, 1907, hereby appeal from said interlocutory decree which adjudges and decrees that an injunction be granted against these defendants and each of them. enjoining them and each of them, from making, advertising for sale, selling, keeping on hand for sale, or in any manner dealing in any whiskey not distilled and produced by the complainant W. A. Gaines & Company, at its Old Crow Distillery in Woodford County, Kentucky, and bearing the names "Crow," "Old Crow," "P. Crow," or "J. W. Crow," or any other combination of words or letters containing the word "Crow" or bearing the pictorial representation of a crow, and further adjudges and decrees that the cross bill of these defendants against complainant herein, should be dismissed for want of equity.

And said defendants pray that this, their appeal to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, may be allowed, and that a transcript of the record, proceedings and papers upon which said interlocutory decree was made, duly authenticated, may be sent to the said Circuit Court of Appeals for the Eighth Circuit, and that citation issue to complainant herein.

And now at the time of filing this petition for appeal, Moritz Hellman and Max Kahn, Administrator of the Estate of Abraham M. Hellman, deceased, appellants, file their Assignment of Errors setting forth separately and particularly, each error intended to be urged in the United States Circuit Court of Appeals for the Eighth Judicial Circuit, and your petitioners will ever pray.

MORITZ HELLMAN AND MAX KAHN,

Administrator of the Estate of Abraham M. Hellman, Deceased, By KLEIN & HOUGH, Their Solicitors.

#### Bond.

Know all men by these presents; That we, Moritz Hellman and Max Kahn as principals, and Herman A. Haeussler as surety, are held and firmly bound unto W. A. Gaines & Company, a corporation, in the full and just sum of Five Hundred (\$500.00) Dollars, to be paid to the said W. A. Gaines & Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally, by these presents.

Sealed with our seals and dated this 19th day of July, in the year

of our Lord, One Thousand Nine Hundred and Seven.

Whereas, lately at the March term A. D. 1907, of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, in a suit pending in said Court between W. A. Gaines & Company, a corporation, complainant, and Moritz Hellman and Max Kahn, Administrator of the Estate of Abraham M. Hellman, deceased, defendants, interlocutory decree was rendered against the said Moritz Hellman and Max Kahn Adminis-

trator of the Estate of Abraham M. Hellman, deceased, enjoining the said defendants from making, advertising for sale, selling, keeping on hand for sale, or in any manner dealing

in any whiskey not distilled and produced by the complainant W. A. Gaines & Company, at its Old Crow Distillery, in Woodford County, Kentucky, and bearing the names "Crow," "Old Crow," "P. Crow," or "J. P. Crow," or any other combination of words or letters containing the word "Crow" or bearing the pictorial representation of a crow, and also dismissing the cross bill of these defendants herein against the complainant.

And the said Moritz Hellman and Max Kahn, administrator of the estate of Abraham M. Hellman, deceased, have obtained an appeal from the said Court, to reverse the decree in the aforesaid suit, and the citation directed to W. A. Gaines & Company, citing and admonish- it to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri,

sixty (60) days from and after the date of said citation.

Now the condition of the above obligation is such that if the said Moritz Hellman and Max Kahn, administrator of the Estate of Abraham M. Hellman, deceased, shall prosecute said appeal to effect, and answer all damages and costs in said cause, and by reason of said appeal, then the above obligation be void. Else to remain in full force and virtue:

Sealed and delivered in the presence of:

MORITZ HELLMAN, MAX KAHN, By LUTHER ELY SMITH, Att'y, HERMAN A. HAEUSSLER,

Approved:

DAVID P. DYER, Judge.

Opinion on Demurrer to Original Bill.

In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

W. A. GAINES COMPANY, Complainant, vs.
A. M. Hellman et al., Defendants.

#### Memorandum.

Adams, District Judge:

The demurrer to the first ground of complainant found in the petition must be sustained on the authority of Warner vs. Searle and Hereth Co., 191 U. S. 195. There is no charge in the bill that the defendants are using the registered trade-mark in commerce with foreign nations or Indian tribes, and I cannot agree with counsel for complainant that because the amount in controversy is alleged to be more than two thousand dollars, exclusive of interest and costs, and because there is diversity of citizenship between complainant and defendants, that fact is sufficient to warrant the complainant's remedy for all kinds of use of his technical trade-mark, and especially with that use of it in local or inter-

state commerce. It is true that where diversity of citizenship exists and the statutory amount necessary to give this court jurisdiction is stated, this court would have jurisdiction of a certain kind to enforce complainant's rights in so far as he has any, by reason of the registration of his trade-mark. It is the wrongful use of a counterfeit or imitation registered trade-mark that is prohibited. The Court, in Warner vs. Searle (supra) says: "The certificate of registry was good for thirty years as a matter of evidence, but when it was sought to enjoin the wrongful use it should have been made to appear that the trade-mark was then being used in that commerce, and that that use was interfered with, without right, by defendant. And if the presumption of continuing use in such commerce flows from the registry, nevertheless, to make out infringement, it must appear that the alleged counterfeit or imitation was being used on merchandise intended to be transported to a foreign country or in lawful commercial intercourse with an Indian tribe.'

There are no such allegations in the bill in this case, and in so far as the complainant predicates its right to relief on the ground that it has a registered trade-mark it can only secure relief so far as the rights secured by that registered trade-mark are interfered with, namely: so far as the defendant interferes with complainant's use of its trade-mark on goods shipped or intended to be shipped to foreign countries or to Indian tribes by way of com-

merce between them.

I am also of opinion that complainant's first cause of action is defective in that it fails to state any of the facts which by law secured to it the exclusive use of the word-"Old Crow" as a trademark. There are no averments to the effect that complainant or its predecessor in right or title ever applied a label containing that trade-mark to any of its packages of whiskey. The right of property in trade-mark depends upon priority of appropriation and such a length of use as would justify the public at large to believe that the particular trade-mark represented the origin or ownership of the goods to which it was attached. MacKahan Pharmacal Co.

vs. Denver Chemical Mfg. Co., 113 Fed. 468.

Indeed, I do not think that the complainant makes any case of exclusive right to use James Crow's old secret process. Complainant stated that its predecessors learned of the James Crow's secret process and used it. It fails to state that anybody else did not learn it—in other words, that it and its predecessors had any exclusive knowledge of that, or any exclusive right to use it. There are other defects in the bill, but it is enough to say that in my opinion for the reason assigned the bill is bad and the demurrer should be sustained.

The next question arises on motion to strike out what is called the second count of the bill. Of course there is no "count" in a bill in equity, and although the complainant's counsel has improperly designated his second cause of action as second count, I treat it simply as a statement of other grounds for equitable relief, besides those stated in the so-called first count.

The criterion for determining the existence of multifariousness,

as Mr. Justice Miller stated in United States vs. Bell Telephone Co., 128 U. S. 352, is very largely a question of convenience. If there is such diversity of subject matter embraced in the two causes of action as would render it inconvenient or difficult in established practice and procedure in equity to award appropriate decrees, such facts would render the bill multifarious as to subject matter. But in this case the two grounds of complaint are cognate and in fact very closely related. The first ground is the infringement of a technical trade-mark; the second is for using a common law trademark in such a way as to amount to unfair competition in trade. These two grounds of complaint are of such a similar character that they may be well joined in a bill in equity. The authorities for this conclusion are Jaror Hygienic Underwear Co. vs. Fleece Hygienic Underwear Co., 60 Fed. 622; Amarium Co. vs. Neiman, 98 Fed. 14; Harper vs. Holman, 84 Fed. 222; Bell Telephone Co. (supra).

It may be there is repetition of jurisdictional and other averments found in the so-called second count that might properly enough be stricken out on an exception for impertinence. However that may be, I cannot sustain the defendants' motion to strike the so-called

second count. It is therefore denied.

## (Opinion on Demurrer to Bill.)

In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

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5096.

W. A. Gaines & Company, Complainant, vs.

Abraham M. Hellman et al., Defendants.

### Memorandum.

Adams, District Judge:

It is not clear that complainant has a common law trademark in the words "Old Crow," but whether it is such trade-mark or not is immaterial in the view I take of this case. The relief sought is to restrain the defendants from unfair competition in trade. All the averments in relation to the use by complainant and its predecessors, in right, of the words "Old Crow" as applied to their whiskey are pertinent enough to the main purpose of the bill if for no other reason, because they show that the words "Old Crow" indicate that the whiskey, in relation to which it is used, was distilled on Glenn's Creek, Woodford County, Kentucky, and because they show how these words came to be used.

The Bill discloses that complainant and its predecessors, in right, have for many years been distilling a certain superior article of whiskey on Glenn Creek, Woodford County, Kentucky, and that the

whiskey, so distilled by them, has come to be known by the public

and by the trade as "Old Crow" whiskey.

The bill further discloses that these words "Old Crow" have continuously, since 1835 and down to the present time, indicated to the trade and to the public generally that the whiskey known by these words was made by a process invented by one James Crow, and further indicated to the trade and public that the whiskey known by these words was distilled on Glenn's Creek in Woodford County,

Kentucky, and nowhere else in the world.

The bill then discloses that the defendants have recently begun the distilling of whiskey in the City of St. Louis, and not on Glenn's Creek, which they are putting upon the market and describing as "Old Crow" whisky; that the effect of the defendants' conduct is to deceive the public into the belief that the defendants' whiskey, so manufactured in St. Louis in fact, was really manufactured on Glenn's Creek and under the process of James Crow; that by reason of the foregoing facts the defendants are disposing of their whiskey as and for that of the complainant's and are deceiving the public into the belief that they are getting compiainant's whiskey when in fact

they are not.

624 The effect of the averments of the bill is that the words "Old Crow," as used by complainant in connection with its whiskey, are equivalent to saving that the whiskey was made on Glenn's Creek after the process of James Crow, and that the public and traders in whiskey so understand the meaning of these words. It seems obvious, I think, if the words "Old Crow" do signify to the public, as alleged, that the whiskey known by those words is distllled on Glenn's Creek, then it follows, I think, that when the defendants use these words in connection with their liquor, they in effect say: that such liquor is distilled on Glenn's Creek. If such are the facts, and for the purposes of the demurrer they must be so taken, the defendants do not, tell the truth. They represent that their whisky is made on Glenn's Creek, when it is not; they represent that their whiskey is made under the process of old James Crow, when it is not, and they do this with the intention of deceiving the public and to injure the complainant's business. If the words "Old Crow" do constitute a common law trade-mark, which gives the complainant the absolute right to use them, then of course the defendants have not that right. If on the other hand, the words "Old Crow" do not constitute a common law trade-mark, but signify, as averred in the bill, that the whiskey called by them was made on Glenn's Creek after the process of James Crow, then the defendants doubtless could open a distillery on Glenn's Creek and use that process and properly call their product, "Old Crow Whiskey" and nobody could complain, but as the defendants do not distill their whiskey on Glenn's Creek, but do distill it in St. Louis, then any representations that they are distilling it on Glenn's Creek is a departure from the truth and is reasonably intended to deceive the public and to injure the complainant's business.

The foregoing analysis of the bill brings the case within the

principles announced in Pillsbury-Washburn Flour Mills Co. vs.

Eagle, 86 Fed., 608, 618 and cases there cited.

There are many exceptions and many grounds of demurrer stated, all of which have been considered, and while some portions of the bill might, by over-refinement, be regarded as impertinent on the whole I am satisfied that all the averments are permissible on the theory that the bill is for unfair competition, as inducement or full explanation of the character of complainant's right and of the defendant's invasion of it.

The demurrer and exceptions are all overruled.

625 (Opinion on Final Hearing.)

No. 5096.

W. A. Gaines & Co., Complainant,

MAX KAHN, Administrator with the Will Annexed of the Estate of Abraham M. Hellman, Deceased, and Moritz Hellman, Respondents.

Dyer, J.:

The bill in this case is in substance as follows: The plaintiff is a Kentucky corporation engaged in the manufacture and sale of whiskey, in Woodford County, Kentucky; that at the time this suit was commenced Moritz Hellman and Abraham M. Hellman were copartners in the liquor business in the City of St. Louis under the firm name of A. M. Hellman & Co. That since the original bill in this case was filed Abraham Hellman has died and the respondent Max Kahn has been duly appointed administrator of his estate.

The complainant claims that it is sole and exclusive owner of a certain trade mark for whiskey, consisting of the words "Old Crow" and that this mark has been used by it and its predecessors in business for about forty years, and that this mark has been applied by it and its predecessors to packages, by marking, branding, stamping and labelling. It is further averred in the bill that the plaintiff corporation is the successor in business of W. A. Gaines & Co., a co-partnership, and that W. A. Gaines & Co. was the successor of Gaines, Berry & Co., a co-partnership. It is further charged that in the year 1867 Gaines, Berry & Co. adopted and commercially applied the words "Old Crow" as a trade mark for whiskey distilled by them, that the name was so used by them until 1870 when they were succeeded in business by W. A. Gaines & Co., to whom the same with all other assets were transferred; that the firm of W. A. Gaines & Co. (the co-partnership) continued the use in the same way of the mark until 1887, when they were succeeded by the complainant corporation; that after this succession the complainant continued to use and is now using the mark in the same way as its predecessors.

It is further averred in the bill that in the year 1835 one James Crow became domiciled upon Glenn's Creek, in Woodford County, Kentucky, and there began the manufacture of a whiskey of superior excellence and quality, which became designated about that time as "Crow," or "Old Crow;" that James Crow was continually from 1835 to the time of his death in 1855 engaged in the distilla-

tion of said whiskey which was known and designated as 626 "Crow" or "Old Crow" whiskey, and that during his life time this whiskey acquired a wide and extensive sale and reputation. That upon the death of the said James Crow there was upon the market a considerable quantity of that kind of whiskey, and that it was known commercially and was sold and dealt in continuously by various persons until the year 1867 when the co-partnership of Gaines, Berry & Company begun the production of whiskey, using the same process and material that had theretofore been used by James Crow, and conducting the distillation of whiskey upon Glenn's Creek, in Woodford County, Kentucky. That from the time of the death of Crow until 1867 there was no whiskey produced upon the said Glenn's Creek or elsewhere to which the said

words "Crow" or "Old Crow" were applied as a trade mark.

It is further stated in the bill that the words "Crow" or "Old Crow" had been left open for adoption by the death of the said James Crow. and that the cessation of the distillation of the whiskey, designated by the said words, so that the same were lawfully appropriated and used by Gaines, Berry & Co. in the year 1867. It is further averred in the bill that from the time when the process of making of said whiskey was first devised and put into use by Crow in 1835 down to the present time the words "Oid Crow" have been applied continuously to the whisky produced by the said process and to no other whisky whatsoever, and that the distillation and production of said whiskey, made by said process has always been made at Glenn's Creek, Woodford County, Kentucky, and in no other place in the United States, nor anywhere else in the world. That the words "Old Crow" have continually since the year 1835 down to the present time indicated to the public and particularly to all consumers of and dealers in whisky throughout the world that the whisky to which they were applied was made by the said process devised and invented by the said James Crow and to no other whisky whatsoever. the words "Old Crow" have continuously since the year 1835, down to the present time indicated to the public, and particularly to consumers of and dealers in whisky throughout the world that the whisky to which these words were applied is and was distilled at Glenn's Creek, Woodford County, Kentucky. It is further averred that the said whisky to which the words "Old Crow" are applied is sold at a higher price than any other whisky of equal age produced in the United States, and this by reason of its uniform excellence and the skill and care devoted by complainants to the selection of the materials used, and to the process of distillation, together with the

natural advantages of the locality in which the complainant's distillery is situated. It is further averred in the bill that the complainant and its predecessors have expended large sums of money in and about the advertising of said whiskey throughout the United States. It is further averred that the said mark "Old Crow" is a lawful and valid and subsisting trade-mark and that com-

plainant has been universally recognized as the sole and exclusive owner thereof: that complainants have by reason of the uniform excellence of the whiskey distilled and sold by them under the trademark "Old Crow" established a large and continuously increasing trade and demand for said whisky, so distinguished by said trade-It is then charged that the rights of complainant being well known, the defendants have unjawfully disregarded the same and have from the first of January, 1903, and thence continuously and from day to day until the filing of the bili of complaint herein made or caused to be made, sold or caused to be sold in the city of St. Louis. and State of Missouri, and elsewhere, a compounded liquor or liquid. to which they applied the trade-mark "Old Crow" and that this was done against the consent of the complainants and in violation of their trade-mark rights. It is further averred that by the fraudulent acts of the defendants they have sold a spurious compounded liquor as and for complainant's whiskey, and have diverted to themselves trade to which the complainant was entitled, and which it would have otherwise received. That the whisky so soid by the respondents was purchased by the public and the consumers thereof in the false belief that it was complainant's whisky, and that by reason of the inferior quality of the liquor so sold by respondents the reputation of complainant's whisky has been greatly damaged. It is further claimed that the said unlawful and wrongful acts of the respondents constitute unfair competition in trade; that the said acts are now continued and are imperiling and jeopardizing the complainant's established trade and good will.

The answer of the defendants makes specific denials of each and every allegation in the complainant's bill contained, except that they admit at the time of the filing of the bill of complaint, Moritz Hellman and the late Abraham M. Hellman were co-partners doing business under the name and style of A. M. Hellman & Company, and that said Abraham M. Hellman is dead and Max Kahn has

been appointed his administrator.

The respondents in their answer affirmatively set up and state that in 1863 the firm of I. & L. M. Hellman, a co-partnership composed of Isaac and Louis M. Hellman, were the predecessors in 628 business of Moritz Hellman, and the late Abraham M. Hellman; that they did a general wholesale liquor business in the city of St. Louis, Missouri, and made and produced according to their own formula a blended whisky, which said firm of I. & L. M. Hellman & Co., designated as "Crow" or "Old Crow" whiskey, and branded and stamped upon barrels, kegs, boxes and bottles containing the said whiskey, the figure of a crow and the words "Crow," "Old Crow" and "Celebrated Old Crow" and "J. W. Crow's Bourbon," together with the firm name and the word "Hellman's." and continuously sold and dealt in whiskey in packages so stamped. branded and labeled, and continuously designated the said whiskey to the trade by the said names and each of them, until the year 1867, when Isaac Hellman, one of the members of said firm of L & L. M. Hellman departed this life; that after the death of Isaac Hellman, Louis M. Hellman acquired all the rights and property of

the said Isaac Hellman, in the firm of I. & L. M. Hellman, including the right to make, and produce whiskey according to the formula of said firm and sell the same, and to use and apply to such whiskey the said names of "Crow," "Old Crow" and "Celebrated Old Crow," and "J. W. Crow's Bourbon," together with the brands, labels, marks

and figures used in connection therewith.

It is claimed by the respondents that they and their predecessors are rightfully entitled to the use of the said words, "Crow," "Old Crow," "Celebrated Old Crow" and "J. W. Crow's Bourbon," and the figure of a crow as a trade-mark for and upon the whiskey made and produced by them; and that this was well known to the complainant herein ever since the year 1896, and acquiesced in by the

complainant since that time,

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The respondents then aver that the whiskey produced by the complainant and sold by it under the firm name of "Crow" or "Old Crow" and represented by them to be whiskey of superior excellence is in point of fact a whiskey containing a large and dangerous percentage of fusel oil, a deadly poison, and a large percentage of other dangerous and deleterious impurities and that the same is unwholesome and impure, and that the same has not been subjected to any process of rectification, blending or vatting for the purpose of removing such dangerous and deleterious impurities, and that in representing said whiskey to be pure and of superior excellence the complainant is guilty of fraud upon the public and especially upon purchasers and consumers of whiskey.

The replication to this answer on the part of the complainant is

a general denial.

Respondents to the bill in this cause have filed a cross-bill in which they themselves are complainants and the W. A. Gaines & Company, (corporation) is made respondent. In this cross-bill the averments are along the lines marked out in their answer to the original bill in this cause. In this cross-bill complainants ask for affirmative relief against the corporation, W. A. Gaines & Company. There is an answer filed to this cross-bill by W. A. Gaines & Co., and a replication to the answer by Hellman and Kahn. The bill and cross-bill practically present the same question.

The questions for my consideration have been in a great measure passed upon by courts of competent jurisdiction in the States of Mis-

souri and New York.

In the Missouri case the facts relied on by the complainant are substantially the same as those appearing in the record now before the court. The recital of the facts by Judge Smith of the Kansas City Court of Appeals I find to be substantially the facts disclosed in the testimony of the witnesses for the complainant here. Judge Smith in his recital of the facts in the case before him says:

"It is disclosed by the evidence that one James Crow, a distiller, had a secret formula for the making of whisky. He was employed in 1833 by Oscar Pepper, the owner and operator of a distillery, for whom he made whisky according to his formula until 1855. He died a year later. The whisky made by him was of excellent quality.

One Mitchell, who had worked with Crow and had learned his formula, took Crow's place and continued to make whisky at the Pepper distillery until the latter's death in 1865. After the death of Pepper, one Edwards leased the distillery and carried it on for about a year. In February, 1867, Gaines, Berry & Co. leased it and carried it on until July, 1869. In the last named year this copartnership built and moved into a new distillery, located about three miles away from the Oscar Pepper distillery. From 1869 to 1871 the latter was not operated. In 1870 the copartnership was succeeded by that of W. A. Gaines & Co., which later in 1887 was succeeded by the plaintiff. When Gaines, Berry & Co. leased the Pepper distillery, they emploved Mitchell, already referred to as Crow's pupil, as their distiller. and he remained in their employment and that of their immediate successor, W. A. Gaines & Co., until 1872, and during all that time the whisky output of the distillery of these firms was made according to the Crow formula. One Van Johnson who worked with

Mitchell for several years, succeeded Mitchell as distiller in the employment of W. A. Gaines & Co., and used the Crow 630 formula in the production of whisky by the latter and its successor, the plaintiff. So that the Crow formula has been continuously used in the production of whiskey be the several parties named for nearly three-quarters of a century. It is true that after the expiration of the second lease of the Pepper distillery in 1873, James E. Pepper (son of Oscar Pepper) and E. H. Taylor, operated it for a year or so, and then tore it down, erecting a new distillery in its This last named copartnership was succeeded in the ownership of the new distillery by Labrot & Graham "who have operated it ever since its acquisition by them." It does not appear that after Gaines, Berry & Co. left the old Oscar Pepper distillery, any one operating it or the new one erected in its place, ever used the Crow process in the making of whisky, or that they or any of them ever applied the words "Old Crow" to any whiskey of their production. It does not appear that Oscar Pepper ever used the words "Old Crow" to designate the whisky produced at his distillery after James Crow left his employment. From 1855 to 1855 he operated his distillery, and designated its production as "Old Oscar Pepper" whisky. Edwards, who next operated the Oscar Pepper distillery, as previously stated, designated the whisky produced by him "Edwards' Whisky" and did not apply the words "Old Crow" to it. From 1855 to 1867, when Gaines, Berry & Co, took charge of the old Oscar Pepper distillery no one used the words "Old Crow" or "Crow" to designate his whiskey. They began in the last named year (1867) to apply the words "Old Crow" to whisky of their production, and they and their successors down to the present time have continued to do so. It does not clearly appear that Oscar Pepper used the words "Old Crow" or "Crow" to designate the whisky produced by him while Crow was in his employment; but, if he did, it is certain that he discontinued their use after Crow left his service.

Smith, P. J., in W. A. Gaines & Co., vs. E. Whyte Grocery Fruit & Wine Co., 107 Mo. App., 507; 81 S. W. Rep. 648, 652.

It was intimated by counsel for the defendants in this case upon the oral argument that the case above referred to should have but little weight in determining the case here for the reason that that case was not properly tried for the defendants, and that it savored somewhat of collusion. I have examined the record in that case and I am satisfied that the suspicion indulged in by counsel is not well founded.

The evidence in this case shows beyond question, as I think, that James Crow began distilling a certain kind of whisky, on

Glenn's Creek, in Woodford County, Kentucky, in the year 631 1835; this whisky was made according to a formula known only at that time to Crow himself. Crow gave the name of "Crow" or "Old Crow" to the whisky made by him from 1835 to 1855, in which latter year he died. During all of that time he was the distiller for Oscar Pepper at the distillery of the latter on Glenn's Creek, in Woodford County, Kentucky. After the death of Crow, one Mitchell who had worked in the same distillery with him, and who during the time became acquainted with Crow's formula, continued to make the same kind of whisky. The whisky was known to the trade by the name of "Crow" or "Old Crow" and was of superior quality, and was easily sold at a good price.

The evidence in this case satisfies me that in the year 1863 the defendants or their immediate predecessors were engaged in the whiskey business in the City of St. Louis, and that during that year they offered a whiskey of their own make for sale and called it "Crow". whiskey. I am satisfied that this was done by them for the purpose of deceiving their customers as to the character of the whiskey offered by them. They marked the barrels "Crow" and also used a picture of the bird on some of the packages. It was an attempt to palm off on the trade inferior whisky, made under the name of "Crow," they well knowing at the time the superior quality of the whisky manufactured on Glenn's Creek in Woodford County, Kentucky. It was unfair competition in that they sought to make others believe that they were selling the genuine "Old Crow" whisky, when in fact they were offering an inferior production of their own.

The claim that is made by the defendants in their answer as well as in their cross-bill that they adopted the trade mark of "Old Crow"

long before 1867 cannot be allowed.

A case involving the same question as that here presented was before the Supreme Court of New York, in Gaines vs. Leslie. In that

case the court said:

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"It appears that these words have been used for many years by the plaintiff, and its predecessors in business, as the mark of their brand of whisky, purporting to be the brand originally taking its name from one James Crow, a distiller, employed some 60 years ago in a distillery located near to or upon the site of the plaintiff's present "Old Crow" distillery in the State of Kentucky. Certain evidence received without objection upon the trial would tend to show that the plaintiff has succeeded directly to the rights of the original distillers of his "Crow" whisky, and, in any event, I think that the prima facie case, as to title, is supported by the reasonable inference to be drawn from the evidence, that, if the original distillers had a right to trade-mark in the word "Crow" the right was abandoned to this plaintiff, or to its predecessors, and that their privilege to use the word became fixed, through general acceptance, in the course of succeeding years."

Bischoff J., in W. A. Gaines & Co., vs. Leslie, 54 N. Y. Supp.

421-423.

The evidence in the record in this case abundantly supports the opinions in the Missouri and New York cases above referred to.

The defendants have shown by some evidence in the case that they used the words "P. Crow" and "J. W. Crow" on packages put up by them. Why were they so used? No one by the name of "P. Crow" or "J. W. Crow" was ever in the employ of the defendants, and no satisfactory reason is given for the employment of the name or names. The evidence on the other hand is everwhelming, and is practically uncontradicted, that James Crow began distilling whisky in Kentucky as far back as 1835, and so continued until his death in 1855. That during all of that time he used on the packages containing the whisky made by him the words "Crow" or "Old Crow," and that from 1867 until the present time the complainant and its predecessors have used the words "Old Crow" in designating the whisky made by them.

I do not deem it necessary to pursue this matter further. The motion heretofore filed by defendants to expunge certain exhibits filed

by complainant will be overruled.

The cross bill filed by the defendants will be dismissed, and a decree entered in favor of the complainant according to the prayer of the bill.

And afterwards, to-wit on September 19", 1907, there was filed in said cause a præcipe for transcript which is in words and figures as follows, to-wit:

#### $(Pracipe\ for\ Transcript.)$

In the United States Circuit Court in and for the Eastern Division of the Eastern Judicial District of Missouri.

No. 5096. In Equity.

W. A. Gaines & Company, Complainant, vs.

MORITZ HELLMAN et al., Defendants.

To the Clerk:

In preparing the transcript of record in the appeal to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, in the case of W. A. Gaines & Company, complainant, vs. Max

633 Kahn, administrator of the estate of the late Abraham M. Hellman, deceased, and Moritz Hellman, defendants, in Equity, Case No. 5096, you will include the following only:

1. Amended bill of complaint;

- 2. Process;
- 3. Marshal's return;

4. Answer.

5. Replication;

6. Cross Bill and exhibits;

7. Order for substituted service of cross bill;

8. Process on cross bill;

9. Marshal's return;

10. Answer to cross bill;

11. Replication to cross bill;

12. Bill of revivor; appearance, consent and order on same;

Opinion of Judge Adams on demurrer;
 Opinion of Judge Adams on exceptions;

15. Testimony for complainants, including notation by Notary as

to adjournments, captions and certificates of depositions;

16. Testimony of defendants, including all notices and stipulations printed therein, notations by notary as to adjournments, cap-

tions and certificates of depositions;

17. Opinion rendered by the court in announcing its decision on the merits, decree, order permitting amendment of amended bill; order granting motion to set aside order permitting said amendment, motion to modify decree by striking out portion permitting an accounting, order overruling motion to modify decree; motion to expunge exhibit record in Whyte case; order denying motion to expunge record in Whyte case, and all orders subsequent to the decree.

18. Assignment of errors, petition for appeal, order allowing ap-

peal, and appeal bond and approval;

634

19. The various exhibits offered in evidence by complainant and defendants; in all cases the entire exhibit must be included in the transcript, except in the following exhibits, the parts set forth below are to be inserted in the transcript as and for the complete exhibit:

#### Account Books.

Defendants' Exhibit No. 1, Page 2, 212 66 66 3, " 66 32 66 44 66 48 66 44 143 66 66 66 9. 299, 373, 378, 429, 462, 485, 515, 518, 523, 551, 565, 571, 575, 580, 586, 593, 599, 605, " 10, 267, 256; " A, Rheinstrom deposition, pp. 49, 58, 59, 69, 70, 79, 92, 97, 105, 111, 112, 357, 358, 363.

#### 2. Whisky price lists:

(a) Judge & Dolph Drug Company, 515 Olive Street, St. Louis, U. S. A. Price List St. Louis, Mo., December, 1904. Entries as to "Old Crow."
Bourbon Whiskies.
Old Crow, bottled by W. H. Lee & Company, quarts. \$1.23 Old Crow, bottled by D. Nicholson, quarts. 1.23 Old Crow, bottled by Hellman, quarts. 1.23 Old Crow, bottled by Judge & Dolph, quarts. 1.23
(b) Judge & Dolph Drug Company, 515 Olive Street, St. Louis, U. S. A.
Second Edition, Toasts and Cocktails, (page 17).
Bourbon Whiskies.
Old Crow, W. A. Gaines, bottled in bond, 2-4-10       \$11.50       \$.96         Old Crow, W. A. Gaines, Bottled by Lee & Co.,       \$13.50       1.25         Old Crow, W. A. Gaines, our bottling quarts       \$12.00       1.23
(c) H. W. Voss & Company, Cincinnati, Price List January, 1904 (pages 18-19).
40 Old Crow Spring '96       \$1.50         85 Old Crow June '97       1.40         60 Old Crow Spring '98       1.30         85 Old Crow Fall '98       1.17½         75 Old Crow Spring '99       1.15         100 Old Crow Spring '00       .97½
635 200 Old Crow Spring '01
(d) Wm. C. Biles & Company, Cincinnati, Ohio.
Whiskey Price Current, Vol. 7, No. 8, July 10, 1899.
(Page 6.) 5 Fall '90 Old Crow

(P. 7.)	
5 Spring '93 Old Crow	.97
(P. 15.)	
	\$1.55
10 Spring '91 Old Crow (Imp. gau.)	
25 Spring '92 Old Crow	$.96\frac{1}{2}$
	2.40
25 Spring '95 Old Crow	.95
25 Spring '96 Old Crow	. 95
25 Spring '97 Old Crow	.88
25 Spring '98 Old Crow	.80
(e) Biles' Semi-monthly Popular Edition Whisky Price List.	
(Copyright 1907 by The J. W. Biles Co.)	*
Vol. 17, No. 15, Feb. 9th, 1907.	
Cincinnati, Ohio.	
(Page 17.)	
Old Crow:	
106 1905 1904 1903 1902 1901 1900	1890
S. F. S. F. S. F. S. F. S. T. S. 100	F. S.
95 95 130 140 160 160 180	195
Odds & Ends.	
Old Crow 50 Spring '06	\$.90
25 Fall '05	$.92\frac{1}{2}$
	1.60
	1.60
10 Spring '99	1.60
Defendants' Exhibit "Manning C" may be omitted from tra as an exhibit.	nscript
(20) Citation to appellee and service of same.	
KLEIN & HOUGH,	
Attorneys for Defende	ants.

Volume Two. Filed Sep. 20, 1907. John D. Jordan, Clerk.

636 (Complainant's Exhibit Memorandum of Advertising Disbursements,)

Amounts Paid by W. A. Gaines & Co. a/c Advertising, Show Cards, Glass Signs, etc., from 1869 to August 31", 1904.

Mar.	9, 1869	†Corliss, Macy & Co	34.00	34.00
Ap'l	11, 1870.		244.50	244.50

<sup>†</sup>Represents lead pencil marks in original.

Feb'y Mar.	17, 1871	$35.50 \\ .75$	
Dec.	18, 1871	1.75	
Jan'y	26, 1872 †W. A. Willard	180.02	38.00
Jan'y	26, 1872 †Mayn & Knapp	146.75	
Mar. Mar.	11, 1872 6 Farm	$\frac{29.50}{50.75}$	
Mar.	19, 1872 †Mayn & Knapp 21, 1872	$29.75 \\ 35.25$	
May.	13, 1872	$\frac{35.25}{25.25}$	
May	13, 1872	21.50	
Aug.	20, 1872 † Mayn & Knapp	37.50	
			505.52
Jan'y	30, 1873	38.70	
Mar.	15, 1873	292.50	
Oct.	23, 1873	3.00	
	_		334.20
May	27, 1874	20.00	
June	12, 1874	2.25	
Oct.	12, 1874	6.70	
Nov.	23, 1874	78.50	
Dec.	10, 1874	3.00	110 45
4 - 17	10 10**	5.75	110.45
ApT	10, 1875		
ApT	24, 1875 9, 1875	$196.30 \\ 144.00$	
July	0, 1010	144.00	346.05
Janu's	12, 1876	10.00	040.00
	21, 1876	12.00	
	31, 1876	8.50	
Janu'y	31, 1876	27.00	
	15, 1876	14.50	
Aug.		166.67	
Aug.	28, 1876	1,230.00	
	_		
	Amys. ford	$1,\!468.67$	1,612.72
	Amts. brot. ford	4	1,612.72
Oct.	9, 1876	570.00	2,038.68
Apr.	29, 1878	25.00	
637			
May	22. 1878	52.00	
Nov.		$\frac{32.00}{25.00}$	
NOV.		20.00	
Mar.	27. 1879	35.25	
Apl	4, 1879	185.51	
May	20, 1879	28.00	
May	20, 1879	121.77	

<sup>†</sup>Represents lead pencil marks in original.

May	31, 1879	50.00	
June	25, 1879	27.65	
June	30, 1879	10.00	
July	16, 1879	470.12	
Nov.	28, 1879	137.45	
Dec.	16, 1879	118.00	
2000		110.00	1 100 75
Jan'y	5, 1880	64.90	1,183.75
Jan'y	12, 1880	12.00	
Jan'y			
Feb.	23, 1880	330.00	
Mar.	19, 1880	58.03	
Mar.	26, 1880	$\frac{20.25}{5}$	
June	15, 1880	82.75	
July	16, 1880	125.00	
Sept.		103.25	
Sept.		101.60	
Nov.		114.00	
Nov.		50.00	
	15, 1880	2.25	
Dec.	14, 1880	91.00	
r	1 1001		1,155.03
Jan'y	4, 1881	223.46	
Jan'y	8, 1881	134.25	
Jan'y	18, 1881	5.95	
Jan'y	31, 1881	25.00	
Ap'l	27, 1881	76.50	
June	30, 1881	166.75	
July	15, 1881	134.95	
	_		
		766.86	6,092.17
July	18, 1881	198.40	-,
Oct.	7, 1881	25.00	
Oct.	11, 1881	8.50	
Oct.	21, 1881	88.50	
Nov.	26, 1881	52.20	
		02.20	
Jan'v	7, 1882	55.00	
Feb'y	15, 1882	61.50	
Mar.	16, 1882	109.00	
Mar.	23, 1882	30.00	
May	29, 1882	20.70	
	20, 1002	20.70	
638			
June	14 1999	10.05	
June	14, 1882 30, 1882	10.35	
-		81.40	
July	6, 1882	27.50	
Aug.	18, 1882	56.75	
Oct.	16, 1882	118.44	
Dec.	15, 1882	58.70	
Dec.	18, 1882	8.00	

54-311

Jan'y 15, 1884.....

Jan'y 19, 1884.....

Jan'y 21, 1884.....

Jan'y 28, 1884.....

132.00

15.00

108.25

81.00

Feb. 1, 1884	.00 .25 .25 .27
Amts. ford	.67 11,100.82
Amts. ford       2,285         Feb'y 13, 1884       682         Feb'y 13, 1884       21         Feb'y 18, 1884       924         Feb'y 20, 1884       912         Feb'y 28, 1884       142         Feb'y 29, 1884       84         Mar. 8, 1884       69         Mar. 8, 1884       125         Mar. 8, 1884       187	$   \begin{array}{c}     34 \\     00 \\     46 \\     20 \\     50 \\     75 \\     58 \\     00 \\   \end{array} $
Mar. 15, 1884       86         Mar. 15, 1884       25         Mar. 17, 1884       13         Mar. 22, 1884       222         Mar. 22, 1884       352         Mar. 25, 1884       232         Mar. 26, 1884       82	58 69 00 00 50 38
Mar. 31, 1884       185.         Ap'l 14, 1884       85.         Ap'l 17, 1884       25.         Ap'l 18, 1884       95.         Ap'l 18, 1884       145.         Ap'l 21, 1884       797.         Ap'l 21, 1884       797.	25 00 00 20 00 10
Ap'l       24, 1884       99.2         Ap'l       28, 1884       56.4         Ap'l       28, 1884       131.6         Ap'l       28, 1884       54.5         May       7, 1884       89.2	25 40 50 50
May       14, 1884.       120.0         May       15, 1884.       25.0	
8,472.8	6 11,100.82
Amts. ford       8,472.8         May       20, 1884       53.7         May       20, 1884       51.0         May       22, 1884       51.2         May       30, 1884       100.0         June       5, 1884       55.5         June       14, 1884       150.0         June       23, 1884       200.0	0 0 5 0 0

	125.00		 					4	, 188	June 28
	129.75									June 30
	85.00									July 17
	25.00									July 17
	25.00		 					4	. 188	July 17
	146.47		 					4	. 188	July 24
	65.20		 					4.	. 188	July 24
	88.76		 					1		July 29
	88.88		 					4	188	Aug. 22
	25.00		 					4	,	Aug. 18
	51.74									Aug. 10
	15.00									Aug. 25
	95.39									Aug. 25
10 100 %	99.39		 	0 0				1.,	, 100	aug. 20
10,100.50		~								
21,201.32										
21,201.32						d	for	brot	mts. I	A
11,443.81			 				1885	to	1884	Aug. 31.
9,206,55			 				1886	to	1885	Ang. 31
15,087.05			 	0 0 0			1887	to	1886	Aug. 31
7,775.89			 				1888	to	1887	Ang. 31
6,277.47			 				1889	to	1888	Aug. 31
7,870.92			 				1890	to	1889	Ang. 31
6.178.20			 				1801	to	1890	Aug. 31,
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			 				1894	to 1	1893	Aug. 91,
5,284.00			 				$1894 \\ 1895$	to 1	$\frac{1893}{1894}$	Aug. 31,
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Exhibit filed with the deposition of William J. Gorman in the case of W. A. Gaines & Co. Complainant vs. Max Kahn, et al., Respondent marked "Complainant's Exhibit Memorandum of Advertising Disbursements."

[Seal]

T. N. LINDSEY,

Notary Public, Franklin Co., Ky.

My commission expires January 13th, 1906.

Complainant's Exhibit, Chicago Times.

The Chicago Times, Saturday, December 15, 1877—Triple Sheet.

Price Lists.

Chapin & Gore, Importers, 73 and 75 Monroe Street, Chicago, Ill.

CHAMPAGNES.		
FOR NET CASH.	Qts.	Pts.
Chapin & Gore, Special Imp., Extra Dry Half pints, \$32 00	\$26 00	\$28 00
Duminy & Co., Dry Verzenay	23 00	25 00
" Extra Quality, Sec	28 00	30 06
L. Roederer, Carte Blanche	26 00	28 00
L. Roederer, Dry Sillery	23 75	25 78
L. Roederer, Dry Schreider	24 00	26 00
L. Reederer, Carte Blanche, from the Russian Market,		
50 pts. and 25 qts., in basket	65 00	70 00
Pommery & Greno, Sec	28 00	30 00
J. Roussillion & Co., Sec	28 00	30 00
V. ve. Cliequot Ponsardin, Dry	25 75	27 75
Jules Mumm, Extra Dry	23 00	25 00
Jules Mumm. Dry Verzenay	20 50	22 50
G. H. Mumm. Extra Dry Verzenay	23 75	25 75
G. H. Mumm, Dry Verzenay	21 00	23 00
Heidsieck, H. Piper & Co	22 25	24 25
Krug & Co	22 00	24 00
Bouche, File & Co., Dry Verzenay	20 75	22 75
Bouche, Fils & Co., Napoleon Cabinet	23 00	25 00
" " Magnums \$44 00		1
" " " Half pints\$27 00		
Heidsieck & Co., Dry Monopole	26 00	28 00
Giesler & Co., dry Sillery	22 25	24 25
Ruinari. Pere & Fils, Verzenay	22 25	24 28
Ackerman-Laurance, Carte Noire	15 50	17 50
DOMESTIC CHAMPAGNES.		
American Wine Co., (Cook's Imperial)	15 50	17 50
Urbana Wine Co., Gold Seal Dry and Extra Dry	14 00	16 00
U bana Wine Co., Imperial	13 00	15 00

65	л		٠	,
u	٠.	t	2	2

042	SHERI	RY WINE	ES.	1		1
Dud Cont	6 C . 4-	4111-1-			Per Gal.	Per Case.
Duff, Gordon	& Co., Amo	ntillado, (	Centennial Exp	osition,		
Duff Gordon	& Co. Chois	net Amor	tillado, 1808,	L'anita	15 00	
Duff, Gordon	Dry	13 00				
Duff, Gordon	& Co., Quee	n Victoria	a, Old and Fr	nity	12 00	* * * * * *
Duff, Gordon	& Co., Ex.,	Fine Tab	e. Pale		10 00	
Duff, Gordon	& Co., Table	Pale		1	8 00	
Duff, Gordon	& Co., Bar.	Pale		1	6 00	
Manuel Misa	Fine Table	Pale	**********		5 00	
P. Martin,			*********		4 00	1
Star	repnew		****		3 00 2 50	
	A liberal disc				2 311	
so	DUR MASH	WHISKIE	ES.			
Distilled expr	essly for us	and from	the best Disc;	In Hbl.		
	tifferies in I			Lors	0	Per
					Pertial.	
Chapin & Go:						
4	Bourbon,	spring of		35 00	85 50	- 4 1
86	**	60	1873	4 50	5 00	815 00
66	86	4.4	1875	3 50	4 50	\$12,00
14	Rye.	8 n	1872	5 10	5 60	
14	84	16	1873	4 60	5 10	
44	6.6	4.5	1874	4 10	4 60	15 00
** *	6.0	6.1	1875	3 60	4 10	
Hermitage, B		60	1868	7 50	8 60	22 00
14	66		1869	6 50	7 00	50 00
64	64	B+	1871	5 75	6 25	
44	44	6 +	1872	5 00 4 50	5 50	
és	65	4.0	1874	4 00	4 50	15 00
16	16	4.6	1875	3 50	4 00	10 00
Á4.	Rye.	4.5	1869	6 60	7 10	20 00
66		4.0	1870	6 35	6 85	
14	56	86	1871	5 85	6 35	
	46	16	1872	5 10	5 60	
44	61	9.5	1973	4 60	5 10	15 00
11	6.0	0 lb	1875	3 60 3	4 10	
Old Crow, Bo	urbon,	44	1872	5 00	5 50	
46	60	66	1873	4 50	5 00	
46	40	45	1874	4 00	4 50	15 00
		44	1875	3 50	4 00	
W. H. MeBray	er, Boarbon,	61	1869	6 50 4	7 00   5 00	20 00
ic	44	66	1874	4 00 1	5 00 1 4 50	15 00
84	44	86	1875	3 50	4 00 1	19 00
44	Rye.	64	1873	4 60	5 10	
Bond & Lillar		44	1874	4 00	4 50	15 00
N. Harris,	1-	61	1869	6 50	7 00	20 00
			1870	6 25	6 75	
	IRISH	WHISKE	Υ.	1	1	
					Per 1	Per
Dunville, in w	cond nor coll	OB			Gal.	Case.
						\$16 00
8	Discount			1		2200 000

John Ramsey, in wood, per gallon	Per Gal. \$7 00	Per Case. \$20 00
CALIFORNIA WINES.	Per Gal.	Per Case. 10 00
Angelica Sherry CLARET WINES.		10 00 10 00
CLARET WINES.		
OF CRUSE & FILS FBERES. Chat Bouliac St. Julian Margaux Pontet Canet Larose Chat Larose Chat Larose Chat Lafte Grand Cru Chat Margaux	Qts. \$ 8 50 9 50 10 00 13 50 14 50 35 00 40 00 40 00	Pts. 810 50 11 50 12 00 15 50 16 50
OF JULES HUE, TH. LAMARQUE & CO.		
Margaux Pontet Canet Leoville St. Julian Medoc	20 00	
OF BRANDENBURG FRERES.		,
Medoc St. Estephe St. Julian Margaux Pontet Canet St. Pierre Larose Chat Leoville Chat Larose Chat Mouton Chat Margaux Grand, Vin. 1869 Chat Lafite Grand, Vin. 1869	6 25 7 25 10 00 10 00 14 00 15 00 18 00 35 00 35 00	8 25 9 25 10 25 12 00 14 00 16 00 20 00 17 00 20 00 37 00
MISCELLANEOUS.	İ	
St. Julien, No. 1 Leoville, No. 1 Subject to discount to the trade.	7 00 9 00	* * * * * *
RHINE WINES.		
OF DEINHARD & CO., COBLENZ. Schloss Johnanisberger Cabinet Schloss Johnanisberger Marcobrunner Raunthaler Leibfraumilch Geisenheimer Erbacher Neirsteiner A liberal discount to the trade	Ot4. 39 00 27 50 22 25 18 50 13 25	Pts.

an a summer some	Ots.	Pts.
OF C. LAUTEREN SOHN.		
Neirsteiner	9 50	
Deidesheimer	9 50	
Hockheimer	14 00	
Steinwein, in flasks	15 00	
MISCELLANEOUS,		
	85 00	
Johannisberger Cabinet, of Otto Prumm, Mayence	50 00	
Schloss Johannisberger, of Otto Prumm, Mayence	13 00	
Schloss Johannisberger, of Otto Prumm, Mayence Laubenheimer, of Otto Prumm, Mayence		
Neirsteiner, No. 1	8 00	
Subject to discount to the trade.		
RED HOCKS.		
OF DEINHARD & CO., COBLENZ.	Qts.	Pts.
Assmannshauser	19 00	
Steinwein, in flasks	16 50	
Walporzheimer	14 50	
Subject to discount to the trade.		
MOSSELE WINES.		
OF DETNHARD & CO., COBLENZ,	Qts.	Pts.
Schwarzberger	\$22 00	
Pisport Auslese	16 50	
Pisport Austese	14 50	
Brauneberger	13 00	
Pisport	11 00	
Winninger Subject to discount to the trade.	11 00	
Subject to discount to the trade.		
WHITE WINES.		
OF CRUSE & FILS FRERES.		
Chat Yquem, Monopole	\$45 00	\$47 00
Chat Yquem	30 00	32 00
Latour Blanche	25 00	27 00
Haut Sauternes	13 50	15 50
Sauternes	9 50	11 50
OF JULES HUE, TH. LAMARQUE & CO.	10 25	12 25
Haut Barsac	13 00	15 00
Haut Barsac		1000
OF BRANDENBURG FRERES.	0.00	11 00
Haut Sauternes	9 00	11 00
Chat Sauternes	11 00	13 00
Latour Blanche	16 00	18 00
Chat Latour Blanche	21 00	23 00
Chat Yquem	23 50	25 50
OF J. FREYCHE.		1
Chat Cursan	9 00	
A liberal discount to the trade.		
PORT WINE		
	Per	Per
	Gal.	Case.
Caldway Complex (ID)?	10 00	Caec.
Cockburn, Superior, "D"  London Dock	6 00	
London Dock	5 00	
Bargundy		
Cockburn, White, Spanish	12 00	
White Spanish		
A liberal discount to the trade.		1

BURGUNDY WINES.	1	1	
OF CHARLES BERNARD.  Clos de Vougeot Romanee Chambertin Pommard Chablis Beaune  OF R. BBUNINGHAUS.		Qts. 34 00 26 00 24 00 20 00 17 00 12 00	Pts. 36 00 28 00 26 00 22 00 19 00 14 00
Chablis Nuits Volnay Chambertin Romanee Clos de Vougeot Subject to discount to the trade.		19 00 19 00 19 00 21 50 23 50 30 00	21 00 21 00 21 00 23 50 25 50 32 00
CATAWBA WINES.	1	Per	Per
Urbana Wine Co.'s  Kelley's Island Wine Co.'s  "Sweet, per gal.  Urbana Wine Co.'s  Subject to discount to the trade.		Gal.	Case. 9 00 7 00
COGNAC BRANDIES.	-		
IN GLASS.  James Hennessy, quarts  J. & F. Martell, "pints  Dubois, Freres & Cagnion, pints Chillingworth, F. V. O., quarts  IN WOOD.  Dubois, Freres & Cagnion, 1855. "1860. "1865. "1870. "1872.  James Hennessy, 1865. "1869. "1872.  J. & F. Martel, 1865. "1869. "1872.  Sazerac, V. O. S., 1837.  Boutelleau & Co., 1858. "1849.  A liberal discount to the trade.		Qts. 16 00 15 50  30 00 Per Gal. 16 00 14 00 12 00 10 00 8 00 12 00 10 00 8 00 12 00 11 00 8 00 12 00 11 00 8 00 12 00 11 00 8 00 12 00 11 00	Pts.  20 00 16 00  Per Case.
RUMS.		Per Gal.	Per Case.
St. Croix, New St. Croix, Old Jamaica Jamaica. Old London Dock Lawrence, Old Medford Chase & Trull, Bunker Hill A liberal discount to the trade.		7 00 7 00 7 00 3 50 3 50	

646	GINS.	1	1
		Per	Per
35	IN GLASS.	Case	Case
John Dok	sto, Green Cases	\$11 00	******
	ayper & Sons, Green Cases	11 00	
Booth's Ol	d Tom	13 50	******
Meijer's E	ast India Schnapps	10 25	
		Per	Per
M C	IN WOOD	Gal.	Case
John Dok	sto, our own importation and special brand	5 00	
Booth's Ol	uyper & Sons	5 00 6 00	
	Discount to the trade.	0 00	
	IMPORTED LIQUEURS.	Per	Per
Absinthe .		Case	Bot.
Anisette .	***************************************		
Assorted 1	Liqueurs, cut glass		
44	plain "		
Donation.	" 1/2 pint Flasks with Tankard		
Benedictine			
Chartreuse	pints quarts		****
**	pints		
Curacoa,	quarts		
	pints		
	Pekoe		
Kummal (	reme de Allash		
Kirschwass	er		
			*****
Vermouth.	F. Gancia & Co		
14	Noilly, Prat & Co		
Creme de (	Cocoa, Vanille	*****	
	FRUIT BRANDIES.	Per	Per
	THOSE CHANDIES.	Gal.	Case.
Blackberry			
	C D :		
Camornia	Grape Brandy	Per	Per
	BITTERS.	Case	Case
	r	Qts.	Pts.
Reed's Bitt For ten ca	se lots a special price, and samples furnished	\$10 00	
Boker's Bi	if desired. tters Five Case Lots, \$12.50.	13 00	
Angostura	Bitters		820 00
Sainsevain	Wine Bitters	8 50	620 00
*Wormwood	d Bitters		
	and Green Wormwood.		
	ALES, ETC.		
Bass & Co	's India Pale Ale, in hogsheads		
20	" in barrels		
.16	" in kilderkins		
Guinness S	tout, in hogsheads		
44			
	in kilderkins		

IN BOTTLE.	Per Doz. Qts.	Per Doz. Pts.
Bass & Co.'s India Pale Ale, bottled by E. & J. Burke, by	4	
the cask Bass & Co.'s India Pale Ale, bottled by Hibert, by the cask Guinness Superior XXX Stout, bottled by Machen & Co.,		2 00 2 00
by the cask		2 00
Guinness Extra Stout, bottled by E. & J. Burke, by the cask Wm. Younger's Sparkling Edinburgh Ale, by the cask		2 00 2 00
McEwan's Sparkling Edinburgh Ale, by the cask		2 00
Allsopp's India Pale Ale, by the cask		2 00
Ginger Ale, Cantrell & Cochran, per cask, 10 doz. in cask, gold		1 60
MINERAL WATERS.	Per	Per
	Case	Case
NATURAL IMPORTED.	Qts.	Pts.
Freidrichshall Bitter Water, 2 doz, in case, imperial pints Hunyadi Janos, 50 bottles in case, imperial pints		4 50 14 00
Vicby Hautrive	13 00	19 00
" Grande Grille	13 00	
" Celestins	13 00	
Selters Waters in jugs, 100 in cask	15 00	
	8 00	
Selser " 50 jugs in basket		
Apollinaris Water, pints, 100 bottles in case	10 00	15 00
Apollinaris Water, quarts, 50 Stone Jugs	10 00	
Apollinairs Water, pints, 50 " " Delatour Plain Sods, 10 doz. in cask, per doz		8 00
NATURAL AMERICAN. Hathorn Spring, pints, 4 doz. in case Congress " 4 " Geyser Spouting Spring, pints, 4 doz. in case		7 50 7 50 7 50
PURE WINE VINEGAR.	Per Gal. 50	
BAY RUM.	Per Gal.	Per Botl.
Triple Flavor	4 00	1 50
FLASKS.	Per Gross	
1 Pint		
1 Wart		
DEMIJOHNS.	Per	
% Gallon	Doz.	
1 "		
2 "		
3 " 4 "		
5 "		
HUNGARIAN WINES. White Wines—in Boxes (a 12 bottles).		
Dor4!		
Pesti	\$ 7 00 9 00	
Semlyai Superior	12 00	

	Per Doz.	1
Bakator	14 00	
Viscontai Muscatel	15 00	
Tokaji Bor	25 00	
RED WINES—in Boxes (a 12 bottles).		
Szegszardi	7 50	
Egri	9 00	
Villanyi	10 00	
Egri Superior	12 00	
Budai Superior	16 00	
Villanyi Superior	18 00	
Budai Cream	20 00	· · · · · · · · · · · · · · · · · · ·
Karlovai	20 00	
ASZU, or Essence Wines—in Boxes (3.12 bottles)		
Menesi Aszu	\$22 00	
Rusztí Aszu	22 00	
Matrai (Hungarian Port)	16 00	
Tokaji Maslas	18 00	
Tokaji Cabinet	30 00	
Tokaji Imperial	40 00	1 11744
SZILVALE-in Boxes (a 12 bottles).		
Szilvale (Plum Brandy)	24 00	
CHAMPAGNE.		
Hungarian Crown euerts, per 1 dez.	22 00	
" pints. per 2 dec.	24 00	

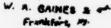
Imported liquors of every description, in bond or free of duty, at purchaser's option. A complete stock of every description. We are prepared to furnish any of the whiskies mentioned in the above list, in any quantities, from goods in store, or, if desired, we will ship original packages direct from our stocks in warehouses in Kentucky, or from Empire Warehouse, Chicago.

We do not handle mixed, cut or compounded goods, and guarantee the absolute purity of every article we offer for sale.

Branch stores: 121 Clark st., Chicago. 152 Twenty-second st., Chicago. 188 West Madison st., Chicago. 73 South Halsted street, Chicago. 30 and 32 North Illinois street, Indianapolis, Ind.

Complainant's Exhibit.

"Midas Trade Mark."

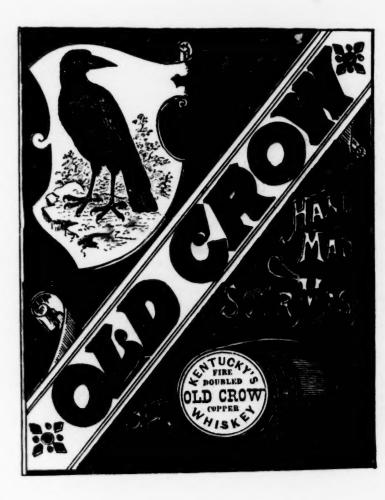




Used since Dec. 1810.

Complainant's Exhibit.

A. Moll Grocery Co., Label.



#### Complainant's Exhibit.

A. Moll Grocery Co., Label No. 2.

651

#### 

This Whiskey was taken from Package marked:

W. A. GAINES & CO., DISTILLERS.

Cask No. ST. LOUIS, MO.





Complainant's Exhibit.

II. A. Steinwender & Co., Label

# OLD CROW BOURBON

W.A.Gaines & Co. Distillers.



BOTTLED AND GUARANTEED BY

H.A. Steinwender & Co.

#### Complainant's Exhibit

"Steinwender & Sellner Mercantile Co. Label"

## **OLD CROW**

DISTILLED BY

W. A. Gaines & Co., Woodford County, Ky.



## **BOURBON WHISKEY**

BOTTLED AND GUARANTEED

Steinwender & Sellner Merc. Go.

Complainant's Exhibit.

"Nicholson Label."

# Old Crow BourbonWhiskey

W.A.GAINES & CO.
FRANKFORT, KY.



BOTTLED AND GUARANTEED BY

David Vlicholson St. Souis, Mo,U.S.A. 655 (COMPLAINANT'S EXHIBIT CERTIFICATE OF TRADE MARK REGISTRATION.)

United States of America, Department of the Interior, Patent Office.

To all persons to whom these presents shall come. Greeting:

This is to Certify that the annexed is a true copy from the records of this office of the Trade-mark registered by W. A. Gaines &

Company, June 28, 1904, number 42,919 for whiskey.

In testimony whereof, I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington this 28th day of January, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States of America the one hundred and twenty-ninth.

[SEAL.] F. J. ALLEN, Commissioner of Patents,

#### THE UNITED STATES OF AMERICA:

To all to whom these presents shall come:

This is to certify, that by the records of the United States Patent Office it appears that the W. A. Gaines & Company of Frankfort, Kentucky, a corporation organized under the laws of the State of Kentucky, did, on the 8th day of June, 1904, deposit in said Office for Registration fac-similes of a certain Trade-Mark for Whisky, and the date of the receipt thereof was duly noted, and recorded; that on the 8th day of June, 1904, it deposited therewith a statement, and a written declaration under the oath of George F. Berry, an officer of said corporation, copies of all of which are hereto annexed; and the said corporation having made the payment of a fee of Twenty-Five Dollars, and complied with the regulations in such cases prescribed by the Commissioner of Patents, and in all other respects complied with an Act of Congress approved March 3, 1881, entitled "an Act to authorize the [the] Registration of Trade-Marks and protect the same," the said fac-similes, statement, and declaration were duly recorded, and the said Trade-Mark has been duly registered in the said Patent Office this 28th day of June, one thousand nine hundred and four, and protection therefor will remain in force for Thirty Years from said date unless sooner terminated in accordance with Section 5 of said Act.

In testimony where- the seal of the Department of the Interior, is hereto affixed this twenty-eighth day of June 1904, and of the Independence of the United States, the one hundred and twenty-eighth. Given under my hand, at Washington, D. C.

[s. s.] E. B. MOORE,
Acting Commissioner of Patents,

M. J. H.

(Here follow trade-mark, statement, and declaration marked pages 657 to 660, inclusive.)

### UNITED STATES PATENT OFFICE.

W. A. GAINES & COMPANY, OF FRANKFORT, KENTUCKY.

#### TRADE-MARK FOR WHISKY.

STATEMENT and DECLARATION of Trade-Mark No. 42,919, registered June 28, 1904.

Application filed June 8, 1904.

#### STATEMENT.

To all whom it may concern:

Be it known that the W. A. GAINES & COM-PANY, a corporation organized, existing, and doing business under and by virtue of the laws 5 of the State of Kentucky, and having its principal office and place of business at Frankfort, in the county of Franklin, in said State, has adopted for its use a Trade-Mark for Whisky, of which the following is a description.

As shown in the accompanying facsimile, the said trade-mark consists of the words "OLD Crow."

This trade-mark has been continuously used by the said W. A. Gaines & Company and its predecessors since the year A. D. 1835.

The mode in which the said trade-mark is

applied and affixed to goods is by branding, stenciling, or printing the same upon barrels and labels and corks used in packing whisky for sale.

The class of merchandise to which this trademark is and has been appropriated is spirituous liquors, and the particular description of goods comprised in said class upon which the said trade-mark is used is whisky.

> W. A. GAINES & COMPANY, By GEORGE F. BERRY.

Witnesses:

W. J. GORMAN, W. H. JEFFRIES.

#### DECLARATION.

State of Kentucky, county of Franklin, ss:

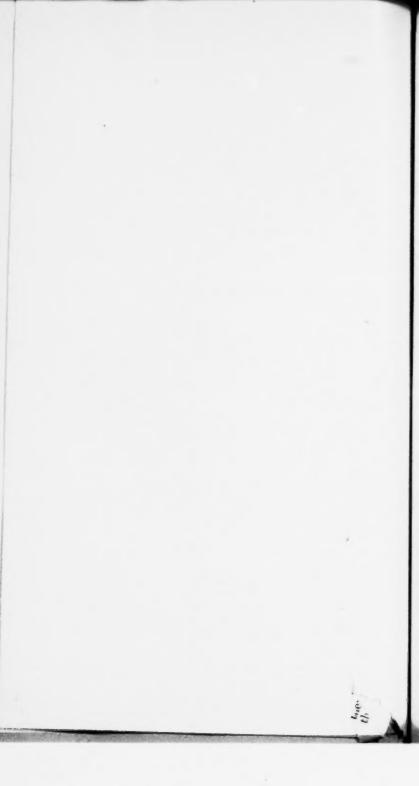
George F. Berry, being duly sworn, deposes and says that he is secretary of the corporation W. A. Gaines & Company, the applicant named in the foregoing statement; that he verily believes that the foregoing statement is true; that the said corporation at this time has a right to the use of the trade-mark therein described; that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that the trade-mark is used by the said corporation

in commerce between the United States and foreign nations or Indian tribes and particularly with the Dominion of Canada, and that the description and facsimile presented for record truly represent the trade-mark sought to be registered.

#### GEORGE F. BERRY.

Subscribed and sworn to before me this 5th day of May, 1904.

[L. 8.] JESSE P. WILLIAMS, Notary Public, Franklin Co., Ky.



#### 661 (COMPLAINANT'S EXHIBIT JUDGE & DOLPH'S PRICE LIST.)

#### No. 1.

Judge & Dolph Drug Company, 515 Olive Street, St. Louis, U. S. A.

#### Price List.

St. Louis, Mo., December, 1904. Entries as to "Old Crow."

#### Bourbon Whiskies.

Old Crow, bottled by W. H. Lee & Company, quarts\$1.5	23
Old Crow, bottled by D. Nicholson, quarts\$1.5	23
Old Crow, bottled by Hellman, quarts\$1.5	
Old Crow, bottled by Judge & Dolph, quarts\$1.5	23

#### ("COMPLAINANT'S EXHIBIT JUDGE & DOLPH'S PRICE LIST.")

#### No. 2.

Judge & Dolph Drug Company, 515 Olive Street, St. Louis, U. S. A.

Second Edition, Toasts and Cocktails (page 17).

#### Bourbon Whiskies.

Old Crow, W. A. Gaines, bottled in bond, 2-4-10	
Gal. fives\$11.50	\$.96
Old Crow, W. A. Gaines, bottled by Lee & Co.,	
quarts	1.25
Old Crow, W. A. Gaines, our bottling, quarts\$12.00	1.23

#### (URNER'S CROSS-EXAMINATION EXHIBIT No. 1.)

P. Crow.

Bourbon.

(URNER'S CROSS-EXAMINATION EXHIBIT No. 2.)

O. Woldkirch, Baton Rouge.

Crow's Bourbon. W. G. Wear & Co., Memphis.

S. Mendelsohn, D. Brunner. Montgomery City.

662 (Urner's Cross-examination Exhibit No. 3.)

Crow's Whiskey.

Hanna.

M. D. Thatcher, Pueblo.

> Albert Ertet, El Paso.

In the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

No. 5096. In Equity.

W. A. Gaines & Company, Complainant,

Max Kahn, Administrator of the Estate of the late Abraham M. Hellman, Deceased, and Morris Hellman, Respondents.

Complainant's Exhibit, Record in W. A. Gaines & Company vs. E. Whyte Grocery, Fruit & Wine Company, 107 Mo. App. 507. Apr. 2, 1907.

E. H. PARKINS, Notary Public, D. C.

Endorsed: Filed May 4, 1907. James R. Gray, Clerk.

In the Kansas City Court of Appeals.

STATE OF MISSOURI, sct:

Be it remembered that on the 25th day of November, A. D., 1903, there was filed in the office of the Clerk of the Kansas City Court of Appeals, Appellant's Abstract of Record in the case entitled: E.

Whyte Grocery, Fruit and Wine Company, Appellant vs. W. A. Gaines & Co., Respondent, which is in words and figures as follows, to-wit:

In the Kansas City Court of Appeals, October Term, 1903.

E. Whyte Grocery, Fruit and Wine Co., Appellant, vs. W. A. Gaines & Co., Respondent.

Appellant's Abstract of Record.

#### Petition.

The original petition in this cause, filed October 24, 1900, in the Circuit Court of Jackson County, Missouri, omitting caption, is as follows:

Plaintiff states that it is and for many years last past has 663 been a corporation created, organized and doing business under and by virtue of the laws of the State of Kentucky, and engaged in the business of distilling and manufacturing whiskies at its distillery in the State of Kentucky.

That the defendant is and for three years last past has been a corporation created, organized and doing business as such at Kansas City, in the State of Missouri, under and by virtue of the laws of the

State of Missouri.

Plaintiff states that the business now operated by plaintiff corporation was founded by James Crow about the year 1835, a period of over sixty years ago; that said Crow was a distiller and originated and devised the trade-mark "Old Crow" for whiskies distilled by him at his distillery in Woodford County, Kentucky, which became known as the Old Crow Distillery; and the "Old Crow" whiskey distilled and sold by the said James Crow, by reason of its purity, high standard of quality and excellence of manufacture, obtained a most excellent reputation. That thereafter, and about the year 1866, the firm of Gaines, Berry & Co., purchased and succeeded to the business, distillery, good will and trade-marks of the business originated by the said James Crow, and continued the distilling, preparing and selling of whiskies at said distillery in Woodford County, Kentucky, and which partnership of Gaines, Berry & Co., was thereafter changed to the firm or partnership of W. A. Gaines & Co., who acquired the business, property, trade-marks, good will and distillery of said preceding firm, and continued the business of distilling and selling "Old Crow" whiskey.

Plaintiff states that among the trade-marks originated and devised by the said James Crow and used by him and continued to be used by the plaintiff and its predecessors, was the certain trade-mark for whiskey known as, and consisting of the arbitrary words "Old Crow," which were attached to the packages, barrels and bottles containing the genuine "Old Crow" whiskey distilled by the said James

Crow and succeeding parties in interest, which became, and is the distinguishing mark of the whiskies distilled and sold by the plaintiff and its predecessors at the said Old Crow Distillery in Woodford County, in the State of Kentucky, and which brand of Old Crow whiskey commanded and still does command a large and ready sale on the market, and was and is well known to the dealers in and purchasers and consumers of whiskey in the United States and elsewhere.

Plaintiff states that in the year 1887, plaintiff was incorporated under the laws of the State of Kentucky, and succeeded to and acquired the business of the aforesaid firm of W. A. Gaines &

664 Co., and all its property, distillery, rights, good will and trade-marks, including the "Old Crow" trade-mark, and said plaintiff corporation has continued to manufacture the said "Old Crow" whiskey at its distillery in Woodford County in the State of Kentucky, pursuing the same methods and exercising the same care and supervision in the manufacture of its product as had heretofore been given to it by the predecessors of said corporation. And plaintiff states that the genuine "Old Crow" whiskey has usually been sold under the trade-mark consisting of the title "Old Crow" and also with the arbitrary symbol or device of a crow perched on the branch of a tree, and the branding of the packages or labeling of the bottles containing the said whiskey either with the arbitrary words "Old Crow" alone, or in combination with said symbol of a crow, has been and is generally understood by the liquor trade throughout the United States, as well as the dealers in and consumers of whiskey, to indicate genuine "Old Crow" whiskey, distilled by the plaintiff or its predecessors at the Old Crow Distillery in Woodford County in the State of Kentucky.

Plaintiff further states that the said "Old Crow" trade mark for whiskies was duly registered by the firm of W. A. Gaines & Co., in the office of the United States Commissioner of Patents at Washington, on the 11th of April, 1892, and the certificate of registration under the hand and seal of said Commissioner of Patents of the United States, and numbered 9,278, was duly issued to the said firm of W. A. Gaines & Co., as owners of said trade-mark for whiskey.

Plaintiff further states that the use of the "Old Crow" trade-mark for whiskies by this plaintiff and its predecessors has been continuous, and the whiskies produced at the Old Crow Distillery owned by this plaintiff and its predecessors, have been uniform and of the highest

standard of quality.

Plaintiff further states that notwithstanding the premises, and in violation of the rights and ownership of this plaintiff in and to its said brand or trade-mark, and in and to the good will of its business, and with the wicked, wrongful and fraudulent intent of deceiving and misleading the purchasing public and consumers of whiskey in the United States, and with the wrongful and inequitable intent of enjoying the benefits of the great reputation of this plaintiff's "Old Crow" trade-mark for whiskey, the said defendant has for a long time past, at Kansas City, in the County of Jackson, State of Missouri, wrongfully bottled or caused to be bottled, offered for sale and sold,

and does wrongfully bottle or cause to be bottled, offer for sale and sell, at said Kansas City, Jackson County, Missouri, a cheap imitation and inferior grade of whisky, which is not the 665 genuine "Old Crow" whiskey, and which has not been distilled or manufactured by this plaintiff, or by any of its predecessors, at the aforesaid Old Crow Distillery, with the fraudulent intent on the part of said defendant to mislead and deceive the purchasing public and the buyers and consumers of whiskies, as well as to deprive this plaintiff of the full and proper use and enjoyment of its said trade-mark, the good will of its business and the emoluments and profits to it belonging, and with the unlawful, unjust and inequitable intent of acquiring the profits, emoluments and good will of plaintiff's business and trade-mark, and in pursuance of said unlawful design, and in the consummation threof the said defendant has bottled, or caused to be bottled, and sold, and does bottle or cause to be bottled, and sell, the said cheap imitation and spurious whisky in bottles which are labeled with false and misleading labels having printed thereon the title "Old Crow Whisky," and the symbol of a crow, in imitation of plaintiff's trade-mark and symbol; and plaintiff states that said defendant has represented and does represent the said inferior, cheap and spurious whisky, so put up and sold as aforesaid, to be genuine "Old Crow" whisky, distilled by the plaintiff or its predecessors at the Old Crow distillery in Woodford County, Kentucky, whereby the said defendant is enabled to mislead and deceive, and does mislead and deceive the purchasing public and the consumers of whisky, and induce them to believe that the said imitation whisky is the genuine "Old Crow" whisky, prepared and distilled at the said Old Crow Distillery as aforesaid.

Plaintiff further states that the said defendant has not received authority or permission from it, or from any of its predecessors, to bottle or sell any whisky of other manufacture or origin, under the title, trade-mark, or designation of "Old Crow," or to re-fill with other whiskies any of the empty bottles originally put out on the market containing genuine "Old Crow" whisky, and such use by the defendant is entirely unauthorized, fraudulent, wicked and decep-

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Plaintiff states that the aforesaid inequitable and fraudulent conduct of the defendant is not only injuring the plaintiff in its sale of its genuine "Old Crow" whisky, and in the profits which it would otherwise derive therefrom, but that the said infringing, imitation and counterfeit whisky sold by the defendant is of such a greatly inferior quality to the genuine "Old Crow" whisky, and because of such inferiority is greatly damaging the reputation of plaintiff's genuine "Old Crow" whisky, and unless such infringement be dis-

continued and the sale of such imitation "Old Crow" whisky prevented, such sale will irreparably damage the reputation, character and standing of plaintiff's article in the market.

Plaintiff further states that the infringing acts of the defendant are contrary to equity and good morals; and that even if it should be adjudged upon the trial of this action that a technical trademark violation has not been established, yet the aforesaid acts of the

defendant constitute an unfair trade and an unfair competition which are contrary to equity and good morals, and which should

be prevented and restrained.

Wherefore, plaintiff prays that a preliminary injunction any issue from this court, enjoining and restraining the defendant, its officers, servants, agents and employes, and each of them from preparing, bottling putting up and selling any imitation whiskies not manufactured by the plaintiff, as and for the genuine product of plaintiff's distillery; and from labelling, selling or representing any imitation whisky or whiskies not prepared or distilled by the plaintiff, as genuine "Old Crow" whisky, distilled and prepared at the Old Crow Distillery at Woodford County, Kentucky, or from using the title "Old Crow," or the symbol of a crow, or any of the trade-marks, symbols or devices of plaintiff, in connection with any imitation whiskies; or from branding any barrels, boxes, casks or packages with any imitations of plaintiff's trade-mark, title, symbols or devices, or from using any imitations of plaintiff's trade-mark, symbols or devices, or from causing the same to be done, or from refilling any empty bottles which originally contained genuine "Old Crow" whisky with imitation whisky or from causing the same to be done; and that upon final hearing such injunction may be made perpetual, and for such other and further relief as may be just and in accordance with equity.

> GAGE, LADD & SMALL, Attorneys for Plaintiff.

Be it remembered that on the 13th day of the regular October term, 1900, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 24th day of October, 1900, the following proceedings were had and made of record in the cause entitled:

41050.

W. A. GAINES & Co., Plaintiff,

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E. WHYTE GROCERY, FRUIT AND WINE COMPANY, Defendant.

Now on this 24th day of October, A. D. 1900, comes the plaintiff and presents to the court its written petition herein, which being seen and heard by the court, it is by the court ordered that 667 the defendant, the E. Whyte Grocery, Fruit & Wine Company, and its officers, servants, agents and employes, and each of them be, and they are hereby restrained until the further order of this court from preparing, bottling, putting up and selling any intoxicating whiskies not manufactured by said plaintiff, as and for the genuine product of plaintiff's distillery, and from labeling, selling and representing any imitation whisky or whiskies not prepared or distilled by said plaintiff, as the genuine "Old Crow" whisky, distilled and prepared at the Old Crow Distillery at Woodford County, Kentucky, or from using the title "Old Crow"

of the symbol of a crow or any of the trade-marks, symbols or devices of plaintiff in connection with any imitation whiskies; and from branding any barrels, boxes, casks, or packages with any imitations of plaintiff's trade mark, title, symbols or devices, and from using any imitations of plaintiff's trade mark, symbols, or devices and from causing the same to be done, and from refilling any empty bottles which originally contained genuine "Old Crow" whisky, with imitation whisky, or from causing the same to be done.

And it is further ordered by the court that the said defendant, The E. Whyte Grocery, Fruit & Wine Company, be and appear before this court at the Court Room of Division No. 4, of the Circuit Court of Jackson County, Missouri, at Kansas City, at 9:30 o'clock a. m., on Saturday, the 3rd day of November, A. D. 1900, to show cause, if any it have, why a preliminary injunction should not issue

in accordance with the prayer of plaintiff's petition.

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On the 18th day of the regular October term, 1900, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 30th day of October, 1900, the following further proceedings were had and made of record in this cause:

41050.

W. A. Gaines & Co., Plaintiff,

E. WHYTE GROCERY, FRUIT AND WINE COMPANY, Defendant.

Now defendant files motion to require plaintiff to file injunction bond in this cause.

On the 19th day of the regular October term, 1900, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 31st day of October, 1900, the following further proceedings were had and made of record in this cause:

41050.

W. A. Gaines & Co.

VS.

E. WHYTE GROCERY, FRUIT & WINE Co.

Now the motion of the defendant to require plaintiff to file an injunction bond in this cause is by the Court sustained, and it is ordered by the Court that said plaintiff file injunction bond in this cause in the penal sum of \$750, on or before the first day of November, 1900.

On the 20th day of the regular October Term, 1900, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 1st day of November, 1900, the following further proceedings were had and made of record in this cause:

#### 41050.

#### W. A. GAINES & Co.

v.

### E. WHYTE GROCERY, FRUIT & WINE Co.

Now plaintiff files an injunction bond herein in the penal sum of \$750.00 with Sanford B. Ladd and John S. Morrin sureties thereon, which bond is by the Court approved.

On the 22nd day of the regular October Term, 1900, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 3rd day of November, 1900, the following further proceedings were had and made of record in this cause:

#### 41050.

## W. A. GAINES & Co.

V.

# E. WHYTE GROCERY, FRUIT & WINE Co.

Now it is ordered by the Court that the restraining order in this cause be and it is continued in full force and effect until November 17th, 1900.

Be it remembered that on the 3rd day of the regular January Term, 1901, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 16th day of January, 1901, the following further proceedings were had and made of record in this cause:

#### 41050.

#### W. A. GAINES & Co.

V.

### E. WHYTE GROCERY, FRUIT & WINE CO.

Now at this day come the respective parties hereto and the application for a temporary injunction being heard and submitted to the Court it is upon consideration by the Court now ordered and decreed that until the final hearing of this cause the said defendant, The E. Whyte Grocery, Fruit & Wine Company, its officers, servants, agents and employes and each of them, upon the giving of a bond as herein provided, be, and they are hereby enjoined and restrained from preparing bottling, putting up and selling any imita-

669 tion whiskies not manufactured by W. A. Gaines & Co., the above named plaintiffs for the genuine products of plaintiff's distilleries, and from labeling, selling or representing any imitation whiskey or whiskies not prepared or distilled by said plaintiff as the genuine "Old Crow" whiskey, distilled and prepared at the Old Crow Distillery, in Woodford County, Kentucky, and from

using the title "Old Crow" or the symbol of a crow, or any of the trade-marks, symbols or devices of the plaintiff in connection with any imitation whiskies; and from branding any barrels, boxes, casks or packages with any imitation of plaintiff's trade-marks, symbols or devices and from causing the same to be done and from refilling any empty bottles which originally contained genuine "Old Crow" whisky, with imitation whisky, and from causing the same to be done, the said ten porary injunction to become effectual upon the giving of a bond by the plaintiff with a good and sufficient security in the sum of One Thousand (\$1000.00) dollars to be conditioned according to law.

And the said plaintiff now presenting to the Court an injunction bond, executed by the plaintiff as principal and the American Surety Company of New York, as surety, in the penal sum of One Thousand (\$1,000.00) dollars conditioned as provided by law, it is

ordered that said bond be, and it is hereby approved.

On the 3rd day of the regular January Term, 1901, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 16th day of January, 1901, the following further proceedings were had and made of record in this cause:

41050.

W. A. GAINES & Co.

V.

E. WHYTE GROCERY, FRUIT & WINE Co.

Now defendant files answer to the petition.

On the 10th day of the regular January Term, 1901, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 24th day of January, 1901, the following further proceedings were had and made of record in this cause:

41050.

W. A. GAINES & Co.

V.

E. WHYTE GROCERY, FRUIT & WINE Co.

Now plaintiff files motion to require the defendant to make its answer more definite and certain.

On the 11th day of the regular January Term, 1901, of 670 the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 25th day of January, 1901, the following further proceedings were had and made of record in this cause: 41050.

W. A. GAINES & Co.

V.

E. WHYTE GROCERY, FRUIT & WINE CO.

Now by agreement of parties it is ordered by the Court that this cause be and it is transferred to Division Number Two (2) of this Court.

On the 29th day of the regular January Term, 1901, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 16th day of February, A. D. 1901 the following further proceedings were had and made of record in the cause entitled:

41050.

W. A. GAINES & Co.

V.

E. WHYTE GROCERY, FRUIT & WINE CO.

Now on this day plaintiffs' motion to make defendant's answer more definite and certain is by the Court sustained.

Be it remembered that on the 2nd day of the regular April Term, 1901, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 9th day of April, 1901, the following further proceedings were had and made of record in the cause entitled:

1835

W. A. GAINES & COMPANY

VS.

E. WHYTE GROCERY, FRUIT & WINE CO.

Defendant files amended answer herein.

On the 5th day of the regular April Term, 1901, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 12th day of April, 1901, the following further proceedings were had and made of record in this cause:

1835.

W. A. GAINES & COMPANY

VS.

E. WHYTE GROCERY, FRUIT & WINE Co.

Now on this day plaintiff files motion to strike out part of defendant's amended answer herein.

On the 23rd day of the regular April Term, 1901, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 4th day of May, 1901, the following further proceedings were had and made of record in this cause entitled:

1835.

W. A. GAINES & COMPANY

VS.

E. WHYTE GROCERY, FRUIT & WINE CO.

Now on this day plaintiff's motion to strike out part of defendant's amended answer is taken up, fully heard and considered and is by the Court sustained. To which ruling of the Court defendant excepts.

On the 26th day of the regular April Term, 1901, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 8th day of May, 1901, the following further proceedings were had and made of record in the cause entitled:

1835.

W. A. GAINES & COMPANY

VS.

E. WHYTE GROCERY, FRUIT & WINE CO.

Now on this day defendant files second amended answer herein.

Be it remembered that on the 1st day of the regular January Term, 1902, of the Circuit Court of Jackson County, Missouri, the same being the 13th day of January, 1902, the following further proceedings were had and made of record in the cause entitled:

1835,

W. A. GAINES & COMPANY

VS.

E. WHYTE GROCERY, FRUIT & WINE CO.

Now on this day plaintiff files amended petition which omitting caption and signature is as follows:

Amended Petition.

Plaintiff's amended petition omitting caption, is as follows:

Plaintiff, for its amended petition, states that it is and for many years last past has been a corporation created, organized and doing business under and by virtue of the laws of the State of Kentucky, and engaged in the business of distilling and manufacturing whiskey at its distillery in the State of Kentucky.

That the defendant is and for three years last past has been a corporation created, organized and doing business as such at Kansas

City, in the State of Missouri, under and by virtue of the laws of the State of Missouri.

672 Plaintiff states that from about the year 1835, until the year 1855 or 1856, when he died, one James Crow was, by trade, a distiller of whiskey, and followed his occupation as such in Woodford County, in the State of Kentucky. That he was not the owner of a distillery, but was, during that period, employed as a distiller by one Oscar Pepper, who did own a distillery in said county. That said Crow possessed such skill as a distiller, that the whiskey distilled by him while so employed by the said Oscar Pepper at said distillery, attained, by reason of its purity, high standard of quality and excellence of manufacture, a most excellent reputation, and that said Crow, himself, during his lifetime, enjoyed a superior reputation as a practical distiller of whiskey. That after the death of said Crow, the said Oscar Pepper continued to operate his said distillery, producing whiskey thereat, and having in his employment as distillers, persons who had worked with and learned their trade of the said James Crow. That the said Oscar Pepper died about the year 1865, and that in January, 1867, the firm of Gaines, Berry & Company leased from the heirs of said Oscar Pepper the said distillery which had been operated by him during his lifetime. and entered into possession thereof, and began the manufacture of whiskey therein, employing as distillers the same persons who, as already stated, had learned their trade of the said James Crow and been employed as distillers by the said Oscar Pepper. That said firm of Gaines, Berry & Co., continued the distilling, preparing and selling of whiskey at said distillery, until the year 1870.

That said firm of Gaines, Berry & Co., did in the year 1867, originate, devise, adopt and use as a brand and trade-mark, to designate and identify whiskies distilled by them at said distillery, the words "Old Crow," and that said distillery by reason thereof became, and was generally known as the "Old Crow Distillery."

That the said firm of Gaines, Berry & Co., in the year 1870, erected another distillery in said Woodford County, three or four miles from the one which had been operated by them as aforesaid, and did transfer their business of distilling and manufacturing whiskey to said new distillery, to which they at once gave the name of "Old Crow Distillery." And said distillery so built by them, ever since its erection has been continuously and is now recognized and notoriously known as the "Old Crow Distillery," and that no other distillery in the United States has, since said erection, borne or been known by said name. That for the period of three years immediately after the completion of said new distillery in 1870 neither the

said firm of Gaines, Berry & Co., nor its successor hereinafter
673 mentioned, or any other person distilled or manufactured
whiskey at the distillery formerly operated by said Oscar
Pepper, although said Gaines, Berry & Co., and its said successor,
during said period of three years, retained the possession of the
same

That in the year 1870, or thereabouts, the said firm of Gaines, Berry & Co., was changed to the firm or partnership of W. A. Gaines

& Co., which last mentioned firm acquired the business, property, brands, trade-marks, including the "Old Crow" brand or trade-mark, the good will and the distillery of said preceding firm, and without interruption, continued the business of distilling "Old Crow" whiskey at said distillery so erected by said preceding firm, and selling the

same until the incorporation of this plaintiff.

Plaintiff states that in the year 1887, it was incorporated under the laws of the State of Kentucky, and succeeded to and acquired the business of the aforesaid firm of W. A. Gaines & Co., and all its property, distillery, rights, good will, brands and trade-marks, including the "Old Crow" brand or trade-mark. And said plaintiff corporation has since that time, without interruption, continued to manufacture said "Old Crow" whiskey at its said distillery in Woodford County in the State of Kentucky, pursuing the same methods and exercising the same care and supervision in the manufacture of its product, as had theretofore been given to it by the predecessors

of said corporation.

That the said brand or trade-mark for whiskey embraced and embraces as its peculiar feature, the arbitrary words "Old Crow," which were and are attached to the packages, barrels and bottles containing genuine "Old Crow" whiskey distilled by the said firm of Gaines, Berry & Co., the firm of W. A. Gaines & Co., and this plaintiff, and they became and are the distinguishing mark of the whiskies distilled and sold by this plaintiff and its said predecessors at the said Old Crow Distillery in Woodford County, in the State of Kentucky, and said brand of "Old Crow" whiskey has always been and now is of a superior quality and value and has always commanded and still does command a large and ready sale on the market, and was and is well known to the dealers in and consumers of whiskey in the United States and elsewhere.

That ever since the adoption, as aforesaid, by said Gaines, Berry & Co., in the year 1867, of the words "Old Crow" as a brand or trademark for whiskey, all the whiskies distilled by them at the said distillery leased by them from the heirs of Oscar Pepper, and by them and the said firm of W. A. Gaines & Co., and by this plaintiff,

at the distillery erected by Gaines, Berry & Co., in the year 1870, have been branded by them respectively on the pack-674 ages containing such whiskies, and sold by them, with the trade-mark "Old Crow;" that the use by this plaintiff and its predecessors of said words "Old Crow" as a trade-mark for whiskies, has been continuous and exclusive since the year 1867; that the quality of the whiskey produced by them at their said distillery has been uniform and of the highest standard, and that the branding of the packages or labeling of the bottles containing said whiskey either with the arbitrary words "Old Crow" alone or in combination with the symbol of a crow has been and is generally understood by the liquor trade throughout the United States, as well as the dealers in and consumers of whiskey, to indicate that the contents of said packages or bottles were genuine "Old Crow" whiskey distilled by the plaintiff, or its said predecessors at the said "Old Crow" Distillery in Woodford County, Kentucky, now owned and operated by this

plaintiff and erected as aforesaid in 1870, by its predecessor, Gaines,

Berry & Co.

That since their adoption as a trade-mark by Gaines, Berry & Co., as aforesaid, in the year 1867, no other distiller or manufacturer of whiskey has at any time used or claimed the right to use the words "Old Crow," as a brand or trade-mark for whiskey distilled or manufactured by such distiller or manufacturer, and that the plaintiff and its said predecessors have by their continuous use as aforesaid of the said trade-mark to indicate the whiskies distilled and manufactured by them at their said distillery, built up a large and valuable trade in their said whiskies.

That said "Old Crow" trade-mark for whiskies was duly registered by the firm of W. A. Gaines & Co., in the office of the United States Commissioner of Patents at Washington, on the 11th day of April, 1882, and the certificate of registration under the hand and seal of said Commissioner of Patents of the United States, and numbered 9.378, was duly issued to the said firm of W. A. Gaines & Co., as the

owners of said trade-mark for whiskey.

That notwithstanding the premises, and in violation of the rights and ownership of this plaintiff in and to its said brand or trade-mark, and in and to the good will of its business, and with the wicked, wrongful and fraudulent intent of deceiving and misleading the purchasing public and consumers of whiskey in the United States, and with the wrongful and inequitable intent of enjoying the benefits of the great reputation of this plaintiff's "Old Crow" trade-mark for whiskey, the said defendant has for a long time past, at Kan-

675 sas City, in the County of Jackson, State of Missouri, wrongfully bottled or caused to be bottled, offered for sale and sold. and does wrongfully bottle or cause to be bottled, offer for sale and sell, at said Kansas City, Jackson County, Missouri, a cheap imitation and inferior grade of whiskey, which is not the genuine "Old Crow" whiskey, and which has not been distilled or manufactured by this plaintiff, or by any of its predecessors, at the aforesaid Old Crow Distillery, with the fraudulent intent on the part of said defendant to mislead and deceive the purchasing public and the buyers and consumers of whiskies, as well as to deprive this plaintiff of the full and proper use and enjoyment of its said trade-mark, the good will of its business and the emoluments and profits of it belonging, and with the unlawful, unjust and inequitable intent of acquiring the profits, emoluments and good will of plaintiff's business and trade-mark, and in pursuance of said unlawful design, and in the consummation thereof, the said defendant has bottled or caused to be bottled, and sold, and does bottle or cause to be bottled and sell. the said cheap imitation and spurious whiskey in bottles which are labeled with false and misleading labels, having printed thereon the title "Old Crow Whiskey," and the symbol of a crow, in imitation of plaintiff's trade-mark and symbol; that said defendant has represented and does represent the said inferior, cheap and spurious whiskey, so put up and sold as aforesaid, to be the genuine "Old Crow" whiskey, distilled by the plaintiff or its predecessors at the Old Crow Distillery in Woodford County, Kentucky, whereby the said defend-

ant is enabled to mislead and deceive, and does mislead and deceive the purchasing public and the consumers of whiskey, and induce them to believe that the said imitation whiskey is the genuine "Old Crow" whiskey, prepared and distilled at the said Old Crow distillery, as aforesaid.

That the said defendant has not received authority or permission from plaintiff, or from any of its predecessors to bottle or sell any whiskey of other manufacture or origin, under the title, trade-mark or designation of "Old Crow," or to refill with other whiskies any of the empty bottles originally put out on the market containing genuine "Old Crow" whiskey, and such use by the defendant is en-

tirely unauthorized, fraudulent, wicked and deceptive.

Plaintiff states that the aforesaid inequitable and fraudulent conduct of the defendant is not only injuring the plaintiff in its sale of its genuine "Old Crow" whiskey, and in the profits which it would otherwise derive therefrom, but that the said infringing, imitation and counterfeit whiskey sold by the defendant is of such

676 greatly inferior quality to the genuine "Old Crow" whiskey, and because of such inferiority is greatly damaging the reputation of plaintiff's genuine "Old Crow" whiskey, and unless such infringement be discontinued and the sale of such, imitation "Old Crow" whiskey prevented, such sale will irreparably damage the reputation, character and standing of plaintiff's article in the market.

Plaintiff further states that the infringing acts of the defendant are contrary to equity and good morals; and that even if it should be adjudged upon the trial of this action that a technical trade-mark violation has not been established, yet the aforesaid acts of the defendant constitute an unfair trade and an unfair competition, which are contrary to equity and good morals, and which should be pre-

vented and restrained.

Wherefore, plaintiff prays that a preliminary injunction may issue from this Court, enjoining and restraining the defendant, its officers, servants, agents and employes, and each of them, from preparing, bottling, putting up and selling any imitation whiskies not manufactured by the plaintiff, as and for the genuine product of plaintiff's distillery; and from labeling, selling or representing any imitation whisky or whiskies, not prepared or distilled by the plaintiff, as the genuine "Old Crow" whisky, distilled and prepared at the Old Crow Distillery, at Woodford County, Kentucky, or from using the title "Old Crow," or the symbol of a crow, or any of the trade-marks, symbols or devices of plaintiff in connection with any imitation whiskies; or from branding any barrels, boxes, casks or packages with any imitation of plaintiff's trade-mark, title, symbol or devices, or from causing the same to be done, or from refilling any empty bottles which originally contained genuine "Old Crow" whisky with imitation whisky, or from causing the same to be done; and upon final hearing such injunction may be made perpetual, and for such other and further relief as may be just and in accordance with equity. GAGE, LADD & SMALL,

Attorneys for Plaintiff.

On the 3rd day of the regular January term, 1902, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 15th day of January, 1902, the following further proceedings were had and made of record in the cause entitled:

1835.

# W. A. GAINES & COMPANY

VS.

E. WHYTE GROCERY, FRUIT & WINE CO.

Defendant files motion to strike out plaintiff's amended petition.

On the 47th day of the regular January term, 1902, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 8th day of March, 1902, the following further proceedings were had and made of record in the cause entitled:

## W. A. GAINES & COMPANY

VS.

E. WHYTE GROCERY, FRUIT & WINE Co.

Now on this day defendant's motion to strike out plaintiff's amended petition is taken up, fully heard and considered and is by the Court overruled and the question of costs of depositions heretofore taken is reserved until final hearing of the case. To which ruling of the Court defendant excepts.

On the 50th day of the regular January term, 1902, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 12th day of March, 1902, the following further proceedings were had and made of record in the cause entitled:

1835.

## W. A. GAINES & COMPANY

VS.

E. WHYTE GROCERY, FRUIT & WINE CO.

Now on this day defendant files answer to plaintiff's amended petition; which omitting caption and signature is as follows:

Defendant's Answer to Amended Petition.

Defendant's answer to plaintiff's amended petition, omitting caption, is as follows:

1. Comes now the defendant, E. Whyte Grocery, Fruit & Wine Company, a corporation organized under the laws of the State of Missouri, and for its answer to plaintiff's amended petition herein,

denies each and every allegation therein contained, except such as

are hereinafter expressly admitted.

2. For further answer defendant states that it is a corporation organized under the laws of the State of Missouri engaged in the grocery, fruit and wine business, in Kansas City, Jackson County, Missouri. That said defendant is the successor in business of E. Whyte & Company, a partnership which for many years prior to the incorporation of this defendant was engaged in said grocery, fruit and wine business in Kansas City, Missouri. That upon the incor-

poration of the defendant in the year 1895 it acquired for value all of the stock on hand, assets, privileges and good will including all the trade-marks, trade-names, and labels and the right to use the same, belonging to the said partnership; and said defendant to the said that the same and the same a

fendant, and its said predecessors have, for many years past, been engaged in bottling, labeling and selling wines and liquors.

Defendant states that the words "Old Crow" and the symbol of a crow have been used by said defendant and said predecessors on labels affixed to whisky bottled and sold by them for twenty-three years last past, without any objection or remonstrance from said plaintiff or its predecessors; and said defendant and its predecessors have at all times claimed the right to use said words and symbol upon their said labels; and defendant states that plaintiff either knew or might by the exercise of ordinary diligence have known of the said use of said label and symbol by said defendant and its predecessors; but defendant denies that it has ever had or used upon whiskey, bottled or sold by it any false or misleading labels in imitation of plaintiff's alleged trade-mark or label; and defendant further denies that it has ever represented that the whisky so bottled and sold by it was or is the whisky prepared and distilled by plaintiff or its predecessors, and defendant further denies that it has ever mislead or deceived the purchasing public and consumers of whisky, or induced them to believe that the whisky so bottled and sold by it was the whisky prepared and distilled at the plaintiff's distillery.

And defendant further expressly denies that said plaintiff or its predecessors, Gaines, Berry & Company or W. A. Gaines & Company, originated or devised the said alleged brand or trade-mark "Old Crow" as applied to whisky, but defendant states that the said words were in use as a designation of whiskey long prior to the formation of the firm of Gaines, Berry & Company or any other prede-

cessors of the plaintiff.

Defendant further states that all labels used on whiskey bottled by it have plainly and distinctly called attention to the fact that said whiskey was bottled by it and that it was responsible for its purity and fine quality, and said labels have always contained the business name or name and address of said defendant or its predecessors.

Defendant further states that said labels, so used by it, have never, at any time, even remotely, imitated or resembled the labels of plaintiff or its predecessors, or could have been mistaken for plaintiff's

labels by purchasers of whiskey.

Defendant further states that the whiskey bottled by it is and always has been of an excellent grade and quality, and not inferior to the whiskey prepared and distilled by plaintiff.

Defendant further states that the words "Old Crow" together with a symbol of a crow have been many years past, and are now in general use by bottlers and sellers of whiskey in Kansas City and elsewhere in the United States, upon the labels thereof, as a common designation of bottled whiskey, without regard to its source or manufacture; that among the bottlers of and dealers in whiskey in Kansas City, Missouri, who have used the said words "Old Crow" upon labels for bottled whiskey of various manufacture are the following:

Baruch Mercantile Company; B. S. Flersheim Mercantile Company; Fred Eyssell; J. W. Ryan; M. Quinn; M. Cohen; Louisville Supply Company; M. Hoffman and the Atlantic and Pacific Distributing Company and many others in Kansas City and elsewhere whose names are at present unknown to defendant; the said defendant alleging the fact to be that the use of said words upon labels among bottlers and dealers in whiskey is and has been so general and common that the said words are not now and never have been

the exclusive right and property of the plaintiff herein.

That the appellation of "Old Crow" and said symbol of a crow, as applied to bottled whiskey, do not now and have not for many years past, of themselves, indicated to the purchasers of bottled whiskey, that the same was bottled or manufactured by the plaintiff in this case, or by its predecessors; and that the said words and symbol are and have been for many years past in general and common use by the whiskey trade, to designate various kinds, grades and manu-

facturers of whiskey.

Defendant further states that the words "Old Crow" and a symbol of a crow are so frequently and so commonly used by the bottlers and sellers of whisky upon the labels thereof, and for so many different grades and manufactures of whiskey, that the said words and said symbol are not supposed by purchasers to indicate that the whiskey contained in bottles so labeled, is the whisky manufactured by plaintiff or of any particular manufacture; and that the knowledge of said use is so general, that the purchasers of bottled whiskey are not deceived or mislead by the said words and symbol upon labels into purchasing another kind or quality of whiskey for the whiskey distilled by plaintiff.

 Further answering defendant states that the alleged cause of action in plaintiff's petition mentioned did not accrue within

680 five years before the commencement of this action.

4. Further answering defendant states that the alleged cause of action in plaintiff's petition mentioned did not accrue within

ten years before the commencement of this action.

5. Further answering defendant states that said plaintiff has not complied with section 1025 of the Revised Statutes of the State of Missouri of 1899, and said plaintiff is not entitled to prosecute or maintain this action by reason thereof.

Wherefore defendant prays that the temporary injunction granted herein be dissolved that defendant be discharged and for its costs

and expenses in this behalf incurred.

CHAS. R. PENCE, Attorney for Defendant. On the 53rd day of the regular January term, 1902, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 15th day of March, 1902, the following further proceedings were had and made of record in the cause entitled:

1835.

### W. A. GAINES & COMPANY

VS.

E. WHYTE GROCERY, FRUIT & WINE Co.

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Now on this day plaintiff files reply to defendant's answer to-plaintiff's amended petition as follows:

Plaintiff's Reply to Amended Answer to Petition.

Plaintiff's reply to the amended petition herein, omitting caption, is as follows:

Plaintiff for reply to the answer to the amended petition herein denies each and every allegation in said answer contained.

GAGE, LADD & SMALL, Attorneys for Plaintiff.

Be it remembered that on the 1st day of the regular April term, 1902, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 14th day of April, 1902, the following further proceedings were had and made of record in the cause entitled:

1835.

#### W. A. GAINES & COMPANY

VS.

E. WHYTE GROCERY, FRUIT & WINE CO.

Now on this day by agreement of parties and by consent of the Judges of Division No. 3 and Division No. 5 of this Court, it is ordered by the Court that this cause be and the same is hereby transferred to Division No. 5 of this Court.

On the 49th day of the regular April term, 1902, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 6th day of September, 1902, the following further proceedings were had and made of record in the cause entitled:

1835.

# W. A. GAINES & COMPANY

VS.

E. WHYTE GROCERY, FRUIT & WINE CO.

Now at this day comes the parties hereto, W. A. Gaines & Company, the plaintiff, by Messrs. Gage, Ladd & Small, its attorneys,

and the E. Whyte Grocery, Fruit & Wine Company, the defendant, by Charles R. Pence, Esq., its attorney, and this cause is submitted to the Court upon the pleadings and evidence herein and upon the argument of counsel for the said parties, and due consideration being had hereof, the Court finds that the plaintiff is and for many years prior to the commencement of this action, was the owner and entitled to the exclusive use of a valid trade-mark for whiskey manufactured by it, the essential feature and distinguishing characteristic of which said trade mark are the words "Old Crow;" that the defendant at and prior to the commencement of this action was infringing said trade mark; that the defendant in the use of labels upon bottles containing whiskey not manufactured by the plaintiff was guilty of unfair trade and competition, and the Court further finds in favor of the plaintiff upon all the issues made by the pleadings.

It is therefore ordered, adjudged and decreed by the Court that the said defendant, the E. Whyte Grocery, Fruit & Wine Company, its officers, servants, agents and employes, and each of them be and they are hereby perpetually enjoined and restrained from preparing, bottling, putting up or selling any whiskey not manufactured by said plaintiff at its distillery in Woodford County, in the state of Kentucky, known as the "Old Crow Distillery," as and for the product of plaintiff's said distillery; and from labeling, selling or representing whiskey not manufactured or distilled by the plaintiff at its said distillery, as "Old Crow" whiskey and from using the words "Old Crow" or the word "Crow" in connection with any whiskey not manufactured or distilled by the plaintiff at its said distillery, and from labeling, branding, or marking any barrels, boxes, casks, bottles or packages which contain any whiskey other than that manufactured and distilled by said plaintiff at said

682 distillery with the words "Old Crow," or the word "Crow" and from causing the same to be done, and from so branding. labeling or marking the same with the said words or word, either alone or in combination with any other word, words, symbol or device, and from keeping, selling, dealing in or disposing of any such barrels, boxes, casks, bottles or packages, so labeled; and from selling, dealing in or in any manner disposing of whiskey not manufactured and distilled by the plaintiffs at its said distillery, as and for, or with any representation whatever, that it is whiskey distilled and manufactured by the plaintiff at its said Old Crow Distillery, and from keeping and offering for sale any whiskey as Old Crow whiskey manufactured by the plaintiff at its said distillery which is not so, and from [restoring] for that purpose to any device. deceit, fraud, or misrepresentation whatever, by the use of any stamp, mark, label or otherwise.

And it is further ordered, adjudged and decreed that the said plaintiff have and recover of the said defendant its costs herein laid out and expended, and that it have execution therefor.

On the 50th day of the regular April term, 1902, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 27th day of September, 1902, the following further proceedings were had and made of record in this cause:

1835.

W. A. GAINES & COMPANY

VS.

E. WHYTE GROCERY, FRUIT & WINE Co.

Now on this day defendant files motion to re-tax costs herein.

Be it remembered that on the 38th day of the regular October term, 1902, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 26th day of November, 1902, the following further proceedings were hand and made of record in this cause:

1835.

W. A. GAINES & COMPANY

VS.

E. WHYTE GROCERY, FRUIT & WINE Co.

Now on this day defendant's motion for a new trial and motion in arrest of judgment are by the Court overruled; to which ruling of the Court defendant excepts and defendant's motion to re-tax costs is by the Court overruled; to which ruling of the Court defendant excepts.

On the 40th day of the regular October term, 1902, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 5th day of December, 1902, the following further proceedings were had and made of record in the cause entitled:

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1835.

W. A. GAINES & COMPANY

VS.

E. WHYTE GROCERY, FRUIT & WINE CO.

Now on this day comes defendant and files affidavit for an appeal, which appeal is by the Court allowed to the Kansas City Court of Appeals, and defendant has ninety days in which to file its Bill of Exceptions.

Be is remembered that on the 41st day of the regular January term, 1903, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 28th day of February, 1903, the following further proceedings were had and made of record in the cause entitled:

1835

### W. A. GAINES & COMPANY

VS.

E. WHYTE GROCERY, FRUIT & WINE Co.

Now, on this day comes the E. Whyte Grocery, Fruit & Wine Company, defendant herein and moves the Court to grant an extension of time to defendant in which to file its Bill of Exceptions herein, and the Court being satisfied that good cause has been shown for such extension of time, extends the time for filing Defendant's Bill of Exceptions until on or before June 6th, 1903.

During vacation and on Tuesday, June 2nd, 1903, of the Circuit Court of Jackson County, Missouri, at Kansas City, the following further proceedings were had and made of record in the cause entitled:

1835.

#### W. A. GAINES & COMPANY

VS.

E. WHYTE GROCERY, FRUIT & WINE CO.

Now on this day comes E. Whyte Grocery, Fruit & Wine Company and prays for an extension of time in which to file its Bill of Exceptions herein and it appearing to the Judge in vacation that good cause has been shown for such extension of time it is ordered that the time for filing defendant's Bill of Exceptions be and the same is hereby extended until on or before August 6th, 1903.

Stipulation for the extension of time filed.

Be it remembered that on the 47th day of the regular April term, 1903, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 2nd day of July, 1903, the following proceedings were had and made of record in the cause entitled:

684

1835.

## W. A. GAINES & COMPANY, Plaintiff,

VS.

E. Whyte Grocery, Fruit & Wine Company, Defendant.

Now on this day comes the defendant by attorney and shows to the court that on the 9th day of September, 1902,—filed in this court its motion for a new trial and in arrest of judgment, and that although said motion shows the filing aforesaid, yet the record through an error does not, and the court so finding by consent of the parties hereto in open court orders that the following nune pro tune be made herein, to-wit 1835

# W. A. GAINES & COMPANY, Plaintiff,

E. WHYTE GROCERY, FRUIT & WINE COMPANY, Defendant.

Now on this 9th day of September, 1902, comes defendant by attorney and files its motion for a new trial and in arrest of judgment.

Monday, July 27th, 1903.

Now comes defendant and presents to the judge in vacation its Bill of Exceptions herein, which said Bill of Exceptions is by the judge allowed, signed, sealed and ordered to be and is filed and made a part of the record of this court and this cause.

Tuesday, July 28th, 1903.

Now comes defendant and presents to the judge in vacation its Bill of Exceptions, said Bill of Exceptions is by the judge allowed, signed, sealed and ordered to be and is filed and made a part of the record of this court and this cause.

# Bill of Exceptions.

In the Circuit Court of Jackson County, Missouri, at Kansas City, April Term, 1902.

Div. No. 5.

1835.

# W. A. Gaines & Company, Plaintiff,

E. WHYTE GROCERY, FRUIT & WINE COMPANY, Defendant.

Be it remembered that on the 1st day of July, 1902, and at the April Term, 1902, of said Circuit Court, this cause coming on for trial before Hon. W. B. Teasdale, Judge of said court, plaintiffs appearing by Gage, Ladd & Small, their attorneys, and defendants appearing by its attorney, Charles R. Pence, proceedings were had as follows, to-wit:

Plaintiffs to sustain the issues upon their part offered and intro-

duced evidence as follows, to-wit:

Mr. Pence: Before any evidence is introduced here I wish to renew a motion that was made before Judges Gates, and my motion is—I now move to exclude any evidence under the amended petition in this case and to strike out the amended petition on the ground that it constitutes a change of the cause of action as alleged in the original petition in this case, and is a departure from the original petition in this case. The original petition in this case, if Your Honor please, alleged that this trade mark was invented and de-

signed by James Crow in the year 1833, and that the plaintiff in this case purchased from James Crow his rights in the trade mark. The amended petition is based upon the claim that the trade mark was originated and devised by the firm of Gaines, Berry & Company, the predecessor of the plaintiff, in the year 1867. Our claim is that the titles are dissimilar, and that there is a departure in the amended petition from the case alleged by the original petition.

Motion by the court overruled; to which action and ruling of the

court plaintiff then and there duly excepted.

Plaintiff read in evidence the depositions of Edson Bradley, Solomon K. Lichtenstein, taken in New York City, N. Y., on the 15th of May, 1901, which are in figures as follows, to-wit:

Edson Bradley, of lawful age, being produced, sworn and examined on the part of the plaintiff, deposeth and says:

Q. What is your name, age, residence and occupation?

A. Edson Bradley; 49 years; residence, Tuxedo Park, New York; occupation, vice president of W. A. Gaines & Co., Frankfort, Kv.

Q. Is W. A. Gaines & Co., a corporation?

A. It is.

Q. Incorporated under the laws of what state?

A. Kentucky.

Q. Will you please state when it was incorporated?

A. 17th day of February, 1887.

Q. Were you connected with the plaintiff corporation at that time in any capacity?

A. I was at that time the second vice president.

Q. At the time of the incorporation of the plaintiff did it succeed

to the business of any other concern?

A. Yes, it succeeded to the co-partnership of W. A. Gaines & Co., composed of Marshall J. Allen, Hiram Berry, George H. Allen, Frank S. Stevens and Edson Bradley.

Q. The Edson Bradley referred to is yourself?

A. Yes. Q. How long had the firm of W. A. Gaines & Co. been in existence?

A. Since about 1870.

Q. Do you know whether that firm had succeeded the prior firm?

686 A. Yes, it succeeded the firm of Gaines, Berry & Co. about 1870.

Q. Do you know when the firm of Gaines, Berry & Co. was started?

Yes, in 1866.

Q. Will you state what business the various firm of Gaines, Berry & Co., W. A. Gaines & Co., and the corporation W. A. Gaines & Co.,

have been engaged in?

A. They have been distillers of fine bourbon and rye whiskies under the trade-mark brands of Old Crow and Hermitage, the former whisky having been continuously manufactured by them at the Old Crow distillery located on Glens Creek in Woodford county,

Kentucky, where it is to-day situated, and the latter brand being made at the Hermitage distillery in South Frankfort, Kentucky.

Q. Referring to your statement, "Old Crow distillery," will you state to the court whether that is the designation by which that dis-

tillery is known to the trade generally?

A. Yes, it has always been known by that name, and no whisky was ever produced in that distillery except the Old Crow whisky under the trade-mark brand "Old Crow."

Q. Do you know of any other distillery in the United States or elsewhere which is known to the trade as the Old Crow distillery?

A. No, there is not and never has been any other distillery so known.

Q. How extensive is the business done at that distillery?

- A. The distillery is one of the largest hand-made sour mash distilleries in the United States, having a daily capacity to mash 850 bushels of grain and producing between 80 and 90 barrels each 24 hours when in operation. The average annual production and sale of the Old Crow whisky by W. A. Gaines & Co. is about ten thousand barrels, every barrel of which is sold by them under the trade-mark, Old Crow.
- Q. The use by the plaintiff and its predecessors of the trade-mark, Old Crow, for whisky distilled at the Old Crow distillery has been continuous, has it not?

A. Yes.

Q. The Old Crow whiskey distilled at that distillery is a hand-

made whisky?

- A. Yes, it is what is known as old-fashioned, hand-made, sour mash whisky manufactured exactly as it was formerly made by James Crow and his successors.
- Q. Who is in charge of the manufacturing branch of plaintiff's business?

A. William E. Bradley, of Frankfort, Ky., my brother, under my

supervision and direction.

Q. Has the whisky, which is known as old-fashioned, hand-made process whisky, a higher reputation in the market than other whisky?

A. Yes.

687 Q. And does it command a better price?

A. Yes, there is no other whisky in the United States that commands as high a price in the open market as the Old Crow.

For the information of the court I offer in evidence the standard whisky price-list of J. W. Biles Co., commission merchants of Cincinnati, Ohio, issued under date of April 10th, 1901. This price-list is the recognized at standard basis of all whisky-quotations in the United States. On page 17 of this price-list are quoted the various ages of Old Crow whisky that on the date of the issue of this price-list were purchasable in the market. These prices it will be seen are very much higher than that of any other whisky quoted, and more than double the price of most of the standard brands. The Old Crow whisky quoted in this price-list is the Old Crow whisky of W. A.

Gaines & Co., no other whisky being recognized in the trade as Old Crow.

Plaintiff's counsel offers the price-list referred to in evidence, and the same is marked "Plaintiff's Exhibit A."

Exhibit A is as follows:

Old Crow, spring, 1899, 971/2; fall 1898, 100; spring 1897, 135;

spring [1796] 140; spring 1894, 145; spring, 1893, 135.

Old Crow—25 spring 1899, 95c.; 25 fall 1898, 97½c.; 25 spring 1898, \$1.12½; 25 spring 1897, \$1.30; 10 spring 1893, \$1.30; 25 spring 1892, \$2.75; N. Y. C. H.

Q. Is there any recognition by the United States government of the ownership of the title or trade-mark of Old Crow whisky as belonging to W. A. Gaines & Co., the plaintiff?

Objected to by defendant as incompetent, irrelevant and immaterial.

Objection overruled.

A. Yes, such recognition is made. It is the common practice of the Internal Revenue Department in its correspondence with the collector of the 7th District of Kentucky, where the Old Crow distillery is located to refer to this house as the Old Crow distillery of W. A. Gaines & Co. The special agents of the Internal Revenue Department have on many occasions and always are prepared to make seizure of any whiskies found in the market bearing the Old Crow trade-mark, provided the said whiskies were not manufactured by W. A. Gaines & Co., and the officers had knowledge of that fact, There have been numerous instances of such seizures, one of them within a few days past in the city of New York.

Q. In the conduct of the business of W. A. Gaines & Co., 688 does it sell to its customers in bulk—that is, in barrels, to any

extent?

A. Yes, more than nine-tenths of its entire product is sold to the trade all over the United States in original barrels, and this has been done since the distillery was originally built.

Q. These goods sold in bulk by the plaintiff are subsequently bot-

tled by its customers, are they not, to a large extent?

A. Yes, a very considerable part of the whiskey is bottled either by the wholesale dealer who originally purchased the whiskey or by his smaller customers. Any owner of the genuine Old Crow whiskey from the plaintiff's distillery is entitled of course to bottle same and to place upon the bottles any descriptive form of label bearing the trade-mark, Old Crow and representing the origin and quality of the whiskey, provided such labels do not colorably imitate the labels used by the plaintiff for their own bottling or such other labels as are used by the trade and which labels by continuous and long usage have become the property of such bottlers. For example William H. Lee & Co., of St. Louis, Mo., who have for many years continuously purchased the whiskey from W. A. Gaines & Co.—the Old Crow whiskey, and bottled same under a peculiar style of label bottled by them but bearing the Old Crow trade-mark, and which label

has become their property through continuous use on their special bottling. Of course, I refer to the label itself and not to the trademark, Old Crow. The label itself has come to identify W. H. Lee & Co.'s bottling of genuine Old Crow whiskey. We would not authorize any other bottler to use an imitation of W. H. Lee & Co.'s label, nor would we have the right to do so. It is the custom of the plaintiff when a purchaser of its Old Crow whiskey so desires to furnish a label for the bottling of the whiskey. This label bears the trade-mark, Old Crow, and also states that the whiskey is distilled by W. A. Gaines & Co., Woodford County, Kentucky. This has not been the universal custom and labels for bottling the Crow whiskey are not issued for five per cent of the whiskies sold, the bottler as a rule preferring to get up his own form of label so that he may become identified with it and have something that others cannot use. Other bottlers prefer to purchase regular stock labels which are carried by the lithographers all over the United States, as they are cheap and many of them of attractive design. The plaintiff has always had knowledge that such labels were carried in stock by the lithographers, but it was their belief and general information that the labels were only sold to parties who owned the genuine Old Crow whiskey of W. A. Gaines & Co., and upon such genuine whiskey, of course any form of descriptive label might properly be used. Several of the largest lithographers in the United States uniformly

consult the plaintiff, or its agent in New York, Paris, Allen & Co., when selling labels bearing the trade-mark, Old Crow, in order that they may be told whether the parties proposing to buy the labels are dealers in the genuine Old Crow whisky or not, and when told that the parties have not got Old Crow whiskey they have

refused to sell the labels to them.

Q. Has it come to the knowledge of the plaintiff within the past few years that there are many dealers selling whiskey labeled as Old

Crow, which is not genuine Old Crow whiskey?

A. Yes, we have obtained knowledge of many such infringements. It is a very difficult matter, however, for us to detect the infringers. for the reason that the proper use on the genuine goods of such a great variety of labels throughout the United States renders it impossible for us to know except by examination of the contents of the packages or through indirect information received whether the parties are bottling the genuine goods or not. We have done everything in our power, however, to detect the infringements, and whenever we have found them have prosecuted them vigorously. It is manifest that the wholesale dealers to whom plaintiff sells its production forms no basis for plaintiff's knowledge of the number of people in the United States dealing in plaintiff's genuine Old Crow Whiskey, for the customers of plaintiff are mostly large wholesale dealers and resell this whiskey to the smaller trade who again resell to retailers, so that there are thousands of handlers of the genuine Old Crow whiskey, the great percentage of which are entirely unknown to plaintiff.

Q. Will you state for the information of the Court how many suits to restrain infringements of the trade-mark Old Crow whiskey, were

brought by the plaintiff in the past five years?

A. Over 1,200, and in every case where the case reached trial an injunction was granted in favor of the plaintiff. These cases numbered over 500.

Q. What other steps, if any, have you taken to prevent the use of the trade-mark, Old Crow, on goods not manufactured at the Old

Crow distillery?

A. Since 1870, the plaintiff and its predecessors have issued caution notices against the infringement of the Old Crow trade-mark to the extent of millions of such notices and have continuously advertised in the trade papers and done everything in their power to inform the public that it was the owner of the trade-mark and to caution infringers.

Q. Have you sold any of your genuine Old Crow whiskey in

Kansas City, and if so, to whom?

A. To M. Hofmann, Glasner & Barsen, Frank Jones, Steultz Bros., Sol Block and Grif, Morrin-Powers Mercantile Co. These are the houses who have purchased direct from the plaintiff or from its New York representative, Paris, Allen & Co., but there are undoubtedly many more more houses in Kansas City who have indirectly purchased the genuine Old Crow Whiskey from other large jobbers direct or through whiskey brokers.

Q. Has the plaintiff a regular agency in the State of Missouri?

A. No, all of its sales are made either through traveling salesmen or by mail, or through regular whiskey brokers throughout the United States, whose orders are always transmitted to us by mail or telegram to New York city.

Q. I now show you a bottle of whiskey bearing a label marked "Old Crow Whiskey," and on the lower line of the label the words "E. Whyte & Co. Will you state, if you know, what bottle that is?

A. This bottle was forwarded to me by plaintiff's agent, Harry E. Blood, on July 3rd, 1900, from Kansas City, Missouri, by express and was received at my office and in my presence within a day or so after its shipment. It was in a sealed package and was opened in my presence and has been ever since continuously in my personal possession. This bottle bore two labels on its back, which read as follows: "Bought Whyte Grocery & Wine Co., Kansas City, Mo., 6-30-1900; paid 62½ cents or \$1.25 for two bottles. One of the bottles I left sealed with attorneys." This writing was in the handwriting of Harry E. Blood, the plaintiff's agent, and this handwriting is well known to me. The second label bore the following words: "Bought 6-30-1900, time 3:30 p. m., by Moffitt; witness, F. Smith; contents"? This is also in the handwriting of the said Blood.

Q. On receipt of that bottle, as mentioned by you, did you examine the contents of the bottle, and if so will you state what the

contents of the bottle are if you know?

A. Yes, I did examine it, and I found the contents to be practically neutral spirits colored—that is to say, alcohol and water with apparently no admixture of any kind of whiskey, although it might possibly have a very small quantity.

Q. The contents of that bottle are not genuine Old Crow whiskey,

are they?

A. No, it is not genuine Old Crow whiskey, nor is it hand-made, sour mash whiskey, as described by the label, but is spirit of the cheapest and poorest commercial quality. I would call the Court's attention to the fact of the neck label which represents this spirit as having been aged in bond. The character of this spirit precludes the possibility of its having been aged in bond, as only genuine beverage whiskies are so aged.

691 Plaintiff's counsel offers the said bottle in evidence and marks the same, "Plaintiff's Exhibit B."

Witness continues: The misrepresentations on the bottle show the defendant's intent and desire to impose upon the public not only as to the whiskey being Old Crow, but as being whiskey at all.

Q. Will you explain to the Court whether or not the sale of imitation whiskey under the Old Crow trade-mark causes damage to the

plaintiff, and if so in what respect and how?

A. The plaintiff certainly is damaged very greatly by such sales of imitation whiskey, first by the actual loss of trade to the extent of the quantity of imitation goods sold, and secondly (and this is by far the more important loss) by reason of the injury done to the good reputation of Old Crow whiskey by the sale of inferior quality of goods under the Old Crow trade-mark. The sample of whiskey in evidence in this case is one of the most glaring examples of this question, as this whiskey, while represented to be of the highest quality and so guaranteed by the defendant, is in fact substantially the lowest grade of spirits known in this trade, being either simply alcohol and water, technically known as a neutral spirits colored with burnt sugar of a compound of such spirits with a very minute quantity of whiskey of unknown quality. As the Old Crow whiskey is the highest priced whiskey sold in the United States and has the reputation of being of the very finest quality it is manifest that a sale under the Old Crow trade-mark of low grade goods like those put up by the defendant would necessarily injure the reputation of the genuine article and prejudice consumers of these spurious goods against any and all whiskies sold under the name of Old Crow. Thirdly, the sale of imitation goods under the trade-mark, Old Crow, tends to encourage other dishonest dealers to indulge in the same practice, thereby increasing the infringements and damages to the plaintiff. It further makes competition more severe and unfair for the dealers in the genuine and higher-priced Old Crow whiskey, who are thereby discouraged in their efforts to sell the genuine article, and therefore fail to buy as much whiskey from the plaintiff, to its great damage.

EDSON BRADLEY.

Subscribed and sworn to before me on the day, at the place and within the hours first aforesaid.

[SEAL.]

W. F. ALLEN, Notary Public, New York Co. 692 Solomon K. Lichtenstein, of lawful age, being produced, sworn and examined on the part of the plaintiff, deposeth and

savs:

Solomon K. Lichtenstein, age 37 years, reside in the city of New York, occupation, law; am one of the firm of Wise & Lichtenstein of the city of New York, which firm has represented the plaintiff in numerous trade-mark litigations concerning the Old Crow trademark for whiskey since the year 1897. I have had personal charge of the filing of these suits and the conduct thereof, and know that they amounted to 1,222 in number, which were brought in the city of New York and county of New York and neighboring counties, and that in addition we employed counsel in the adjoining states of New Jersey and Connecticut; there were numerous suits of that nature brought in those states. That 572 of these cases brought in New York and neighboring counties have resulted in final decrees of injunction in favor of the plaintiff as against the various defendants. and not one of the various cases brought by the plaintiff has been lost by the plaintiff and many are still pending undetermined as yet. I offer a list of the various defendants, which shows in which county the suit was brought in cases which have resulted in final decree in favor of the plaintiff. The number preceding each of these names is the docket number by which the case is known in my office. list is marked "Exhibit C." Plaintiff's Exhibit C is a list of 1,222 names of persons in Kings, Queens and Richmond counties, New York. I also offer a copy of the perpetual injunction order obtained against one James Burns in Kings county, which is offered as a sample or specimen of the various orders referred to. The above document is marked "Exhibit D." I further state that I know from personal transactions with the plaintiff and from instructions received from them that it has been more than usually diligent in suppressing imitations of its trade-mark all over the United States, and has immediately prosecuted after notice any person who uses anything in the nature of a trade-mark that approaches plaintiff's trademark, Old Crow, and I cite as an instance of this fact the suit brought by the plaintiff against Leslie & Co., of New York county, to restrain the latter firm from use of the trade-mark, White Crow, as being an infringement on the title, Old Crow, although the labels were entirely dissimilar. That case resulted likewise in a decree for injunction, a copy of which I herewith produce and mark "Exhibit E."

S. K. LICHTENSTEIN.

Subscribed and sworn to before me on the day, at the place and within the hours first aforesaid.

[SEAL.]

W. F. ALLEN, Notary Public, New York Co.

### PLAINTIFF'S EXHIBIT "D."

At a Special Term of the Supreme Court of the State of New York in and for the County of Kings, Held at the County Court-house, in the Borough of Brooklyn, in the City of New York, on the 25th Day of March, 1898.

Present: Hon. Augustus Van Wyck, Justice.

W. A. Gaines & Co., Plaintiff, against James Burns, Defendant.

This action having been duly brought to trial before the Hon. Augustus Van Wyck, Justice, without a jury, and after hearing the allegations of the parties and their proofs and said Justive having filed his decision in writing, awarding judgment in favor of the plaintiff and against the defendant for the relief demanded in the complaint to the extent of an injunction and the plaintiff's disburse-

ments as and for the costs thereof.

It is on motion of Wise & Lichtenstein, attorneys for said plaintiff, ordered, that the defendant, his servants, agents and attorneys, and each of them are hereby forever enjoined and restrained from preparing, bottling, putting up or selling any whiskies not manufactured by the plaintiff, as and for the genuine product of plaintiff's distillery; and from labeling, selling or representing any imitation whiskey, or whiskey not prepared or distilled by the plaintiff as the genuine "Old Crow" Rye Whiskey distilled and prepared at the Old Crow distillery at Woodford county, Kentucky, or from using the title "Old Crow" or the symbol of a crow, or any of the trademarks, symbols or devices of plaintiff, in connection with any imitation whiskey for bottling purposes; or from branding any barrels, boxes, casks or packages with any imitations of plaintiff's trademark, symbols or devices, or from using any imitations, symbols or devices, or from causing same to be done, or from refilling any empty bottles which originally contained genuine "Old Crow" Rye Whiskey, with whiskey which was not the product of plaintiff's distillery as aforesaid; or from causing the same to be done under penalty of the punishment prescribed by law as for a contempt.

It is further ordered that the defendant pay unto the plaintiff the sum of — dollars, disbursements as costs in this action and

the plaintiff have judgment accordingly.

Ent.,

A. V. W., J. S. C.

### PLAINTIFF'S EXHIBIT E.

At a Special Term, Part 5, of the Supreme Court of the State 694 of New York in and for the City and County of New York, Held at the County Court-house, in the Borough of Manhattan, in the City of New York, This 6th Day of October, 1898.

Present: Hon. Henry Bischoff, Jr., Justice.

W. A. Gaines & Co., Plaintiff,

WILLIAM M. LESLIE, WILLIAM M. LESLIE, JR., and WARREN E. TROTT, Defendants.

#### Final Decree.

This action having been duly brought to trial before the Hon, Henry Bischoff, Jr., Justice, without a jury, and after hearing the allegations of the parties and their proofs, and said Justice having filed his decision in writing, awarding judgment in favor of the plaintiff and against the defendants, William M. Leslie and William M. Leslie, Jr., composing the partnership trading under the firm name of William M. Leslie, for the relief demanded in the complaint to the extent of an injunction herein being awarded against said last named defendants, together with the plaintiff's cos's in the action, the complaint herein being dismissed as against the defendant, Warren E. Trott, who was joined as a party defendant herein but who was not and is not a member of the defendants' partnership, such dismissal being without costs.

It is on motion of Wise & Lichtenstein, attorneys for said plaintiff, ordered that the defendants, William M. Leslie and William M. Leslie, Jr., trading under the partnership name of William M. Leslie, their servants, agents and attorneys and each of them, are hereby forever enjoined and restrained from using, as a trademark or designation for whiskies not distilled by the plaintiff, the title "Old Crow" or "White Crow," or from using any title or designation for whiskies prepared, bottled or sold by them, the said defendants, not distilled by plaintiff, under any title, trade-mark or designation whereof the word "Crow" forms any part, or from using any of the symbols, trade-marks or devices of plaintiff in connection with any whiskies not distilled by plaintiff, or from causing the same to be done, under penalty of the punishment prescribed by law as for a contempt.

It is further ordered that the complaint herein be dismissed as against the defendant, Warren E. Trott, without costs.

It is further ordered that the defendant-, William M. Leslie and William M. Leslie, Jr., trading under the partnership name of William M. Leslie, pay unto the plaintiff the sum of One Hun-695 dred and Eighty-seven and 23-100 Dollars, costs in this

action, and that plaintiff have judgment accordingly. Enter,

er, Н. В., Jr., J. S. C. Plaintiff read in evidence depositions taken in Versailles, Kentucky, on the 26th of November, 1901, of Thomas S. Edwards, George Edwards, Leopold Labrot, J. P. Williams, W. H. Averill, which are in words and figures as follows, to-wit:

Depositions of witnesses produced, sworn and examined, on the 26th day of November, in the year of our Lord, 1901, between the hours of ten o'clock in the forenoon and one o'clock in the afternoon of that day, at Versailles, in the County of Woodford and State of Kentucky, before me, Fanny Turner, notary public in and for the county aforesaid, in a certain cause now pending in the Circuit Court of the County of Jackson, in the State of Missouri, between W. A. Gaines & Co., plaintiff, and E. Whyte Grocery, Fruit and Wine Company, defendant, on the part of the plaintiff.

———, of lawful age, being produced, sworn and examined, on the part of the plaintiff, deposeth and saith, in answer to interrogatories propounded by John B. Lindsey, attorney for plaintiff:

1. What is your name, age, occupation and place of residence?

A. Name Thos. S. Edwards, age 82 to-morrow. I have a farm.

but I rent it out; reside in Versailles, Kv.

2. Do you know the parties to this suit, or any of them? If so, which of them and how long have you known such party or parties?

A. I know the plaintiff, but do not know the defendant.

3. Have you ever been engaged in business as a distiller; if so, when and where?

A. Yes, sir, I have been engaged in Woodford Co. on Glenn's creek, and also in Anderson Co. and other places in Woodford Co. I have been a distiller nearly all my life.

4. Did you know Oscar Pepper in his life time, and what was

his business, and where was he located?

A. I did, and he was a distiller and farmer and located on Glenn's creek. I knew him all of his life. His father's name was Elijah Pepper. The distillery he used to run is now run under the name of Labrot & Graham. Oscar Pepper ran the distillery from about 1833 to 1865.

5. You state that Oscar Pepper ran a distillery during his life time from the year 1833 to 1865; state if you knew one James Crow, and what position, if any, did he hold in the Oscar Pepper

Distillery?

A. I knew James Crow intimately. He was a distiller in the Oscar Pepper Distillery all the time but two or three years. I ran a distillery a part of the time within a mile of the Oscar Pepper Distillery.

6. Where was the Oscar Pepper Distillery then situated?

A. On Glenn's creek, on the Pepper farm which was first owned by his father, and then Oscar Pepper owned it. It is about 3 or 4 miles up the creek from the present Old Crow Distillery. The Oscar Pepper Distillery is now owned and operated by Labrot, under the name of Labrot & Graham.

7. Did you ever operate the Oscar Pepper Distillery yourself?

A. Yes, one season; that was the year after Oscar Pepper's death. Then Mastin leased it, the whole farm, including the distillery, and he afterwards sub-let the distillery to Gaines, Berry & Co. They ran it for three years and re-leased it but did not run it. They then moved it to its present site. While Gaines, Berry & Co. were running the Oscar Pepper Distillery, they also ran another distillery below it, which is known as the "Old Crow" Distillery. The place where the "Old Crow" is now on, is on land that Gaines, Berry & Co. bought from Dr. Botts.

8. How qualified or expert was Jas. Crow as a distiller of whiskey?

A. He was considered the best in the state.

9. State, if you know, what was the reputation of the whiskey distilled by the said Jas Crow at said distillery?

A. It was considered the best that was made.

10. What was the quality, if you know, of the whiskey distilled by Jas. Crow?

A. It was a very fine quality.

11. How was the whiskey distilled by the said Jas. Crow known?

A. By the name of "Old Crow" whiskey.

12. State if you knew one Wm. F. Mitchell in his life time?

A. I did, I knew him well. He worked under Jas. Crow from about 1845, and continued with him until Crow's death, except for one year when Crow had left and Mitchell continued to run the Oscar Pepper Distillery. I mean Mitchell worked under Crow as a distiller. He always claimed to make the same kind of whiskey as Crow did, under the same process, and continued to work for Oscar Pepper as a distiller until Pepper died, at the distillery owned then by Oscar Pepper, and which was then sometimes called the "Old Crow" Distillery.

Objected to by defendant as hearsay.

Objection sustained.

Mitchell run the distillery for Gaines, Berry & Co. for about three years and then distilled for them for a number of years at the present "Old Crow" Distillery.

13. Did you know the firm of Gaines, Berry & Co.?

A. Yes, sir.

14. What was their business, and if you state that they distilled

whiskey, what distillery or distilleries did they operate?

A. They were engaged in the business of distilling whiskey, first at the Old Oscar Pepper Distillery and at the same time at the one now called the "Old Taylor" Distillery, from about 1866 to 1869 or 1870, and then Gaines, Berry & Co., moved their business from those two old distilleries to the new distillery, which was built on the Botts land, which has ever since been called "Old Crow" Distillery.

15. Do you know the present location of the plaintiff's distillery,

and about when it was started?

697 A. I do know it. It is about a mile of Glenn's Creek where it enters into the Kentucky river, and about 3 or 4 miles from the Oscar Pepper Distillery. This was started about 1869-70

16. Has the quality of the water, employed in the manufacturing or distilling whiskey, any effect upon the quality of the manufac-

tured product?

A. It has.

17. Has the water, employed by the several Old Crow Distilleries, been of the same origin, and what is its quality in respect to its usefulness in producing a good kind of whiskey?

A. It is all of the same origin. It is the best water obtainable for

making whiskey.

18. Did you know the firm of W. A. Gaines & Co., and what firm,

if any, did they succeed, and in what business?

A. I knew the firm of W. A. Gaines & Co. They succeeded the firm of Gaines, Berry & Co., in the distilling business at the Old Crow Distillery.

19. State, if you know, if the corporation, W. A. Gaines & Co.,

succeeded the firm of the same name?

A. Yes.

20. Is the whiskey produced at plaintiff's distillery, the same as was produced by its predecessors, as regards quality?

A. Yes.

21. How is the whiskey manufactured by the plaintiff, at its Old Crow Distillery, and which was manufactured by its predecessors at its present distillery, and at the Old Oscar Pepper Distillery known?

A. It is all known by the name of "Crow" or "Ola Crow."

22. You state that you have been in the whiskey business nearly all your life. State if you ever knew or heard of any distilleries in the State of Kentucky, or elsewhere, that has been known to the trade or to the public as the Old Crow Distillery, except the ones operated by plaintiff and its predecessors?

A. I never did.

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23. Have you ever known of any genuine whiskey to be sold on the market designated as "Old Crow" whiskey, except the product of the distilleries of plaintiff and its predecessors?

A. No, I never have.

24. Was there a time in the history of the manufacture and sale of whiskey in the State of Kentucky, if you know, when the barrels

containing whiskey were not branded or marked?

A. Yes. I think they were not branded before 1866 or 1867, when Gaines, Berry & Co., first commenced branding the whiskey. Before that whiskey was known by the name of the distiller or by the

name of the owner of the distillery.

25. Have you heard, at any time, of any objection being made or raised by any person, the Pepper heirs, or Crow heirs, or anyone else, or by any firm or corporation in Kentucky, or elsewhere, to the use by plaintiff, or its predecessors of the trade-mark or title "Crow" or "Old Crow," as a trade-mark or designation for whiskey?

Objected to by defendant as incompetent and immaterial. Objection overruled.

698 A. I never have.

26. If a package or bottle, labeled "Old Crow," containing whiskey, should be submitted to you, without your having any knowledge as to the origin of the whiskey contained in such package or bottle, and if the same were labeled or branded "Old Crow," without examining the contents, whose whiskey, or the product of what distillery would you believe such whiskey to be?

Objected to by defendant as incompetent, irrelevant and immaterial.

A. I would believe it to be Crow whiskey made by W. A. Gaines

& Co., at the Old Crow Distillery.

26. Suppose, Mr. Edwards, it was bottled whiskey and labeled "Old Crow," or "Old Crow Whiskey," but had a picture of a crow above the word- "Old Crow" and below the words "Old Crow" had these words: "This whiskey is bottled by us, and we are responsible for its purity and fine quality. E. Whyte & Co.," what would then be your conclusion as to who manufactured the whiskey, and where, and who bottled the same?

Objected to by defendant for same reason. Objection overruled.

A. I would think W. A. Gaines & Co. made the whiskey at their Old Crow Distillery in Woodford County, Ky., but that the same had

been bottled by E. Whyte & Co.

27. You have stated that Crow left the Old Oscar Pepper Distillery a year before he died, and that Mitchell ran the Oscar Pepper Distillery thereafter. Do you remember, and if so, state, what designation Oscar Pepper gave to the whiskey made at that distillery by him, after Crow left him?

A. The "Pepper" or "Old Oscar Pepper" whiskey, I think.

28. You have stated that after Oscar Pepper died, you ran the same distillery for one season. How did you designate the whiskey made by you at that place?

A. I called it the "Edwards" whiskey.

29. After Gaines, Berry & Co., ceased to lease the Oscar Pepper Distillery, who first run that distillery?

A. James Pepper, the son of Oscar Pepper.

30. What name, if any, and what brand, if any, did James Pepper use on the whiskey made by him at that distillery while he ran the same?

A. The "Old Oscar Pepper" brand.

31. Who succeeded Jas. Pepper in the ownership of that distillery?

A. Labrot & Graham.

32. How long did they own the same, up to what time, and who

succeeded Labrot & Graham.

A. The partnership of Labrot & Graham continued up until a year ago, when it was succeeded by Labrot, who bought Graham out, and that firm of Labrot & Graham, and Labrot have operated the Old Oscar Pepper Distillery and used the Old Oscar Pepper brand

since they purchased the same from James Pepper, or from Pepper and Taylor, who was probably a partner with Pepper. 699 33. Did Old Oscar Pepper, or you, when you ran the Oscar Pepper Distillery, or Jas. Pepper, or Labrot & Graham, or Labrot, or

any one ever make a claim to the right to use, or use on the product of the Oscar Pepper Distillery, the name "Crow" of "Old Crow"?

A. None of them ever used the word "Crow" or "Old Crow," or

ever claimed the right to use the same as a brand or trade-mark for their whiskey.

34. When did Jas. Crow, to whom you have referred, die?

A. The 20th of April, 1856.

THOS. S. EDWARDS.

Subscribed and sworn to before me on the day, at the place, and within the hours first aforesaid.

FANNY TURNER.

Notary Public, Woodford County, Kentucky.

1. What is your name, age, occupation, and place of residence?

A. Name George Edwards, age 79, a retired farmer, and reside in

2. Do you know the parties to this suit, or any of them? If so, which of them and how long have you known such party or parties?

A. I know the plaintiff well, but do not know defendant. 3. Have you ever been engaged in business as a distiller?

A. I was raised a distiller, from a little boy, from 1828 to 1847. and in 1848 my brother and myself run a distillery.

4. What has been your position, or rather, location and residence for the last fifty years, and what was your office or position during the greater part of that time?

A. I was a farmer and I was a justice of the peace for 20 years, from 1863 to 1882, in that precinct, and I continued to reside in the same locality until nine years ago, when I moved to Versailles. All the distilleries except the Shields Distillery were in my district.

5. How far was the Oscar Pepper Distillery from your father's residence?

A. My father lived within a mile of the Oscar Pepper Distillery from 1823 to 1838, and I lived with him. After that, he moved about three miles above, where he died. I lived with him all that time, pretty much, and I then lived in the neighborhood there until 1850, when I moved to Frankfort and was there three years. In 1852 I moved back to my old district and remained there 40 years.

6. Did you know Oscar Pepper in his life time, and what was his business; and where was he located?

A. I knew him well. He was a farmer and distiller and justice of the peace there for a number of years. I knew him all his life. He was located on Glenn's Creek on the Pepper place, the old Elijah Pepper place, which was afterwards known as the Oscar Pepper place.

That is the place where the Old Oscar Pepper Distillery was 700 on, which is now run under the name of Labrot & Graham, by Mr. Labrot. Oscar Pepper ran that distillery from the time I was a small boy, as long as he lived.

7. You state that Oscar Pepper ran the distillery during his life.

When did he die?

A. He died sometime, I think, between 1865 and 1870, pretty soon after the war.

8. Did you know one Jas. Crow, and if so, what position, if any,

did he hold in the Oscar Pepper Distillery?

A. I knew him from my early boyhood until his death, which occurred in 1856. He was a distiller in the Oscar Pepper Distillery from early in the thirties until about 1855, with the exception of 2 or 3 years, about 1838. About 1838, he was at work at Newt Henry's for 2 or 3 years.

9. Where was the Oscar Pepper Distillery then situated and where

is it now situated?

A. It was then and is now situated on Glenn's creek, on the Pepper farm: It is about 3 or 4 miles above the present Old Crow Distillery. It is now owned by Labrot, and operated under the name of Labrot & Graham.

How qualified or expert was Jas. Crow as a distiller of whiskey?
 I don't suppose he could have been surpassed in this part of

the country or anywhere.

11. State, if you know, what was the reputation of the whiskey distilled by the said Jas. Crow at said distillery?

A. It had the reputation of being superior to any that was manu-

factured. It was of the very best quality.

12. How was the whiskey, distilled by the said Jas. Crow, known?

A. It was sometimes known as the "Crow" whiskey, and sometimes "Old Crow," and sometimes it was called "Pepper." If a man bought it of Crow, he called it "Old Crow"; and if he bought it of Pepper, he called it "Pepper." Jas. Crow and Oscar Pepper divided the product of the distillery, and each sold his own share.

13. State if you knew one Wm. F. Mitchell in his life time?

A. I did, very well.

14. What was his occupation, where did he work, and under

whom, for what period?

A. He was a distiller under Jas. Crow from about 1845 to 1855. He claimed to make the same whiskey as Crow and under the same process, and to have all the secrets of the trade. He once told me that himself.

Objected to by defendant as hearsay. Objection sustained.

15. When did Crow leave Oscar Pepper's employment and when did Crow die?

A. To my best recollection he left there in the fall of 1855, and died in 1856.

16. After Crow left Oscar Pepper's Distillery, who was the distiller at that distillery until Oscar Pepper's death, and under what process was whiskey made by said distiller?

A. Wm. F. Mitchell, and he claimed to make it under the same process as Crow did. Mitchell distilled for Gaines, Berry & Co., at that distillery for several years, and afterwards at the present Old Crow Distillery.

701 17. Do you know the firm of Gaines, Berry & Co.?

A. I did know them all, well. The firm was composed of W. A. Gaines, Hiram Berry and E. H. Taylor, Jr. They were distillers of whiskey.

18. What distilleries did they operate?

A. I think the Old Pepper Distillery, for about 2 years or longer, and they also operated the one now known as the "Old Taylor" Distillery for several years, and they moved their business from those two old distilleries to their present location, which has always been called and known as the "Old Crow" Distillery.

19. Do you know the present location of the plaintiff's distillery,

and about when it was started?

A. It was started about 1869 or 1870, and is located on Glenn's Creek on the boundary line between Woodford and Franklin Counties, about a mile above the mouth of Glenn's Creek and about 3 or 4 below the Old Oscar Pepper Distillery.

20. Has the quality of the water, employed in manufacturing or distilling whiskey, any effect upon the quality of the manufactured

product?

A. It is generally supposed so, but, not being a chemist, I don't

now.

21. Has the water which has been used at the three Old Crow Distilleries, or the distilleries where Old Crow whiskey was made, been of the same origin?

Objected to by defendant as incompetent, irrelevant and immaterial.

A. I would suppose so.

22. What is its quality, in respect to producing a good kind of chiskey?

A. It is good water for that purpose, or any other purpose. Where the present Old Crow Distillery is situated is one of the finest springs to be found anywhere.

23. Did you know the firm of W. A. Gaines & Co., and what firm,

if any, did they succeed, and in what business?

A. I knew the firm and they succeeded the firm of Gaines, Berry & Co., in the distilling business at the Old Crow Distillery.

24. State, if you know, if the corporation W. A. Gaines & Co., suc-

ceeded the firm of that name?

A. That was always my understanding.

25. Is the whiskey produced at plaintiff's distillery, the Old Crow Distillery, the same as was produced by its predecessors, as regards quality?

A. I think so.

26. How is the whiskey manufactured by the plaintiff at its Old Crow Distillery and which was manufactured by its predecessors, at its present distillery and at the Old Oscar Pepper Distillery, known?

A. Known by the name of "Crow" or "Old Crow" whiskey.

27. Have you ever known or heard of any distillery or distilleries

in the State of Kentucky or elsewhere, that has been known to the trade or to the public as the "Old Crow" Distillery, except the ones operated by plaintiff, and its predecessors?

A. No, I never heard of any. No, none.

702 [27.] Have you ever known any genuine whiskey to be sold on the market designated as "Old Crow" whiskey except the product of the distilleries of plaintiff and its predecessors.

29. Was there a time in the manufacture and sale of whiskey in the State of Kentucky when the barrels containing whiskey were not branded or marked?

A. I think up to about 1861 or 1862 there was a chalk or keel mark on it, indicating the number of gallons, that was all the mark. There was no private brand put on the whiskey, until Gaines, Berry & Co., first commenced branding whiskey. Before that whiskey was known by the name of the distiller or the owner of the distillery.

30. Have you at any time ever heard of any objection being made or raised by the Pepper heirs or the Crow heirs or anyone else, or by any firm or corporation in Kentucky, or elsewhere, to the use by the plaintiff or its predecessors, of the trade mark or brand "Crow" or "Old Crow," as a trade-mark or designation for whiskey?

Objected to by defendant as incompetent, irrelevant, and immaterial. Objection overruled.

A. No, never.

31. If a package or bottle, labeled "Old Crow" and containing whiskey, should be submitted to you, without your having any knowledge as to the origin of the whiskey contained in such package, or bottle, and if the same were labeled or branded "Old Crow," without examining the contents, whose whiskey, or the product of what distillery would you believe such whiskey to be?

Objected to by defendant as incompetent, irrelevant, and immaterial. Objection overruled.

A. I would believe it to be the Old Crow whiskey, made by W. A. Gaines & Co., at the Old Crow distillery in Woodford County, Ky.

32. Suppose it was bottled whiskey and labeled "Old Crow" or "Old Crow Whiskey," and had a picture of a crow above the words "Old Crow," and below the words "Old Crow" had these words: "This whiskey is bottled by us, and we are responsible for its purity and fine quality. E. Whyte & Co.," what would then be your conclusion as to who manufactured the whiskey, and where, and who had bottled the same?

Objected to by defendant for same reason. Objection overruled.

A. My idea would be that it was manufactured by W. A. Gaines & Co., at the Old Crow Distillery, and had been bottled by E. Whyte & Co.

33. You have stated that Jas. Crow left the Old Oscar Pepper Distillery about 1855, and that Wm. F. Mitchell ran the Oscar 703
 Pepper Distillery after that. Do you remember, and if so,

will you please state, what designation Oscar Pepper gave to the whiskey, made at that distillery by him, after Crow left him, and how was such whiskey known to the trade and to the public?

A. Designated by "O. Pepper."

34. How was the whiskey made by your brother, Thos. S. Edwards, at that same place, called and known to the trade and public?

A. It was called the "Edwards" whiskey.

35. After Gaines, Berry & Co., ceased to lease the Oscar Pepper Distillery, who first ran that distillery?

A. James Pepper, who was a son of Oscar Pepper.

36. What name, if any, and what brand, if any, did Jas. Pepper use on the whiskey made by him at that distillery, while he ran the same?

A. I never saw a barrel of it.

37. Who succeeded Jas. Pepper in the ownership of that distillery?

A. Labrot & Graham, and that firm has now been succeeded by Labrot.

38. How long did Labrot & Graham own the same, and who succeeded that firm?

A. They ran the firm until about a year ago, when Mr. Labrot purchased Mr. Graham's interest, and is now running the distillery

in the same name, "Labrot & Graham."

39. Did you ever hear of Oscar Pepper, Jas. Pepper, Labrot & Graham, or Labrot, or any of the parties who ever owned the Oscar Pepper Distillery, make claim to the right to use on the product of that distillery, the name or brand "Crow" or "Old Crow?"

Objected to by defendant. Objection overruled.

A. Never in the world.

## GEORGE EDWARD.

LEOPOLD LABROT, of lawful age, being produced, sworn and examined, on the part of plaintiff, deposeth and saith:

By Attorney for Plaintiff:

Q. 1. What is your name, age, residence and occupation?

A. Leopold Labrot, I am 59 years of age, my residence is Frankfort, Ky., and I am a distiller by occupation.

Q. 2. Where is your distillery located?

A. On Glenn's creek in Woodford County, Ky., about ten miles from and about five miles up the creek from the Old Crow Distillery. My distillery is known as the Old Oscar Pepper Distillery.

Q. 3. What is the firm name in which you conduct business at that

distillery?

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A. I do business under the name of Labrot & Graham, which was the firm name under which I and my former partner conducted business. My partner was Jas. H. Graham. I bought out Mr. Graham about two years ago with the right to use the firm name in conducting the business myself.

Q. 4. Please state, if you know, who owned said distillery,

in 1865?

A. Oscar Pepper.

Q. 5. If you know, state who was in possession of and operated

said distillery from about the year 1867 to 1869 or '70?

A. Gaines, Berry & Co. I state from information that they released it for another three years but permitted it to remain idle for a time.

Objected to and excluded.

Q. 5. Who, if you know, succeeded Gaines, Berry & Co., in the use and operation of that distillery or a distillery upon the site of the Old Oscar Pepper distillery?

A. It was run in the name of Jas. E. Pepper but E. H. Taylor con-

trolled the product and had a mortgage upon the premises.

Q. 7. When Gaines, Berry & Co., operated the Old Oscar Pepper Distillery what did they call the product of said distillery and how did they brand it, if they did?

A. They called it "Old Crow" and branded it with that brand.

The essential words of the brand being "Old Crow."

Q. 8. Who first devised that brand to be put on barrels?

A. They devised that brand and were the first persons in Ken-

tucky to use a brand.

Q. 9. Did Pepper, or he and Taylor devise a brand to place on the product made at the distillery known as the Old Oscar Pepper Distillery?

A. On the site of the Old Oscar Pepper Distillery they built a new distillery and called it Old Oscar Pepper Distillery and devised a brand to place upon the product of the distillery of "Old Oscar Pep-

per Distillery.

Q. 10. By what name has that distillery been known since that brand was devised and how was the whiskey branded which was made at that distillery from the time Pepper and Taylor ran it until the present time?

A. Old Oscar Pepper.

Q. 11. Who succeeded Jas. E. Pepper in the title and ownership of said property, the Old Oscar Pepper Distillery, please give the history of the transfers of title until it came into your possession?

A. Jas. E. Pepper became a bankrupt and his assignee transferred it to E. H. Taylor Jr.'s assignee. Taylor being also a bankrupt and that assignee transferred it to Geo. T. Stagg and it was sold by Stagg to Jas. H. Graham and a few months later one undivided half was sold to me by Jas. H. Graham, and about two years ago Jas. H. Graham sold me his undivided. Stagg sold to Graham about twenty-two years ago.

Q. 12. Who operated the Old Oscar Pepper Distillery from 705—the time Jas. E. Pepper and Taylor operated it to the present

time?

A. No one except Graham and I under the firm of Labrot & Graham. The firm operated it continuously up to about two years ago and I have operated it since.

Q. 13. By what name did you call the distillery and what brand

did you use on the whiskey made at that distillery?

A. The same name, Old Oscar Pepper.

Q. 14. From about the year 1869 or '70, where have Gaines, Berry & Co., and their successors, W. A. Gaines & Co., operated a distillery, if they did operate one?

A. About five miles from Frankfort and about the same distance from the Old Oscar Pepper Distillery on the same creek, the Glenn's

creek.

Q. 15. What did Gaines, Berry & Co., and W. A. Gaines & Co., call their distillery which you say is five miles from Frankfort on the Glenn's creek?

A. Old Crow Distillery.

Q. 16. What brand, if any, did they place upon the product of that distiller from time they left the Old Oscar Pepper Distillery and moved to the new distillery to the present time?

A. Old Crow.

Q. 17. After Gaines, Berry & Co. left the Old Oscar Pepper Distillery, did Jas. E. Pepper, or your firm as his successor, ever use the name or brand of Old Crow to designate the product of the Old Oscar Pepper Distillery?

A. Never. We never claimed the right to use it and W. A. Gaines

& Co. had exclusive right to use that brand.

Objected to by plaintiff as a conclusion. Overruled as to question and last clause of answer stricken out.

Q. 18. State whether you have any general acquaintance with the whiskey trade and what is the extent of your acquaintance as to time?

A. I have been identified with the whiskey business for the last thirty years and I am acquainted with the brands of whiskey generally.

Q. 19. State, if you know, whether there is any other distillery

which has used the Old Crow brand?

A. I never heard of any.

Q. 20. If you should see upon a package of whiskey the distinctive words Old Crow, or Old Crow whiskey, unless you were informed otherwise and without examining the contents of the package, where and by whom would you suppose the whiskey so marked was made?

Objected to by defendant as irrelevant and immaterial. Overruled.

A. At the Old Crow Distillery by W. A. Gaines & Co.

706 Q. 21. If the whiskey was bottled and the picture of a crow was upon the bottle with the label below with the inscription, "Old Crow" and below this designation the words "This whiskey is bottled by us and we are responsible for its purity and fine quality. E. Whyte & Co.," where and by whom then would you suppose this whiskey was distilled and by whom bottled?

Objected to by defendant for same reason. Overruled.

A. Distilled by W. A. Gaines & Co. at their Old Crow Distillery and bottled by E. Whyte & Co.
Q. 22. Are you personally acquainted with Edmund H. Taylor, Jr., Geo. H. Allen, Wm. A. Gaines and Hiram Berry? If so, are

either of them living?

A. I knew all of them, E. H. Taylor, Jr., is living but I am informed that he is not at present in Franklin County, Geo. H. Allen is, I understand living in New York, Wm. A. Gaines and Hiram Berry are both dead.

Q. 23. Were you acquainted with the handwriting of Wm. A. Gaines, Hiram Berry, E. H. Taylor, Jr., and Geo. Allen? Have you seen these gentlemen write or corresponded with them so as to

become familiar with their handwriting?

A. I have corresponded with all those gentlemen, and am

familiar with all of their writing except Hiram Berry's.

Q. 24. Please examine a paper now shown you, dated 1st Nov., 1870, purporting to be the assignment of trade marks including Old Crow Distillery and purporting to be signed by, Wm. A. Gaines, Hiram Berry and Edmd. H. Taylor, Jr., and say in whose handwriting are said signatures, respectively?

A. I recognize the signature of William A. Gaines and Edmd. H. Taylor, Jr., as being in the handwriting of those gentlemen.

respectively.

Q. 25. I also show you a like paper of date 1st Nov., 1870, purporting to be a transfer of trade-mark including that of the Old Crow Distillery and purporting to be signed by Gaines, Berry & Co., please state in whose handwriting is that signature Gaines, Berry & Co.?

A. In the handwriting of William A. Gaines.

Q. 26. I also show you a paper purporting to be a deed from Edmd. H. Taylor, Jr., and his wife, Fanny, of date 1st Nov., 1870, and certified by Jas. G. Crockett who styles himself clerk of the County Court of Franklin County, Ky., and ask you to state in whose handwriting is the signature to said deed, Edmund H. Taylor, Jr.

A. I recognize the handwriting of Edmund H. Taylor, Jr., and the signature is in his handwriting. I am not acquainted with the

handwriting of Mrs. Fanny Taylor.

707 Q. 27. Is Mrs. Fanny J. Taylor, the then wife of E. H. Taylor, Jr., living or dead?

A. Dead.

Q. 28. I ask you, Mr. Labrot, if you have in your possession, copies of said original transfers of trade-marks and copy of said deed from Taylor and wife which you have submitted together with the originals of said papers to the notary taking this deposition for comparison and I now ask you if said copies are correct that you will file said three copies as parts of your deposition and mark them re-

spectively L. L. 1, L. L. 2, and L. L. 3?

A. I have such copies but to the copy of the deed from Taylor and wife there is also attached the certificate of N. B. Smith, the present clerk of the Franklin County Court, certifying that said copy is correctly copied from the records of his office and also a certificate signed by J. D. Moore, the presiding justice of the Franklin County Court, certifying to the official character of N. B. Smith and further certificate of N. B. Smith, said clerk certifying to the

official character of said Moore, judge. I file said copies as parts of my deposition and mark them respectively L. L. 1, L. L. 2, L. L. 3, for the purpose of identification. And further saith not.

LEOPOLD LABROT.

Pursuant to adjournment, as above stated, on the 30th day of Nov., 1901, between the hours of eight in the forenoon and six in the afternoon, at the office of D. W. Lindsey, in Frankfort, Ky., aforesaid, I continued the taking of said depositions as follows, to-wit:

J. P. Williams, of lawful age, being produced, sworn and examined on the part of the plaintiff, deposeth and saith:

## By Plaintiff's Attorney:

Q. 1. What is your name, age, residence and occupation?

A. My name is J. P. Williams, I am 44 years old, I reside in Frankfort, Ky., and I am a bookkeeper for W. A. Gaines & Co.

Q. 2. How long have you been in the employ of W. A. Gaines

& Co.

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A. I have been in the employ of the old firm of W. A. Gaines & Co. and the corporation W. A. Gaines & Co., which succeeded that firm for twenty-one years.

Q. 3. State whether the corporation you have mentioned is, or not

the same which is the plaintiff in this action?

A. Yes, sir.

Q. 4. Has said plaintiff corporation any distillery which it operated in the edge of Franklin and Woodford Counties or elsewhere?

A. It has one on the edge of Franklin & Woodford Counties known as the "Old Crow Distillery" and the Hermitage Distillery, located in the City of Frankfort.

Q. 5. How long have you known that Old Crow Distillery?

A. At least twenty-five years.

Q. 6. By what name has that distillery been called during that 25 years?

A. The Old Crow Distillery.

[Q. 27.] What brand, if any, has the plaintiff company and its predecessors in the operation of that Old Crow Distillery, used to designate the product of that distillery ever since you have known it?

A. The Old Crow brand.

Q. 8. Has there been any other distillery in your knowledge,

called the Old Crow Distillery?

A. No, sir, I never heard of any. I know from information that Gaines, Berry & Co., did make whiskey at the Old Oscar Pepper Distillery and branded it with the Old Crow brand. This brand was devised by them.

Objected to by defendant as hearsay and last two sentences excluded.

Q. 9. Did you know the members of the firm of Gaines, Berry &

Co., that is, Wm. A. Gaines, Hiram Berry and Edmd. H. Taylor. Jr.?

A. I never knew Mr. Gaines, I knew Mr. Berry and know Mr. Mr. Gaines and Mr. Berry are both dead. Mr. Taylor is understood to be absent from the city and in Chicago.

Q. 10. Did you ever see Hiram Berry or E. H. Taylor, Jr., write and sign their respective names?

A. Yes, sir.

Q. 11. Are you acquainted with the handwriting of those two gentlemen?

A. I am.

Q. 12. Please examine the paper now shown you dated 1st Nov., 1870, purporting to be the assignment of trade-mark, including the Old Crow trade-marks and brands and purporting to be signed by Wm. A. Gaines, Hiram Berry and Edmd. H. Taylor, Jr., and say, if you know, in whose handwriting are the signatures, the last two to said paper?

A. The signature, Hiram Berry, is his signature and is in his handwriting, the signature, Edmd. H. Taylor, Jr., is also his signature and in his handwriting, while I have never seen Mr. Gaines write, I have seen a number of papers written by him and signed by him and from information derived in that way I can say that the signature of Wm. A. Gaines to said paper, is in his handwriting.

Q. 13. I also show you a like paper of date 1st Nov., 1870, purporting to be a transfer of trade-marks, including that trade-mark and brand of Old Crow and purporting to be signed with the firm name of Gaines, Berry & Co., and state, if you know, who signed said firm name and whose hand-writing the sig-

nature is?

A. From information derived as above stated, I say it is in the

handwriting of W. A. Gaines.

Q. 14. I also show you a paper purporting to be a deed from Edmd. H. Taylor, Jr., and wife, Fanny J. Taylor, of date 1st day of Nov., 1870, purporting to be signed by said Taylor and wife and certified by Jas. G. Crockett, cierk of the Franklin County Court, to have been acknowledged by them, and say if you know, in whose handwriting the signature Edmund H. Taylor, Jr., is appended to said deed and whose signature it is?

A. The handwriting is that of Edmund H. Taylor, Jr., and it is

in his handwriting.

Q. 15. State, if you know, if Mrs. Fanny J. Taylor, the then wife of Edmd. H. Taylor, Jr., is living or dead?

1. She is dead.

Q. 16. I call your attention to three exhibits filed with the deposition of Mr. Labrot marked respectively, L. L. 1, L. L. 2, and L. L. 3; please compare the same with the two assignments of trade-marks and the deed above mentioned and say whether or not they are true copies of the two assignments and deed spoken of by you above?

A. Yes, they are true copies except that the copy of the deed has also appended to it three other certificates, two signed by N. B. Smith, the present county clerk of Franklin County, Ky., and one by J. D. Moore, the presiding judge of Franklin County Court.

Q. 17. Please refer to said copies so filed as exhibits with Mr. Labrot's deposition and make them parts of your deposition?

A. I refer to those copies and make them parts of my deposition.

And further saith not.

J. P. WILLIAMS.

W. H. Averill, being also produced, sworn and examined on the part of the plaintiff, at the same place, on the same date and between the hours aforesaid, deposeth and saith:

By Attorney for Plaintiff:

Q. 1. What is your name, age, residence and occupation?

A. My name is W. H. Averill, I am 69 years of age, I reside in Frankfort, Ky., and I am a druggist.

Q. 2. How long have you been in the drug business?

A. Forty-nine years.

Q. 3. Have you in connection with the sale of drugs sold any spirits by the barrel or bottle?

710 A. Yes, by bottle and at retail in quantities taken by me

from the barrel.

Q. 4. Were you acquainted with the firm of Gaines. Berry & Co.. composed of William A. Gaines, Hiram Berry, and Edmd. H. Taylor, Jr.?

A. Yes, I knew the firm and each member thereof.

Q. 5. What business was that firm engaged in, if you know, in Woodford County and in the edge of Woodford and Franklin Coun-

A. In the manufacture of whiskey, or distilling of whiskey.

Q. 6. Where did they first distill whiskey? A. At the Old Oscar Pepper Distillery.

Q. 7. Do you know what brand or trade-mark, if any, their product at the Old Oscar Pepper Distillery was marked or branded? A. Old Crow.

Q. 8. Who devised that brand, if you know? A. The above named firm, Gaines, Berry & Co.

Q. 9. Did said firm move their business of distilling whiskey from the Old Oscar Pepper Distillery to any other place, if so, where?

- A. Yes, lower down on Glenn's creek, where they built their new distillery. They called it the Old Crow Distillery. It still retains that name.
  - Q. 10. Who succeeded the firm of Gaines, Berry & Co.? A. W. A. Gaines & Co.

Q. 11. What, if any, firm or corporation succeeded W. A. Gaines & Co., in the operation of the Old Crow Distillery?

A. The corporation of W. A. Gaines & Co., the plaintiff in this

action.

Q. 12. By what brand has the plaintiff and its predecessors, W. A. Gaines & Co., and their predecessor, Gaines, Berry & Co., branded and labeled all their whiskey distilled by them at the Oscar Pepper Distillery and the present Old Crow Distillery during the past 30 or 35 years?

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A. "Old Crow."

Q. 13. By what name was the product of the Oscar Pepper Distillery known prior to the time that Gaines, Berry & Co., began making whiskey at that distillery?

A. "Old Oscar Pepper."

Q. 14. Was the whiskey then branded Old Oscar Pepper?

A. No brand was given, but it was known in the market as that make, that was before the day of trade-marks and brands in whiskey, as attached to packages and barrels of whiskey, according to by best recollection.

Q. 15. Since Gaines, Berry & Co., devised the brand of Old Crow, who, if anybody, besides the plaintiff and its predecessors have had any distillery which they denominated Old Crow Distillery?

A. None within my knowledge.

711 • Q. 16. Have you known of any brand of whiskey, Old Crow, other than that of the plaintiff and its predecessors above mentioned?

A. None until this litigation arose, and then only infringing

brands.

Q. 17. Were you personally acquainted with William A. Gaines, Hiram Berry and Edund. H. Taylor, Jr., the members of the firm of Gaines, Berry & Co., and were you or not personally acquainted with them all.

A. Yes, sir; I was acquainted with them all.

Q. 18. Did you ever see those gentlemen, or any of them, write and sign their names? Are you or not acquainted with the hand-

writing of each of said gentlemen?

A. Yes, I have seen all of them write and sign their names; yes, I am acquainted with the handwriting of each of said gentlemen. William A. Gaines, Hiram Berry and Thos. S. Page are dead; Edmd. H. Taylor is still living.

Q. 19. Please examine the paper now shown you date-1st Nov., 1870, purporting to be an assignment of trade-marks and brands including that of the Old Crow and purporting to be signed by William A. Gaines, Hiram Berry and Edmd. H. Taylor, Jr., and say if you know in whose handwriting are each of said signatures to said paper, and whose signatures they respectively are?

A. I recognize the signature- of William A. Gaines, Hiram Berry, and Edmd. H. Taylor, Jr., as being in the handwriting of those

gentlemen respectively, and they are their signatures.

Q. 20. I also show you a like paper of date 1st Nov., 1870, purporting to be the transfer of trademarks and brands, including the trademark and brand of Old Crow and purporting to be signed with the firm name of Gaines, Berry & Co., and to be witnessed or tested by Thos. S. Page, and say if you know in whose handwriting the said firm signature — the said paper is, and in whose handwriting is the attesting witness?

A. Yes, I recognize the firm signature of Gaines, Berry & Co., as being in the handwriting of W. A. Gaines, and the attest Thos. S. Page as being in said Page's handwriting, who was bookkeeper of

the firm at that time.

Q. 21. I also show you a paper purporting to be a deed from Edmd. H. Taylor, Jr., and Fanny J. Taylor, his wife, to Sherman Parris, Marshall J. Allen and Frank S. Stevens, of date 1st day of Nov., 1870, and purporting to be signed by said Taylor and wife and certified by Jas. G. Crockett, the then clerk of the Franklin County Court, to have been acknowledged by them, and say if you know in whose handwriting the signature to said deed Edmd. H. Taylor, Jr., is?

A. I recognize the signature to be in the handwriting of Edmd. H. Taylor, Jr. 1 am not acquainted with the hand-writing of Mrs. Fanny Taylor. She died some time ago.

Q. 22. I call you- attention to three exhibits filed with the deposition of Mr. L. Labrot, marked respectively L. L. 1, L. L. 2 and L. L. 3; please compare the said three papers respectively with the assignments of trade marks and brands and the deed above mentioned and say whether or not they are respectively copies of said

assignments and deed spoken of by you above?

A. I have examined the said copies exhibited with the deposition of L. Labrot and find them true and correct copies of said two transfers and deed respectively, but to the said deed as copied from the record of the County Clerk's office with the certificate of Jas. G. Crockett, then Clerk of the Franklin County Court, there is also appended two certificates, signed by N. B. Smith, the present Clerk of Franklin County, and one certificate signed by J. D. Moore, presiding justice of the Franklin County Court. And I have submitted said copies and the originals to Mr. G. H. Briggs, the notary public taking this deposition, who also finds the copies to be correct as stated above.

Q. 23. Please refer to said copies above filed with Labrot's deposition and make the same part of your deposition marked as aforesaid.

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A. I refer to the three copies above mentioned filed with Labrot's deposition and make them parts of this, my deposition. And further saith not.

W. H. AVERILL.

Gaines, Berry & Co., composed of W. A. Gaines, Hiram Berry and Emd. H. Taylor, Jr., for valuable consideration paid them and in connection with the sale of their interest in the Crow Distillery property, do hereby sell, transfer and deliver to W. A. Gaines & Co., composed of the said W. A. Gaines, H. Berry, Emd. H. Taylor, Jr., Sherman Paris, Marshall J. Allen and Frank S. Stevens, all the trade marks and brands which have been used by Gaines, Berry & Co., in connection with their distilling and selling of iquors, one reading as follows:

"Old Crow Distillery-Copper Distilled Whiskey-W. A. Gaines,

Distiller, late Oscar Pepper, Woodford County, Kentucky."

Another with all of the same words except "Late Oscar Pepper" with any other brands or trade marks particularly those having the words "Old Crow" thereon. And all the right to use the same,

warranting the title and right thereto to said W. A. Gaines & Co., forever.

713 In witness the members of Gaines, Berry & Co. hereto set their names the 1st of November, 1870.

WILLIAM A. GAINES.

WILLIAM A. GAINES. HIRAM BERRY. EDMD. H. TAYLOR, Jr.

Filed as exhibit in deposition of L. Labrot and referred to and made parts of the depositions of said Labrot, J. P. Williams and W. H. Averill.

[SEAL.]

GUY H. BRIGGS, Notary Public, Franklin Co., Ky.

Gaines, Berry & Co., composed of W. A. Gaines, Hiram Berry and Edm. H. Taylor, Jr., for valuable consideration paid them, and in connection with the sale of their interest in the Crow Distillery property, do hereby sell, transfer and deliver to W. A. Gaines & Co., composed of W. A. Gaines, H. Berry, Edmd. H. Taylor, Jr., Sherman Paris, Marshall J. Allen and Frank S. Stevens all the trade marks which have been used by Gaines, Berry & Co., in connection with their distilling, one reading "Old Crow Distillery, Copper Distilled Whiskey—W. A. Gaines, Distiller—Late Oscar Pepper Woodford County, Kentucky. Another with all of the same words except Late Oscar Pepper—with all other brands or trade marks having the words "Old Crow" on them. And all the right to use the same, warranting the title and right thereto to said W. A. Gaines & Co., forever.

In witness the said Gaines, Berry & Co. hereto set their hands the 1st of November, 1870.

GAINES, BERRY & CO.

Test:

THOMAS S. PAGE.

Filed as an exhibit in deposition of L. Labrot and referred to and made parts of depositions of said Labrot, J. P. Williams and W. H. Averill.

SEAL.

GUY H. BRIGGS, Notary Public, Franklin Co., Ky.

Edmund H. Taylor, Jr., of Frankfort, Kentucky, for and in consideration of the sum of Thirty-Three Thousand Nine Hundred and Thirteen Dollars and Fifteen Cents, in hand paid, the receipt whereof is hereby acknowledged, hath granted, bargained, sold and conveyed, and by these presents doth grant, bargain, sell and convey unto Sherman Paris, Marshall J. Allen and Frank S. Stevens, of the City of New York, all of his, the said Taylor's interest, being an undivided sixth part of, in and to all the property, real, personal and mixed and [do] all choses in action of other 714 means belonging to the firm of W. A. Gaines & Co., wherever situated, being the property in South Frankfort, known and

called the Hermitage Distillery, with all its appurtenances, fixtures, machinery and personal property belonging thereto, or used in connection therewith; also the property partly in Woodford and partly in Franklin Counties, Kentucky, on which is the distillery known as the Old Crow Distillery. Also the lease made by Mrs. Nannie Pepper, guardian of O'Bannon Pepper, in and to the distillery property in Woodford County, known as the Oscar Pepper Distillery, with all privileges given in said lease. Also in fifty acres of land in Jefferson County, Kentucky, bought of James B. Lyne, sole executor of Catherine W. Johnson, deceased, and conveyed by and to W. A. Gaines in trust for the firm of W. A. Gaines & Co. Also of, in and to all horses, mules, wagons and grains in fine, in and to all property or rights of property owned by said W. A. Gaines & Co., or held by said W. A. Gaines in trust for said company, and in and to all whisky wherever situated to which they have claim, and in and to all trade marks and brands which have been used by said W. A. Gaines & Co., and also in and to all trade marks and brands which belonged to or have been used by Gaines, Berry & Co., particularly those having the words "Old Crow" thereon, together with the good will of said Taylor in and about the distillery and vending of liquors made at said distilleries by W. A. Gaines & Co., or any firm which may be formed with said Paris, Allen and Stevens, all or either of them therein, to carry on and conduct said business; to have and to hold the interest aforesaid in the property, real, personal and mixed, and choses in action and accounts due said W. A. Gaines & Co., and all the rights of said Taylor therein, to said Paris, Allen and Stevens, and to their heirs and assigns forever.

And said Taylor hereby warrants the interests so as aforesaid

conveyed by him.

In witness whereof said Edmund H. Taylor, Jr., and his wife, Fanny J. Taylor, who hereby relinquishes any right of dower she may have in the premises above herein conveyed to said Paris, Allen and Stevens, hereto set their hands and seals the 1st day of November, 1870.

Signed, seal- and delivered in the presence of

[SEAL.]

EDMUND H. TAYLOR, JR. FANNY J. TAYLOR

STATE OF KENTUCKY, Franklin County, set:

I, James G. Crockett, Clerk of the County Court of the
County aforesaid, do certify that this Deed of Conveyance
from Edmund H. Taylor, Jr., and Fanny J. Taylor to Sherman Paris, Marshall J. Allen and Frank Stevens, was on the 2nd
day of November, 1870, produced to me in my office, duly [stamper,]
according to Act of Congress, and acknowledged by the said Edmund
H. Taylor, Jr., and Fanny J. Taylor, to be their act and deed and
the same with this certificate have been truly recorded in my office.

Given under my hand this 4th day of November, 1870.

Attest:

JAS. G. CROCKETT, Court Clerk.

STATE OF KENTUCKY, Franklin County, sct:

I, W. B. Smith, Clerk of the County Court in and for the County of Franklin and State of Kentucky, and as such the custodian of the recorded seal and books of said Court and of the Court books containing the records of conveyances and other instruments affecting leases in Franklin County, Kentucky, do hereby certify that the foregoing is a true and correct copy of a deed from Edmund H. Taylor, Jr., and Fanny J. Taylor his wife to Sherman Paris, Marshall J. Allen and Frank S. Stevens, as the same appeared of record in my office, — Court for the County of Franklin, Kentucky, and State of Kentucky.

Given under my hand as clerk of the County Court for the County and State aforesaid, with the seal of said office annexed this, the 29th

day of November, A. D. 1870.

[SEAL.]

N. B. SMITH, Clerk Franklin County Court.

STATE OF KENTUCKY, Franklin County, sct:

I, John D. Moore, presiding justice of the County Court for the County of Franklin, and State of Kentucky, hereby certify that N. B. Smith, whose signature is attached to the foregoing certificate as clerk of said Court, was, at the date of such certificate, and yet is, the duly elected, qualified and acting clerk of said Court, and that the said certificate is in due form and made by the proper officer.

Given under my hand as presiding justice as aforesaid this, the

29th day of November, A. D. 1901.

J. D. MOORE, Presiding Justice Franklin County Court.

716 STATE OF KENTUCKY, Franklin County, set:

I, N. B. Smith, Clerk of the County Court of Franklin County, State of Kentucky, hereby certify that Honorable John D. Moore, Whose signature as presiding justice is affixed to the foregoing certificate, was, at the time said certificate was signed, and still is the presiding justice of the County Court of Franklin County, Kentucky, and that he then was and now is duly commissioned and qualified as such officer.

Given under my hand and seal of said Court this, the 29th day of November, A. D. 1901.

SEAL.

N. B. SMITH, Clerk Franklin County Court.

Filed with deposition of L. L. Labrot and referred to and made parts of the depositions of said Labrot, J. P. Williams and W. H. Averill.

SEAL.

GUY H. BRIGGS. Notary Public, Franklin Co., Ky.

Plaintiff read in evidence depositions taken in the city of Frankfort, Kentucky, on the 14th day of May, 1901, of John C. Mastin, Joshua R. Shaw, Van Johnson, C. C. Furr, which are in words and figures as follows, to-wit:

Depositions of witness-, produced, sworn and examined, on the 14th day of May in the year of our Lord, 1901, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, at the law office of D. W. Lindsey in the city of Frankfort in the County of Franklin and State of Kentucky, before me, T. N. Lindsey, a Notary Public in and for said county and state, in a certain cause now pending in the Circuit Court of Jackson County, at Kansas City, in the State of Missouri, between W. A. Gaines & Co., plaintiff, and E. Whyte Grocery, Fruit and Wine Company, defendant, on the part of the defendant.

D. W. Lindsey, attorney, appeared for the plaintiff. B. G. Williams, attorney, appeared for defendant.

J. C. Mastin, of lawful age, being produced, sworn and examined, on the part of the plaintiff, deposeth and saith:

Direct examination.

By D. W. Lindsey:

Q. 1. What is your name, occupation and place of residence?

A. My name is John C. Mastin; I am a merchant and live in Frankfort, Kentucky.

Q. 2. What connection or relation, if any, were you to John W. Mastin, and is the said John W. Mastin living or dead?

A. He was my father and is dead.

Q. 3. Where did you reside during the years 1866, 1867

and 1868 and 1869?

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A. In 1868, I resided in Franklin county on the farm owned by John R. Scott, known as the Joel Scott farm. In 1867 we moved to the farm that was owned then by the heirs of Oscar Pepper, deceased; in 1867, 1868 and 1869 we lived there.

Q. 4. You say that you lived upon the farm that was owned by the heirs of Oscar Pepper, deceased, in 1867—please state as near as you can the date that you moved on to that place and whether or not it was under a lease from the heirs of Oscar Pepper and for what number of years the lease ran and who the lease was to?

A. We moved there on January 1st, 1867, as far as I recollect; we leased the farm from Mrs. Nannie Pepper and R. P. Pepper, guardians of the children and the lease was for three years.

lease was to J. W. and R. H. Mastin.

Q. 5. Please state whether or not there was a distillery on those premises at that time?

A. There was.

Q. 6. Was that distillery operated during the years 1867, 1868 and 1869; if so, state by what firm or persons it was operated and when they commenced operating the distillery?

A. It was—it was operated by the firm of Gaines, Berry & Co. they commenced operating the distillery a short while after we

moved there.

Q. 7. Who constituted the firm of Gaines, Berry & Co., when they commenced business as distillers?

A. W. A. Gaines, Hiram Berry, E. H. Taylor, Jr., and my father, J. W. Mastin.

Q. 8. How long did your father remain connected with the company?

A. Only a short while.

Q. 9. Were you acquainted, either personally or by reputation, with one James Crow, who is said to have been the distiller at the Old Oscar Pepper distillery you have been speaking about some time prior to 1867.

A. I only knew him by reputation.

Q. 10. If you know, please state what his reputation was as a distiller of whiskey and the reputation of the whiskey made by him?

A. I have always heard it spoken of as being the best.

Q. 11. Please state, if you know, by what trade name Gaines. Berry & Co., and the public generally called the whiskey made by them at that distillery?

A. It was branded on the barrels as Old Crow,

Q. 12. Did they call it by any name? A. None other than Old Crow.

718 Q. 13. Who was the distiller for Gaines, Berry & Co., when they commenced operating this distillery and while they operated it, if you know?

A. William Mitchell.

Q. 14. If you know, state by whom said Mitchell was taught or claimed to have been taught the art or business of distilling?

Objected to so far as the witness is required to answer what Mitchell may have claimed as to who taught him the art of making whiskey.

A. I always heard that he learned his trade from James Crow.

Sustained as to what he claimed.

Q. 15. What was the character of whiskey that was produced at that distillery by Gaines, Berry & Co., and which you have stated they labeled Old Crow?

A. It had the reputation of being the very best hand-made sour

mash copper distilled.

Q. 16. What was the character of the water-what kind of water was used at that distillery in making whiskey?

A. It was lime stone, spring water-my recollection is they

laimed that the quality of whiskey was due to the character of the pring.

Q. 17. Did the firm of Gaines, Berry & Co. operate any other disilleries, if so, what distilleries were they, and where were they

ocated?

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A. They operated a distillery known now as the Old Taylor disillery during those years, I don't know how long it was, some time fter they began operating the Oscar Pepper distillery, which was peated on Glenns creek about three miles below the Oscar Pepper istillery—it is about two and a half miles below, I think.

Q. 17. Did they acquire any distillery or erect any other?

A. I think in 1870 they built the present Old Crow distillery. Q. 18. If you know, from whom did they acquire the land upon thich they erected the present Old Crow distillery?

Excepted to because the records will show. Sustained.

A. Dr. Botts—I don't know his first name.

Q. 19. How far is this last named distillery or the present Old row distillery from the Oscar Pepper distillery or the distillery at which Gaines, Berry & Co. first commenced business?

A. About four miles.

Q. 20. What creek, if any, are these distillers situated upon?

A. Glenn's creek.

Q. 21. What is the character of the water used [as] each of them nd how does the supply at the present Old Crow compare with the

apply at the others?

A. It is the same character of water at all of them—my recollecon is that they had the water analyzed at the Oscar Pepper disllery and at the present Old Crow distillery and it is identical. The olume of the water at the present Old Crow distillery is very much

reater than it is at the Oscar Pepper distillery.
Q. 22. After Gaines, Berry & Co. erected the present Old Crow istillery, as you have stated, did they continue to operate the disllery on the Oscar Pepper farm and the Old Taylor distillery or

ither of them?

A. They did not.

Q. 23. What became of those two distilleries, were they operated y any one during the next few years?

A. The Oscar Pepper distillery was not for the next three years-

don't recollect about the other one.

Q. 24. Who was the distiller for Gaines, Berry & Co. at the present old Crow distillery, which you say was erected by them?

A. William Mitchell—I don't know how long he was with them

ut he began making whiskey for them at the new distillery.

Q. 25. What was the character of the whisky produced by aines, Berry & Co., at this new distillery-what did they call the ew distillery and with what brand or trade mark did they brand its roduct?

A. The same character as that made at the Oscar Pepper dis-

tillery—they called the new distillery Old Crow distillery and they branded its product Old Crow.

Q. 26. After Gaines, Berry & Co. ceased to lease and control the old Oscar Pepper distillery, who acquired that property and who now own and operate it?

A. Labrot & Graham—I think possibly James Pepper had some thing to do with it after that, before Labrot & Graham bought it.

Q. 27. How long have Labrot & Graham owned and operated that property?

A. I should say fifteen years, possibly a little longer.

Q. 28. By what name have those who have owned and operated that distillery on the old Oscar Pepper farm known and designated it since Gaines, Berry & Co. left there?

A. Oscar Pepper whisky.

Q. 29. What have they called the distillery?

720 A. The Old Oscar Pepper distillery.

Q. 30. By what name have those who have owned and operated the distillery, which you have called the Old Taylor distillery, known and called it since Gaines, Berry & Co. ceased operating it?

A. The Old Taylor Distillery.

Q. 31. By what name and trade-mark have Gaines, Berry & Co. and their successors, named and branded the product of the distillery erected by them and called the Old Crow distillery as you say since its erection?

A. Old Crow.

Q. 32. If you know, state by whom the firm of Gaines, Berry & Co. was succeeded in the ownership and operation of this Old Crowdistillery last spoken of?

A. By W. A. Gaines & Co.

Q. 33. Was the W. A. Gaines & Co., who succeed the Gaines Berry & Co., a firm or a corporation?

A A firm

Q. 34. And by whom was that firm of W. A. Gaines & Co. succeeded in the ownership, and operation of that distillery and who is now the owner and operator thereof?

A. By W. A. Gaines & Co., a corporation.

Q. 35. Have you ever heard of any one other than Gaines, Berry & Co., and its successors, the firm of W. A. Gaines & Co., and it successor, the corporation, W. A. Gaines & Co., using the brand of trade name, Crow or Old Crow, as a name or trade-mark for whisky

A I have not

Q. 36. Have you ever heard their right to that trade-mark and trade name questioned by any of the owners of the Old Oscar Peppe distillery or the Old Taylor distillery or any one else?

Defendant excepts to this question and the preceding question and answer because incompetent.

Overruled.

A. No, sir. I have not.

Q. 37. Have you ever heard of any objection or adverse claim

having been made or asserted by any person, firm or corporation to the use, by the corporation W. A. Gaines & Co., or any of its predecessors, of the title Crow, or the title Old Crow, either as a name or brand or designation for whisky?

Objected to because incompetent.

Overruled.

A. I have not.

Q. 38. To what extent are you acquainted with the manufacture and sale of Kentucky whiskeys?

A. I don't know how to answer that—I have seen it manufactured

and I know they sell it in barrels and bottles.

721 Q. 39. What has been the character of the whisky produced by the firm of W. A. Gaines & Co., successors of Gaines, Berry & Co., and the corporation, W. A. Gaines & Co., produced at the Old Crow distillery?

Objected to because the question has already been asked and answered.

A. It has always been considered the best.

Q. 40. Have you acquaintance with the brands generally under which distillers in this section of Kentucky designate their product?

A. Yes, sir.

Q. 41. Have you been acquainted with and met from time to time the persons who have owned the distilleries in this section of Kentucky, and particularly with the owners and operators of the Old Oscar Pepper Distillery and Old Taylor Distillery?

A. I have.

Q. 42. If you saw a package or bottle containing whisky which was branded or labeled with the title or brand, Old Crow, without examining its contents, of what distillation or manufacture would you believe the contents of such package or bottle to be?

Excepted to because incompetent.

[Q. 43.] I would believe it to be Old Crow whisky, manufactured

by W. A. Gaines & Co.

Q. 44. If you know, state whether James Crow, the person whose reputation you have spoken of heretofore in this deposition, is living or dead, and if dead, state when he died and whether it was subsequent or previous to 1867 when Gaines, Berry & Co., commenced operating the Oscar Pepper Distillery?

A. My information was that he had been dead about from five

to ten years prior to 1867.

Cross-examination.

By B. G. Williams, attorney for defendant:

X Q. 1. In what year were you born? A. 1853. The 9th day of August, 1853.

X Q. 2. At the time W. A. Gaines & Co., began the operation of the original Old Crow Distillery of which you have spoken, you were then only 13 years of age. I mean Gaines, Berry & Co.? A. I was in my fourteenth year.

X Q. 3. How long did Gaines, Berry & Co. operate the Old Os Pepper Distillery, known at that time as the Old Crow Distillery?

A. My recollection was three years.

722 X Q. 4. How far is the site of that distillery from the present distillery owned by W. A. Gaines & Co., and what they have denominated the Old Crow Distillery?

A. About four miles.

X Q. 5. The water employed by the original Old Crow Distilland that employed at the one which is at present operated by W. Gaines & Co. are from separate springs, are they not, and four meant?

A. Yes, sir.

X Q. 6. You spoke of the Old Oscar Pepper Distillery, the Carlon Distillery and the W. A. Gaines & Co. distillery called Old Crow, as all being upon Glenn's creek, they do not receive the supplies of water from that creek, do they?

A. I think not.

X Q. 7. And the quality of the whisky is not affected by the f that they are all located upon that creek, is it?

A. Except that is all a limestone country and I should think

character of the water would be pretty much the same?

X Q. 8. You speak of being a merchant in Frankfort, Kentuc I omitted to ask you what line of merchandise you carry?

A. Farming implements principally.

X Q. 9. Have you ever been in the whisky business in any whatsoever?

A. I have not.

X Q. 10. Have you had any reason to investigate the comparate excellencies of Kentucky whiskies?

A. I have not.

X Q. 11. You know nothing about the comparative values on market of the various Kentucky whiskies, do you?

A. I know that W. A. Gaines & Co. get for their product as h a price as any producers in Kentucky.

X Q. 12. How do you know that?

A. I have been told so by various whisky men.

X Q. 14. During the time that the firm of Gaines, Berry & operated under lease the original Old Crow Distillery, was JacCrow at that time living?

A. He was not.

X Q. 15. Did Gaines, Berry & Co. or their successors, W. A. Gai & Co., incorporated, ever at any time have James Crow in their ploy?

A. They did not.

Q. 16. Was James Crow ever, at any time, employed at any of distilleries which they now own?

A. He was not.

X Q. 17. You speak of W. F. Mitchell as having been the disti for Gaines, Berry & Co., and that you understood that he had lear the formula from James Crow personally, do you know anything about the truth of that?

A. Well, only as a matter of history. X Q. 18. You mean by that rumor?

Yes, sir.

X Q. 19. Do you not know that Old Oscar Pepper used on his whisky the symbol, Old Crow?

A. I do not.

723 X Q. 20. Do you say that he did not?

A. I say I don't know.

X Q. 21. So far as your recollection and present information is, you only know one Old Crow, that is the W. A. Gaines & Co. brand?

A. That is all.

X Q. 22. But you are not prepared to say that at a different distillery, four miles from theirs and by a different firm the same brand or symbol Old Crow was used?

A. I am prepared to say that if it was, I did not see it. X Q. 23. Were you there or thereabouts at the time the distillery operated by Oscar Pepper was being used?

A. I was not.

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X Q. 24. My understanding from your answer to question 16, is that the spring water at the original Old Crow and at the Old Taylor and at the present W. A. Gaines & Co. Old Crow is practically of the same quality and that the whisky made from the same formula would be alike, is that true?

A. My recollection is that the quality of the water of the original Old Crow and the Old Crow [not] operated by W. A. Gaines & Co., is similar, both being very cold, limestone water. I never heard anything said about the character of the water at the old Taylor.

X Q. 25. Who now owns, and who for the past fifteen or twenty

years, has owned the original Old Crow Distillery?

A. Labrot & Graham.

X Q. 26. And W. A. Gaines & Co., or their predecessors never did own that distillery but only leased it during a period of about three years?

A. My recollection is that they leased it for three years and then leased it for three more years, but did not run it the last three

X Q. 27. And it has been over thirty years since they had anything to do with the original Old Crow Distillery?

A. No, about twenty-seven.

X Q. 28. You don't know anything about how W. A. Gaines & Co., or Gaines, Berry & Co. came to adopt the name Old Crow, after they left the distillery at which James Crow, the man who had made the name valuable, operated?

A. They had established a trade on that brand of whisky and I

guess, did not desire to give it up.

X Q. 29. You mean by that, that after Crow's death, merely by being at the distillery which he operated, they had established a trade on the name Old Crow and carried it away with them?

A. I see no reason why they could not have made just as

724 good whiskey as Crow did for they had the plant, the same water and a man who had evidently learned from Crow.

X Q. 30. That was Mitchell that you refer to?

A. Yes, sir.

X Q. 31. And it was rumored that he had learned under Crow?

A. I never heard it disputed.

X Q. 32. Mitchell's name was never used, was it?

A. It was not.

X Q. 33. What I desire to ask you is did they not undertake to adopt and appropriate the use and value of the reputation of James Crow merely from the fact that at one period of three years' time they were the leasees of a distillery at which James Crow had at one time worked?

A. I don't know their intention.

X Q. 34. Whether you know their intention or not, that is a fact, is it not?

A. I know that they branded their product at the Old Oscar Pepper distillery, which was known as Old Crow whisky, and that they retain that brand now.

X Q. 35. Do you not know that their predecessors had done the same thing?

A. I do not.

X Q. 36. Counsel for plaintiff asked for questions 35 and 36, if you ever heard the right of W. A. Gaines & Co. to use that trade mark questioned and you say, I have not, you mean by that, you do not, that you simply heard no discussion about it, and do not know whether the right is disputed or conceded?

A. I think it is conceded, never having heard it disputed. I

think I would have heard it if it had been discussed.

X Q. 37. Then you never heard it discussed?

A. No

X Q. 38. You say that if you saw a package or bottle of whiskey, which was branded with the title Old Crow, that without examining the contents that you would conclude that it was manufactured by W. A. Gaines & Co.? Will you please describe what the label contains—I mean the label made by W. A. Gaines & Co.—both as to lettering and symbols?

A. I think it contains a lithograph of the plant of the distillery branded Old Crow whiskey bourbon or rye—they have two kinds

of whiskey-manufactured by W. A. Gaines & Co.

X Q. 39. Do you mean by that, that the label contains W. A. Gaines & Co.?

A. Yes, sir.

X Q. 40. Does it also have on the label the picture or symbol of a crow?

A. It does not.

X Q. 41. Then if you found a bottle or package of whiskey which did not have the lithograph picture of the plant and yet was marked Old Crow, you would not believe it was manufactured by W. A. Gaines & Co. would you?

A. I might conclude that it was W. A. Gaines & Co.'s whiskey

sold in barrels and bottled by some one else-that would 725 not be conclusive to my mind, especially if it was a reputable concern that had it for they might want to advertise their

own brand.

X Q. 42. Suppose you found a package that had neither the lithograph picture nor the name of the manufacturers, W. A. Gaines & Co., and yet was marked Old Crow, would you conclude that was W. A. Gaines & Co.'s whiskey?

A. I would if I considered the name on it as reputable—the name

of the concern who were selling it.

X Q. 43. You say you know their label and brand and that they do not use the symbol or picture of a crow, suppose you found this picture of a crow and the word- Old Crow and yet found neither the name of the manufacturer nor the lithograph picture of the plant, where the only Old Crow known to you is manufactured would you conclude that that was W. A. Gaines & Co.'s whiskey?

A. I would if I considered the party who bottled it or branded it

as reputable.

XQ. 44. In answer to question 40, you say that you have an acquaintance with the brands generally under which distillers in this section of Kentucky designate their product, is it not uniformly the custom that the genuine product of each of these distilleries has a label upon it which designates the name of the manufacturer and the place at which it is manufactured?

A. They have.

X Q. 45. How is it then that you would conclude merely from the word- Old Crow that the article was genuine when you know that W. A. Gaines & Co. uniformly place on all articles produced from their plant a lithograph of this distillery and the name of the firm and place where manufactured?

A. Well, my knowledge is that they sell a great deal of barrel goods—that is, the distilleries do, and it is bottled by other parties.

X Q. 46. But if there is any value in the name or if the name would recommend the goods, who ever bottled it would be entitled to use and would use the name of Old Crow manufactured by W. A. Gaines & Co., would they not?

Objected to as argumentative.

A. I am not prepared to answer that. I don't know whether they would have the right to use it or not.

Re-examined.

By D. W. Lindsey, attorney for plaintiff:

Q. 1. In one of your answers on cross-examination, you were asked as to your age on the first of January, 1867, when Gaines, Berry & Co. commenced operating the Oscar Pepper Distil-726

I now ask you if you were employed by that firm at that distillery while they were operating the same in 1867?

A. I did some job work for them—I shelled some corn for them and occasionally ran the mill for them. J. C. MASTIN.

Witness fee for attendance \$1.

Subscribed and sworn to before me, on the day, at the place, and within the hours first aforesaid.

SEAL.

J. N. LINDSEY, Notary Public, Franklin Co., Ky.

My commission expires January 19th, 1902.

Also the deposition of J. R. Shaw, who being of lawful age, produced, sworn and examined on the part of the plaintiff, deposeth and saith:

By D. W. Lindsey, attorney for the plaintiff:

Q. 1. Please state your full name, your age residence and occupation?

A. Joshua R. Shaw—seventy years old last March. Reside in Woodford County, Kentucky, on the farm adjoining the farm on which the Old Oscar Pepper Distillery is situated and my occupation is that of a farmer and cattle trader.

Q. 2. Are you acquainted with the parties to this suit, or either

of them?

A. Yes, sir, with the plaintiff. I don't know the defendant.

Q. 2½. When were you born and when did you move to Woodford County, Ky., and where have you resided from the time you

came to Woodford County, until the present?

A. I was born in Madison County, Kentucky, and moved to Woodford County in the latter part of 1853, to Millville, Woodford County—lived there until the latter part of 1855, when I moved back to Madison County—remained there four years and then moved in the first part of 1860 to the place I now live and have lived there ever since.

Q. 3. While you have lived in Woodford County, were you engaged in any occupation that required you to frequent the distilleries in your neighborhood, if so, state what that occupation was?

A. I feed cattle and hogs at all four of the distilleries on that

road.

Q. 4. When you use the expression on that road, what do you mean?

A. I mean the Glenn's creek pike.

Q. 5. Did you know one James Crow, if so, for what length of time did you know him, and what was his occupation?

A. I knew him, I suppose some five or six years—he was a dis-

tiller.

727 Q. 6. For whom was he distilling whiskey at the time you knew him?

A. He was distilling for Oscar Pepper at the time I knew him.

Q. 7. At what place or distillery?

A. At the Old Oscar Pepper Distillery. Q. 8. Where is that distillery situated?

A. About seven miles this side of Versailles, Kentucky, on the old Oscar Pepper farm on Glenn creek.

Q. 9. Is James Crow living or dead—if you say he is dead, please state when he died, if you can?

A. He is dead, and my recollection is that he died in the latter part

Q. 10. What was his reputation as a distiller of whiskey?

A. He had a good reputation for making whiskey.

Q. 11. Did James Crow remain as the distiller at the Oscar Pepper Distillery on Glenns creek up to the time of his death, or did he leave there and go elsewhere, if so, where did he distill after leaving Oscar Pepper?

A. He left there—he did not remain there until he died—he was distilling for Anderson Johnson and Burget Yancey at the time of his death at a distillery about half a mile below the Oscar Pepper

Distillery.

Q. 12. Did you know William F. Mitchell?

A. Yes, sir. Q. 13. What was his business or occupation?

A. He was a distiller.

Q. 14. At what distillery did Mitchell work when you first knew him and who, if any one, was he working under at that time?

The foregoing two questions and answers objected to because incompetent.

A. He was working at the Old Oscar Pepper Distillery with James Crow.

Q. 15. If you know, state from whom said Mitchell learned the art or business of distilling?

Objected to and overruled as to question; sustained as to answer.

A. He claimed to have learned it from Old Crow.

Q. 16. For what length of time did he work in the distillery with James Crow?

Objected to.

A. I could not state—I don't know whether he worked with Crow more than one season of my own knowledge as I moved away.

728 Q. 17. If you know, state who succeeded James Crow as distiller when Crow left there?

A. I could not state who took his place—I was not living there at the time.

Q. 18. Did you know Oscar Pepper, if so, state if you can when he died?

A. Yes, I knew him, and he died in the spring of 1865.

Q. 19. From the time of your return to Woodford County in 1860 up to Oscar Pepper's death, was the distillery on his farm known as the Oscar Pepper distillery operated, that is, from January, 1860, to the spring of 1865, when Pepper died, if so, who was his distiller?

A. The first distiller old Oscar Pepper had there when I came back, was a man by the name of Sam Brown—I believe I got that wrong. I think John Hawkins was the first one and then Sam Brown—I don't remember that he had any other.

Q. 20. From the death of Oscar Pepper up to January 1st, 1867. was that distillery operated or did it remain idle?

A. I think Tom Edwards ran it one season.

Q. 21. Who was his distiller?

A. He had a negro man by the name of John—I don't know what his other name was.

Q. 22. If you know, state who leased and operated the Oscar Pepper distillery from January, 1867, for the next two or three years?

A. I think it was Gaines, Berry & Co.

Q. 23. If you know, state who was their distiller?

A. William Mitchell.

Q. 24. Is he the same William Mitchell who, you said worked at the same distillery with Crow before Crow's death?

A. Yes, sir.

Q. 25. I will ask you to state, if you know, what was the reputation had by William Mitchell as a distiller of whiskey and what was the reputation of the whiskey that he produced?

Excepted to because incompetent.

A. He was thought to be a good distiller and the whiskey had a

big reputation.

Q. 26. Prior to 1867, January, 1867, when Gaines, Berry & Co., as you have stated commenced operating the Oscar Pepper Distillery. were whiskies produced in Kentucky branded with brands?

A. I never saw anv.

Q. 27. Did Gaines, Berry & Co., when they commenced operating the distillery brand the product of the distillery they were running?

A. Yes, sir.

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Q. 28. What was the brand or trade-mark that they placed on their barrels of whiskey and what was the trade name by which they designated their product of their distillery?

A. They put Old Crow on it, that is my recollection and they called it Old Crow whiskey.

Q. 29. How long did Gaines, Berry & Co. operate that distillery?

A. I think they run it some two or three years only.

Q. 291/2. What was the quality of the whiskey they produced there?

A. It was said to be good.

Q. 30. Did they run any other distillery while they were running that?

A. Not that I remember of.

Q. 31. Did they build any distillery on Glenn's creek?

A. Yes, sir.

Q. 32. Where and when did they build that distillery and by what name has it been called by them and the public since they built it?

A. It is located just above the mouth of Glenn's creek in Woodford County, Kentucky-I don't recollect just what year it was built—in 1868 or 1869 I think—somewhere along there. It has been and is called the Old Crow Distillery.

Q. 33. Does the tract of land upon which that distillery premises is

situated, located entirely in Woodford County or partly in Wood-

ford and partly in Franklin?

A. I think a part of the premises are in Woodford and part in Franklin. There is one warehouse in Franklin, I am pretty sure. The distillery is entirely in Woodford County.

Q. 34. Do you know who constituted the firm of Gaines, Berry &

A. I think Billy Gaines and Hi Berry and John Mastin to start on-Ed Taylor was one of the firm too. E. H. Taylor, Jr., I mean.

Q. 35. What person or firm succeeded Gaines, Berry & Co. at the Old Crow Distillery that you have last spoken of?

A. W. A. Gaines & Co.

Q. 36. And by what firm or corporation was that firm succeeded

A. The same company as I understand. That is, W. A. Gaines &

Co., incorporated.

Co.?

Q. 37. Now, when Gaines, Berry & Co. commenced to operate the present Old Crow Distillery situated as you have stated in the edge of Woodford County and partly in Woodford and partly in Franklin Counties, who was their distiller?

A. William Mitchell.

Q. 38. What trade-mark or brand did they place upon the whiskey produced at that distillery?

A. Old Crow.

Q. 39. And what name did they call the distillery?

A. Old Crow.

Q. 40. And what did they call the whiskey?

A. Called it Old Crow.

Q. 41. Is William F. Mitchell, of whom you have been speaking, living or dead?

A. He is dead.

730 Q. 42. Have you ever had any connection with the manufacture or sale of whiskey?

A. No, sir.

Q. 43. For what length of time since you have resided in Woodford County have you fed cattle at the different distilleries on Glenn's creek?

A. I suppose in all as much as twenty-five years.

Q. 44. Have you ever heard of any distilleries other than those that were operated by W. A. Gaines & Co. and its predecessors, called Crow or Old Crow Distilleries?

A. No. sir.

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Q. 45. Have you ever heard any whiskey produced at any other distilleries than those called Crow whiskey?

A. No, sir.

Q. 46. In a previous answer you state that you never knew any whiskey to be branded before 1867, how was the whiskey known prior to that time? By what name?

A. It was mostly marked by the name of the owner of the distillery and sometimes by the name of the man who distilled it.

Q. 47. Were you acquainted with parties who owned the land upon

which the Old Oscar Pepper Distillery is situated in 1867, and have you been acquainted with the owners of that distillery ever since 1867?

A. In 1867 it belonged to the heirs of Oscar Pepper and then it was owned by Jim Pepper and Ed Taylor who built a distillery on the site of the old one and then Labrot & Graham owned it and still own

it. I knew all of these parties.

Q. 48. Did the heirs of Oscar Pepper who owned the distillery after his death, and James Pepper and Taylor and Labrot & Graham, all know the fact that Gaines, Berry & Co., and after them W. A. Gaines & Co., and after them the corporation W. A. Gaines & Co. were branding their whiskey, produced at the distilleries operated by them with the trade mark Old Crow and calling their whiskey Old Crow whiskey or were any of them conversant with that fact?

Excepted to because leading and incompetent.

A. I take it for granted that they all knew it.

Q. 49. Where did the heirs of Oscar Pepper live while they owned that distillery?

A. Near Midway, Woodford County, Kentucky.

Q. 50. Where did Taylor and James Pepper live while they owned it?

A. Taylor lived here in Frankfort and Jim Pepper was backwards and forwards there—I believe he called his mother's near Midway home.

Q. 51. Where do Labrot & Graham live?

A. Frankfort, Kentucky.

Q. 52. What is the distance from the present Old Crow Dis-731 tillery to Midway where the Peppers lived and to Frankfort where the other parties lived?

A. It is about five miles from Frankfort to the Crow Distillery and from the Crow Distillery to where the Peppers lived I suppose it is

about some ten or eleven miles.

Q. 53. Have you ever known or heard of Labrot & Graham or any of their predecessors who owned the Old Oscar Pepper Distillery objecting or disputing in any way to the use by Gaines, Berry & Co., W. A. Gaines & Co., and the corporation W. A. Gaines & Co., of the name of Old Crow for their distillery or as a trade mark or brand or trade name for their whiskey?

Excepted to because incompetent.

A. No, sir.

Cross-examined.

By B. G. Williams, attorney for defendant:

X Q. 1. Did James Crow the distiller ever at any time make whiskey for Gaines, Berry & Co., or W. A. Gaines & Co., or W. A. Gaines & Co., incorporated?
A. No, sir.

X Q. 2. Did any one of the three firms just mentioned ever at any time own what is now known as the Old Oscar Pepper Distillery?

A. No, sir, they only had it rented.

X Q. 3. And Crow never manufactured whiskey for them at that time, did he?

A. No, sir.

X Q. 4. You say that at the time of Crow's death he was distilling for Anderson, Johnson and Burget Yancey at a distillery below the Old Oscar Pepper Distillery, is that distillery still in existence, if so, who owns it?

A. It is not in existence—it burned down and there is no sign of it

left.

X Q. 5. When did William F. Mitchell die?

A. I don't know just how long he has been dead—some ten or fifteen years I think—he moved off from here when he quit the Crow Distillery down on Long Branch below Frankfort.

X Q. 6. How long precedent to his death was it that he had quit

W. A. Gaines & Co.?

A. My recollection is that is was not a great while—some four or five years, I think.

X Q. 7. Personally you do not know that Mitchell had learned his

formula for making whiskey from Old Crow, do you?

A. I only know that he told me that he claimed to have Old Crow's receipt and that he was the only man that did have Old Crow's receipt.

X Q. 8. Do you know whether or not, at the time Old Oscar Pepper went into the distilling business first, James Crow was his dis-

tiller?

A. No, sir, I do not.

X Q. 9. You say prior to 1867, when Gaines, Berry & Co. began to operate the Oscar Pepper Distillery, Kentucky whiskeys were not branded with brands. I will ask you if before that Old Oscar Pepper did not use this brand, to-wit, Old Oscar Pepper's Hand Made Sour Mash Kentucky Whiskey with the word Old Crow branded on the head of his barrels?

A. I never saw any whiskey branded with brands—it was marked

with a brush.

X Q. 10. Old Pepper did use on his barrels or packages of whiskey the words Old Crow and established a large trade on it, didn't he?

A. I don't know what trade he had—I saw the barrels marked Old Crow when Crow was there and afterwards he marked it Old Oscar Repper.

X Q. 11. Please state for what length of time Old Oscar Pepper

used the brand or trade mark Old Crow, to your knowledge?

A. I don't know what length of time. X Q. 12. About what length of time?

A. I was only living there a short time—a couple of years when I first got acquainted with Old Crow—so far as I can recollect he branded there during those two years.

X Q. 13. And with him the use of the words Old Crow as a brand

of whiskey originated, did it not?

A. Yes, sir, that is my understanding.

X Q. 14. And afterwards W. A. Gaines & Co., who did not own or occupy that distillery and who did not have Crow in their employ

adopted it?

A. They did not own it but rented it as I understand, but only for a very short time and afterwards built a distillery of their own three or four miles distant, and appropriated the name Old Crow. My recollection is they operated it some two or three years but rented and kept control of it some five or six years.

X Q. 15. Will you please describe the symbol and lettering that

W. A. Gaines & Co., place on their barrels or bottled goods?

A. I don't know that I could describe it—I never read all of it—I caught the words Old Crow which is about all I remember of it.

X Q. 16. They do place their name and location on the barrels

and bottles, do they not?

A. I take it for granted they do-I never looked at it enough to

say.

X Q. 18. There is no picture of a crow either on the barrels or bottles, is there?

A. I have never seen any.

X Q. 19. When Tom Edwards operated the original Old Crow Distillery, which now belongs to Labrot & Graham, did he use the brand or name Old Crow?

733 A. I don't know just how Tom did mark it.

X Q. 20. What did the name Old Crow signify, the man that made it or the place it was made, or was it the name of the whiskey or the quality of it?

A. I don't know exactly how to answer that—I take it for granted it was made by the same process that Old Crow made it—they claim

to do it.

X Q. 21. Wasn't the words Old Crow the trade name or the trade mark of the Old Oscar Pepper Distillery and used specifically to des-

ignate whiskey made at that plant?

A. I saw Old Crow mark his barrels Old Crow and it was called Old Crow whiskey and Old Oscar Pepper whiskey. After I left there and came back again Crow was not there and the whiskey was then called Old Oscar Pepper whiskey.

X Q. 22. Was it ever called Old Crow whiskey after you had come

back and after Crow had left?

A. It was never until Gaines, Berry & Co. made whiskey there.

X Q. 23. The present so-called Old Crow Distillery is situated some three miles from the original Old Crow Distillery, is it not?

A. It is five miles.

J. R. SHAW.

Witness fee for attendance \$1.

Subscribed and sworn to before me, on the day, at the place, and with- the hours first aforesaid.

[SEAL.] T. N. LINDSEY,

Notary Public, Franklin Co., Ky.

My commission expires January 19th, 1902.

Not being able to complete the taking of said depositions, by agreement of the parties by counsel, I adjourn the further taking of the same until to-morrow, then to be continued at the same place and between the same hours mentioned in the annexed notice.

T. N. LINDSEY, SEAL. Notary Public, Franklin Co., Ky.

My commission expires January 19th, 1902.

Pursuant to adjournment, as above stated, on the 15th day of May, 1901, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon, at the law office of D. W. Lindsey in the City of Frankfort, Kentucky, I continued the taking of said depositions as follows:

VAN JOHNSON, of lawful age, being produced, sworn and examined, on the part of the plaintiff deposeth and saith:

By D. W. Lindsey, Attorney for Plaintiff:

Q. 1. Please state your full name, occupation and place of business?

A. Van Johnson is my name, my occupation is that of a distiller for the last twenty-seven years, at the Old Crow Distillery.

Q. 2. Where were you born and where have you lived all of your

A. I was born in Woodford County, Kentucky, and have lived all my life in Woodford, Franklin and Shelby Counties, Kentucky.

Q. 3. At what place in Woodford County were you born and what

part of your life has been spent in that neighborhood?

A. I was born about a half mile from the present Old Crow Distillery. I was born September 18th, 1838, and lived in that neighborhood until 1862, then moved to Shelby County and staved there until 1864 and then moved back to where I was born and staved there until 1867, and then moved to Franklin County, about four or five hundred yards this side of the Old Crow Distillery and lived there until 1872 when I moved on the Old Crow premises and staved there until 1886 and then moved about three miles and a half above the Old Crow Distillery on Glenn's creek, staved there about nine years and then moved back on the Old Crow premises and staved there two years and then moved back to my place about three miles [about] the Old Crow where I now live.

Q. 4. During your residence in Woodford County, how far did you live from what is known now as the Old Oscar Pepper Distillery,

which is being operated by Labrot & Graham?

A. I suppose about three and a half or four miles.

Q. 5. When you first knew that distillery, to whom did it belong, who, if any one, was operating the same and who was the distiller?

A. It belonged to Oscar Pepper—Oscar Pepper was the proprietor and James Crow the distiller.

Q. 6. On what running stream of water, if any, was that distillery situated?

A. On Glenn's creek.

Q. 7. You have stated that you are a distiller, please state when you first commenced working at a distillery and when and from whom you learned the art or business of distilling whiskey?

Objected to because incompetent. Overruled.

A. I commenced August, 1869, working on the mash floor of the present Old Crow Distillery. I learned distilling from W. F. Mitchell.

Q. 8. When did you commence distilling yourself and for 735 whom did you work when you commenced and at what place?

A. I commenced February, 1872, distilling myself at the present Old Crow Distillery for W. A. Gaines & Co.

Q. 9. Who has been the distiller at that distillery from the time you commenced in 1872 to the present time?

A. I have.

Q. 10. Were you acquainted with James Crow in his life time?

A. No, sir.

Q. 11. Did you know of him by reputation? If so what was his reputed business?

A. I knew him by reputation as a distiller.

Q. 12. What was his general reputation as a distiller?

A. The best in our country.

Q. 13. If you know, state when James Crow died?

A. I think it must have been about 1856, somewhere along there.

Q. 14. Did you know William F. Mitchell? Was he related to you in any way, if so, in what way?

A. Yes, sir, he was a cousin of mine.

Q. 15. What was his business or profession?

Objected to because incompetent. Overruled.

A. He was a distiller the latter part of his life—he must have been twenty-five or thirty years old when he went to work at Oscar Pepper's Distillery.

Q. 16. If you know, state where and from whom he learned the

science or art of distilling?

Objected to because the witness has already said he did not know Mr. Crow.

A. I got his word for it and he told me he learned from James Crow.

This answer objected to because incompetent and excluded.

Q. 17. Where?

Excepted to because incompetent.

A. At the Oscar Pepper Distillery.

Q. 18. Have you yourself any recollection or knowledge of the fact that Crow-James Crow, was the distiller at the Oscar Pepper Distillery?

A. I never was at the distillery when Crow was there—he lived

right there at the distillery—I was young and never was at the distillery while he was there.

Q. 19. Did Crow live at the distillery within your recollection and

knowledge?

A. Yes, sir, he lived right above the distillery about two hundred vards.

Q. 20. It is my understanding from your previous answers that you were never at or in the distillery and saw James Crow engaged as a distiller at work in the distillery, but I now ask you at the time he so, within your knowledge, lived within two hundred yards of the distillery, if you know, in whose employ he was and what common report in the neighborhood there was — his business at the time.

Objected to because incompetent.

A. The report was that he was in Pepper's employ there at the

distillery.

Q. 21. At the time you have stated Mitchell worked at the Oscar Pepper Distillery and went there to work as a mash hand as you have stated was James Crow living there and reputed to be the distiller at that house?

A. Yes, sir.

Q. 22. Do you remember the event of James Crow's death?

A. I was neither at his death nor his funeral but I know he died. He was working for Anderson Johnson at the time of his death and he is said to have dropped dead in the distillery.

Q. 23. If you know state who distilled for Oscar Pepper at his dis-

tillery after Crow ceased to work for him?

A. Mitchell worked there—W. F. Mitchell—and after Mitchell a man by the name of Ed Kelley I think. I don't know whether

anybody else ran after Kelley died or not.

Q. 24. You have stated that you learned the science or business of distilling from William F. Mitchell. In teaching you the science or business of distilling, did Mitchell profess to teach you according to any particular formula, if so, state what that was and from whom he obtained the same?

Excepted to because incompetent.

A. He taught me from what he had learned from Crow.

Q. 25. Prior to 1867 or about that time were Kentucky whiskeys made in that neighborhood branded or marked with any name or brand?

A. None that I know of.

Q. 26. How were the whiskeys at the several distilleries that you knew of designated or called or named?

A. They were either called by the name of the distiller or the

proprietor.

Q. 27. Is Oscar Pepper dead or living, and if dead, state as near as you can when he died?

A. He is dead—I think he died in 1864 or 1865.

Q. 28. After his death who, if any one, operated his distillery?

A. I don't think anybody ran it until 1867 and then Gaines, Berry & Co. ran it.

737 Q. 29. By way of refreshing your recollection I will ask you if Tom Edwards operated that distillery?

A. I don't know-if he ran it, it must have been when I was in

Shelby County.

Q. 30. Do you know who constituted the firm of Gaines, Berry & Co., who you say commenced operating the Oscar Pepper Distillery in 1867?

## Excepted to.

A. I knew Mr. Hiram Berry and W. A. Gaines, but I don't know who the company was.

Q. 31. If you remember, please state when in 1867 they com-

menced operating that distillery?

A. February because they had Mitchell hired by the year and his term was out the first of February.

Q. 32. Who was their distiller at that distillery and for what

length of time did they operate the Oscar Pepper Distillery?

A. W. F. Mitchell was their distiller—I think Mitchell ran that house for them two years and then John Will Johnson under Mitch-

ell's instructions ran it one year.

Q. 33. Did Gaines, Berry & Co. brand the whiskey produced by them at that distillery with any particular name or mark and did they call the whiskey they produced by any name, if so, state how the whiskey was branded and by what name it was known and called?

A. I don't know whether they branded it at all or not—they

called it Crow whiskey.

Q. 34. What was the character of the water used for distilling whiskey at the Oscar Pepper Distillery?

## Excepted to because immaterial.

A. Lime stone spring water.

Q. 35. If you know, state what was the character or quality of the whiskey produced by Gaines, Berry & Co. at the Oscar Pepper Distillery?

A. I don't know.

Q. 36. Did Gaines, Berry & Co. acquire or erect any other distillery in that neighborhood, if so, state when they acquired the same, where it was located and what name, if any, they gave to this distillery so acquired, and from whom they got the property upon which

the distillery is situated?

A. They had a distillery where the present Old Taylor Distillery is which they rented from Mrs. Johnson and ran during the fall of 1868, and spring of 1869—between the first and middle of June, 1869, they bought a tract of land from Dr. Botts and built the present Old Crow Distillery on it and gave it the name of Old Crow Distillery and called it that ever since.

738 Q. 37. How far is the distillery which you have mentioned at the Old Taylor Distillery from the Oscar Pepper

Distillery operated by Gaines, Berry & Co., as you have stated in 1867, 1868 and 1869?

A. About three miles lower down the creek.

Q. 38. And how far is the present Old Crow Distillery erected on the land bought from Dr. Botts as you have stated from the Oscar Pepper Distillery?

A. About four miles down the creek.

Q. 39. What is the source of the water at the present Old Crow Distillery used for distillation?

A. From a hard lime stone spring on the side of the hill.

Q. 40. How does the water at the present Old Crow Distillery compare in quality and quantity for the purposes of distillation with the water at the Oscar Pepper Distillery?

A. They are both lime stone water but we have double the quan-

tity at the Crow that they have at the Oscar Pepper.

Q. 41. When did you first commence to work for Gaines, Berry & Co., or at either of these distilleries and where did you commence to work?

A. I commenced working for W. A. Gaines & Co., the 10th day of August, 1869, at the present Old Crow Distillery—I never worked for Gaines, Berry & Co.

Q. 42. When was the first whiskey produced at the present Old Crow Distillery—was it before or after you commenced work there?

A. They had been running a short time before I went there to work.

Q. 43. Had they given to the distillery a name when you went there to work, if so, what was the name that they had given to that distillery?

A. They gave it the name of Old Crow and was branding their

whiskey Old Crow when I went there to work.

Q. 44. By what name has that distillery been called by the proprietors of it ever since it was erected and how have they branded their whiskey, each barrel thereof, since they first commenced to make whiskey at that place?

A. They called it the Old Crow Distillery and have branded their

whiskey all the time Old Crow.

Q. 45. By what name has the public [general-] known that distillery and by what name has it known and called the product?

A. The distillery by the name of Old Crow Distillery and the

whiskey by the name of Old Crow whiskey.

Q. 46. By what name has the Oscar Pepper Distillery been generally known and called since Gaines, Berry & Co., ceased to operate it?

A. Old Oscar Pepper Distillery.

739 Q. 47. And how have the persons who have operated it since Gaines, Berry & Co. left it branded their whiskey?

A. I don't know.

Q. 48. By what name has the distillery that you have heretofore mentioned as the Taylor Distillery been known and called since Gaines, Berry & Co., left there in the spring of 1869?

A. It is known by all the people up there as the Old Taylor Dis

tillery.

—. 49. What has been and is the quality of the whiskey produced at the Old Crow Distillery from the commencement of it operation to the present time?

A. We make mighty fine goods there—we have the reputation of

making the best whiskey in the country.

Q. 50. Please state in a general way what care if any in the selection of the grain and otherwise is and has been observed in manufacturing whiskey at that distillery to produce good whiskey

A. They buy the best of grain and then clean it before it is used It is run through a brush machine before we use it—we keep every thing clean and in nice style so that we can produce good whiskey

Q. 51. What have been your opportunities to know of the character of whiskey produced at the Old Crow Distillery from the time

it commenced operation to the present time?

A. I have been there all the time—saw it made—saw it before

went into the barrels—saw it put into the barrels.

Q. 52. You stated you entered the employ at the Old Crow Di tillery as a mash floor hand of W. A. Gaines & Co., in Augus 1869, under whom did you commence work then as a distiller at the distillery?

A. William F. Mitchell.

Q. 53. While Mitchell was there did you receive any promotion and if so what and when?

A. I worked on the floor as a mash hand from August, 1869, unt October, 1870, then I was beer running from then until February 1872, when I was made the distiller which place I have kept even since.

Q. 54. What person or firm succeeded Gaines, Berry & Co. a

distillers?

A. W. A. Gaines & Co.

Q. 55. Was that W. A. Gaines & Co., a firm or corporation?

A. I think that was a firm at that time.

Q. 56. The firm of W. A. Gaines & Co. was succeeded by whom

A. By the corporation of W. A. Gaines & Co.

Q. 57. As a practical distiller I will ask you what effect in the production of whiskey has the quality of the water used?

740 A. It makes a good deal of difference.

Q. 58. What is, in your judgment, as a practical distille the best water to product the best quality of whiskey?

A. Pure lime stone spring water.

Cross-examined.

## By B. G. Williams, Attorney for Defendant:

X Q. 1. As I understand your answers on direct examination you have been living on Glenn's creek in the neighborhood of the present Old Crow Distillery since the year 1867?

A. Yes, sir

X Q. 2. In what year did you begin work for W. A. Gaines & Co.

A. 1869.

X Q. 3. Are you employed by them at present?

A. Yes, sir.

X Q. 4. Has your service for them been continuous since 1869?

A. Yes, sir.

X Q. 5. You have been working for them uninterruptedly from that time to this?

A. Yes, sir.

X Q. 6. Personally you know nothing as to whether W. F. Mitchell did or did not procure from James Crow his formula for making whiskey?

A. Only from what he said himself—I know he worked there and did not know anything about the business before he went to the

Oscar Pepper Distillery because he worked on a farm.

X Q. 7. I understand you to say that James Crow left the Old Pepper Distillery and worked at the Johnson Distillery at one period, is that true?

A. He worked here I don't know how long.

X Q. 8. At the time that Crow was working at the Johnson Distillery who was the distiller at the Old Oscar Pepper Distillery?

A. W. F. Mitchell.

X Q. 9. As I understand you, rumor gives it that Mitchell had been taught by Crow and knew his formula?

A. Yes, sir.

X Q. 10. Then at one period not only Old Oscar Pepper Distillery by the Johnson Distillery were both being operated at the same time by different owners but under the same Crow formula of distillation?

A. I did not say that.

X Q. 11. What do you say upon that point?

A. I don't know whether they were using the same formula or not.

X Q. 12. Crow was using his, was he not?

A. I don't know.

X Q. 13. I understood you to say that Mitchell was a farmer until he learned under Crow—that he knew nothing about making whiskey before that, therefore he was using Crow's formula.

741 was he not, or the manner of making whiskey as taught by Crow, was he not?

A. There are different processes for making whiskey and I don't know whether he was using Crow's formula or not.

X Q. 14. As you understood it did Mitchell know any other

except the Crow formula?

A. He professed he did but I never learned any from him but the Crow formula.

X Q. 15. And not having known Mr. Crow you do not know except what Mitchell told you that he knew the Crow formula or what formula he taught you?

formula he taught you?

A. No, I don't know. He told me he taught me to make whiskey

the same as Crow made it.

X Q. 16. At one time didn't the Old Oscar Pepper Distillery have a distiller other than W. F. Mitchell?

A. It had a fellow by the name of Kelley. X Q. 17. Was he one of Crow's scholars, too?

A. No, sir.

X Q. 18. Who was his instructor in regard to the manufacturing of whiskey?

A. I don't know.

X O. 19. At one time was not John Will Johnson a distiller at the Old Oscar Pepper Distillery?

A. He worked there for Gaines, Berry & Co.

X Q. 20. Did not be learn under W. F. Mitchell?

A. Yes, sir.

X Q. 21. How long did he remain in the employ of Gaines, Berry & Co., or W. A. Gaines & Co.?

A. I don't know.

X Q. 22. About how long?

A. I think he was there about three seasons but only worked as a distiller under the instruction of Mitchell for one.

X Q. 23. Mitchell taught him the business or art of distiller. did he not?

A. Yes, sir.

X Q. 24. How long did John Will Johnson work for E. H. Taylor, Jr., & Sons at the Old Taylor Distillery?

A. I don't know.

X Q. 25. Your best recollection as to about how long?

A. He worked for them two or three different times and two or three different places.

X Q. 26. He did work there, however, a number of years?

Yes, he worked there for a number of years.

X Q. 27. How close is the Old Taylor Distillery where John Will Johnson worked to the present Old Crow Distillery?

A. A mile. X Q. 28. Have they a spring at that distillery of the same description of water as that used at the present Old Crow?

A. I don't know.

X Q. 29. Did you ever analyze that at the Old Crow?

A. No. sir. 742

X Q. 30. They are both, however, lime stone waters and flowing out of hills adjacent to each other?

A. I suppose they are.

X Q. 31. On the same creek?

A. Yes, sir.

X Q. 31. Isn't it true that John Will Johnson and yourself were both learners under W. F. Mitchell, that you were both taught the same formula, and that you both at distilleries within a mile of each other on the same creek employed that knowledge which you had gotten from W. F. Mitchell and by the same process or formula made the same sort of whiskey for years past?

A. We were both learners under Mitchell, but I don't know whether we were both taught the same formula or not.

could not say whether he used the same formula that I did or not or whether he made the same kind of whiskey.

X Q. 33. Mitchell had no other instructor except Crow in the

art of making whiskeys as far as you are advised?

A. No. sir.

X Q. 34. You had no other except Mitchell?

A. No. sir.

[X Q. 36.] And neither did John Will Johnson?

A. I don't know about that.

X Q. 36. Is Johnson now making whiskey as a distiller in some of the Southern States?

A. I think he is in South Carolina.

X Q. 37. And is making whiskey, is he not?

A. I don't know. That is what he said he was going to do.

X Q. 38. At the present Old Crow Distillery, has there been since you have been employed by the firm of W. A. Gaines & Co., whiskey made there branded otherwise than Old Crow?

A. No. sir.

X Q. 39. On the labels on packages and the inscriptions on the heads of barrels does there appear the name of W. A. Gaines & Co., Frankfort, Ky., on merchandise manufactured by that firm?

A. No, sir.

X Q. 40. What do they put on their labels on bottled goods?

A. I don't know for I never paid any attention to it.

X Q. 41. You have seen numbers of their whiskey barrels, have you not?

A. Yes, sir.

X Q. 42. What inscription do they put on the head of the barrels? A. Old Crow, Woodford County, Ky., W. A. Gaines & Co., Distillers.

X Q. 43. Have you seen any of their bottled goods?

A. I have seen the bottles and the packages after they were cased up but I never paid any attention to it.

743 X Q. 44. Can you recall what label, brand, inscription or trade mark is placed by them upon their bottles?

A. No, sir.

X Q. 45. Did not Old Oscar Pepper use on his whiskey the name and brand Old Oscar Pepper Hand Made Sour Mash Whiskey and also the words Old Crow during the time that he operated the original Old Crow Distillery?

A. I don't know.

X Q. 46. Did this man, Ed. Kelley, of whom you have spoken distil for Oscar Pepper a long or short time?

A. Only one year, I think.

X Q. 47. Was James Crow there at that time?

A. No, sir.

X Q. 48. Was Kelley there before or after Crow's time?

A. After.

X Q. 49. Was he there before or after William F. Mitchell?

A. Afterwards.

X Q. 50. Where was Mitchell working at the time Kelley was operating the Old Oscar Pepper Distillery?

A. He was at the Johnson house, I think, but I am not certain he may have been at a distillery of his own down on Long Branch.

X Q. 51. Did W. F. Mitchell, after he had learned the formula of Crow, start a distillery on Long Branch in Franklin County, Ky.?

A. Yes, sir.

X Q. 52. How long did he operate it?

A. Only one season, I think.

X Q. 53. Did he call his whiskey Old Crow? A. No, sir. He never branded it at all.

X Q. 54. Did he claim to manufacture it according to Old Crow's formula?

A. I don't know how he made it.

X Q. 55. Is the virtue which you claim belongs to the present Old Crow whiskey attributable to the spring water of which it is made in any degree?

A. Yes, sir, I think so.

X Q. 56. And to the care and cleanliness with which you handle the corn?

A. I think so.

X Q. 57. More attributable to those two things than to any other thing connected with its manufacture?

A. Those two things and also keeping the distillery clean and

sweet.

X Q. 58. Nothing in the formula of making the whiskey itself which is mysterious or uncommon to distillers, is there?

A. I should think there was,

X Q. 59. Have you any objection to disclosing what that particular feature is?

A. I have.

X Q. 60. Does this brand, Old Crow, designate the distillery the quality of the whiskey, the maker or the formula for making—what does it designate?

A. It designates the quality of it.

X Q. 61. And nothing else?

A. Yes, the distillery, the quality, the maker and the formula for making it.

X Q. 62. At no time was James Crow ever in the employ of Gaines, Berry & Co., or W. A. Gaines & Co., was he?

orly to co., or w. A. dames

A. No, sir.

X Q. 63. And all you know of their ever having his formula arises from what W. F. Mitchell, who is now dead, told you?

A. Yes, sir.

X Q. 64. How many miles is the present Old Crow Distillery from the original and who operates the latter? 1

A. It is four miles and Labrot & Graham operates the latter.

X Q. 65. When you speak of the general public knowing and calling the product of W. A. Gaines & Co. Old Crow, you mean the public in Franklin and Woodford Counties, do you not? In other

words personally you do not know whether their brand is well known or established abroad?

A. I mean the public so far as I know it, which is confined to

Franklin, Woodford and the adjacent counties.

X Q. 66. W. A. Gaines & Co. own and have owned for a number of years another distillery, what is it called?

A. Hermitage.

X Q. 67. Have you ever acted as distiller at the Hermitage?

A. No. sir.

X Q. 68. Who is their distiller there?

A. Marion Williams.

X Q. 69. Does he use the Old Crow formula—the one which you say you learned from W. F. Mitchell?

A. No, sir.

X Q. 70. How do you know?

A. He told me so.

X Q. 71. Does he know the Old Crow formula? A. No, sir; I think not.

X Q. 72. How came he then to tell you he was not using it?

A. He was up at the distillery and told me he did not use that formula of making whiskey.

X Q. 73. You mean by that formula the formula that you were then using?

A. Yes, sir.

Re-examined.

### By D. W. Lindsay, Attorney for Plaintiff:

Q. 1. What became of the Anderson Johnson distillery at which you say Crow worked, and at which he died after leaving the Oscar Pepper Distillery?

745 A. They tore it down.

Q. 2. How long did Gaines, Berry & Co. run the old Oscar Pepper Distillery? Up to what time?

A. They commenced in February, 1867, and run it to the Spring

Q. 3. What became of that distillery after they ceased to run it? A. They tore it down and Ed. Taylor built a new one. Ed. Taylor tore it down.

Q. 4. Was it idle for any length of time after Gaines, Berry & Co. ceased to run it up to the time you say Taylor tore it down?

A. My recollection is that it was.

Q. 5. Was Taylor a member of the firm of Gaines, Berry & Co., or the firm of W. A. Gaines & Co. at the time he tore down that distillery and built a new one as you have stated?

A. I think not.

Q. 6. Who succeeded Taylor at the Oscar Pepper Distillery?

Q. 7. And who succeeded Graham at that distillery?

A. Labrot & Graham.

Q. 8. By what name do Labrot & Graham, and did Graham before them, and Taylor before them call that distillery?

A. I could not tell you what Taylor called it—it always went by

the name of Old Oscar Pepper Distillery?

Q. 9. While Taylor and after him, Graham, and after him, Labrot & Graham, the present owners of that distillery, were operating it, did they know that Gaines, Berry & Co. and W. A. Gaines & Co. and the corporation W. A. Gaines & Co. were calling their distillery the present Old Crow Distillery—Old Crow Distillery and branding their whiskey as Old Crow whiskey?

Defendants objects and excepts to all of the foregoing questions

and answers on re-examination because they are all in chief.

Counsel for plaintiff announces that the said questions objected to in last objection by counsel for defendant were inadvertently and by oversight omitted to be asked in the direct examination.

A. Yes, sir.

VAN JOHNSON.

Witness fee two days attendance, \$2.

Subscribed and sworn to before me, on the 15th day of May, A. D.,

— at the place and between the hours first aforesaid.

[SEAL.]

T. N. LINDSEY,

Notary Public, Franklin Co., K.

My commission expires January 19th, 1902.

Also C. C. Furr, who being of lawful age, produced, sworn and examined on the part of the plaintiff, deposeth and saith:

By D. W. Lindsey, Attorney for Plaintiff:

Q. 1. Will you please state your age, residence and occupation?
A. I am sixty years old—residence Frankfort, Kentucky, and my

occupation, superintendent of the Hermitage Distillery.

Q. 2. Where were you living in 1866 and where have you lived at

all times since then?

A. In 1866 I was living in Versailles and its vicinity—since July, 1869, I have lived in Frankfort, Kentucky.

Q. 3. If you were within that time in the employ of the United

States government, state when and in what capacity?

A. I was appointed Internal Revenue Inspector in December, 1866, and held that office for about three months, when it was abolished and I was then appointed Assistant Assessor for the 7th Internal Revenue District, of Kentucky, which place I held for about fifteen months, when that office was abolished. I was then appointed a United States storekeeper in the same district, which position I held for about twelve years, and was then appointed a gauger, which place I held until I accepted my present employment as superintendent of the Hermitage Distillery in 1882.

Q. 4. Did you know a firm of distillers in Kentucky under the name and style of Gaines, Berry & Co.? If so, state when you first

knew that firm, when they commenced business as distillers, if you know who composed the firm and at what place or distillery they

were operating?

A. I knew the firm of Gaines, Berry & Co.—my first acquaintance with them was in the spring of 1867, it might have been in January or February. The firm at the time I first knew them was composed of W. A. Gaines, E. H. Taylor, Jr., Hiram Berry and John Mastin. They were then operating a distillery at the site of the present Old Oscar Pepper Distillery.

Q. 5. If you know how long did J. W. Mastin remain a member

of the firm?

e

Excepted to because immaterial.

A. My recollection is that he was a member for only one season.

Q. 6. Prior to your being appointed in the revenue service in December, 1866, had you had any knowledge or information in regard to the manufacture and handling of whiskey in the State of Kentucky, and particularly as to the branding thereof?

A. I can't say that I did—I understood after I had been in it for a little while that the custom of branding and using a trade mark was a new thing that had just started up.

Q. 7. For what length of time did the firm of Gaines, Berry & Co.

operate that Oscar Pepper Distillery?

A. I think they commenced in the early part of 1867 and were running it in 1869, and may have run it for a season or two after that.

Q. 8. By what trade name or title did they designate the whiskey made by them at that distillery, and with what brand or trade mark did they brand the barrels or packages containing the same?

A. Their trade mark was Old Crow and the whiskey was so branded. The brand was Old Crow Distillery, W. A. Gaines, Distiller, Woodford County, Kentucky. They called it Old Crow whiskey.

Q. 9. Did that firm operate any other distillery or distilleries in that neighborhood, if so, please state successively what distilleries they so operated, from whom and how they acquired the same and

for what length of time they operated them?

A. They operated the distillery that is known now as the Old Taylor Distillery, leasing it from some people by the name of Johnson, which they ran for about two years. My recollection is that they began running the distillery in 1868 and ran it in 1868 and 1869. In 1869 they built and commenced operating the present Old Crow Distillery on a tract of land purchased from Dr. J. M. Botts, which is about five miles down Glenns creek from the Oscar Pepper Distillery, and about a mile further down the creek than the Old Taylor Distillery.

Q. 10. By what name and trademark or brand did they call and mark and brand the whiskey produced by them at the second dis-

tillery you mention, or the Old Taylor Distillery?

A. Old Crow—the brand was the same as the one used at the Oscar Pepper Distillery.

Q. 11. How long did they operate what you have called the present Old Crow Distillery which you have stated was erected by them in 1869 upon the land purchased by them from J. M. Botts? If they were succeeded in the ownership and operation of that distillery by any other firm, state what that firm was and who composed the same.

A. I can't state how long Gaines, Berry & Co. ran the present Old Crow Distillery, but several years after they began operating it I know that they transferred that distillery to W. A. Gaines & Co. The firm of W. A. Gaines & Co. consisted of W. A. Gaines, E. H. Taylor, Jr., Hiram Berry of Frankfort, Kentucky; Marshall J. Allen, Sherman Paris of New York; Frank Stevens of Swansea, Mass.

Q. 12. Was the firm of W. A. Gaines & Co. succeeded in the ownership and operation of that distillery by any other person or corporation; if so, name the same?

A. Yes, sir, the firm of W. A. Gaines & Co. was succeeded by the

corporation of W. A. Gaines & Co.

Q. 13. By what name have Gaines, Berry & Co. and their successors, the firm of W. A. Gaines & Co. and the corporation of W. A. Gaines & Co., continually designated and called that distillery ever since its erection in 1869?

A. The Old Crow Distillery.

Q. 14. By what name has it been known and called by the public generally during that time?

A. The Old Crow Distillery.

Q. 15. By what name has the product of that distillery been called by the owners of the distillery and the public generally since its erection in 1869?

A. Old Crow whiskey.

Q. 16. How has the product of that distillery been branded on packages containing the same since its erection in 1869 down to the present time?

A. Old Crow whiskey.

Q. 17. Was it branded Old Crow whiskey or Old Crow Distillery?
A. It was branded Old Crow Distillery, W. A. Gaines & Co. Dis-

tiller, Woodford County, Ky.—for part of the time it may have been branded W. A. Gaines, distillers, instead of W. A. Gaines & Co., but the other part of the brand was the same.

Q. 18. If you know, state who was the distiller for Gaines, Berry & Co. during the time that they operated the Old Oscar Pepper Dis-

tillery from 1867 to 1869, including as you have stated?

A. W. F. Mitchell was the first distiller in 1867—my impression is that in 1868 he was transferred down to the Old Taylor Distillery then John Will Johnson, who had been working under Mitchell, succeeded him at the Old Oscar Pepper Distillery. (Mitchell operated the Old Taylor Distillery, during 1868 and 1869 and Johnson ran the Old Oscar Pepper Distillery.)

Q. 19. Who was the distiller for Gaines, Berry & Co., and their successors at the Old Crow Distillery erected by them on the land

purchased by them from Botts in 1869?

A. W. F. Mitchell ran the house for the first three or four years

and he was succeeded by the present distiller, Van Johnson.

Q. 20. What was the capacity of the Old Oscar Pepper Distillery and the Taylor Distillery at the times respectively they were operated by Gaines, Berry & Co., and what has been the capacity of the present Old Crow Distillery?

A. My impression is that the capacity of the Old Oscar Pepper Distillery was about twenty-five bushels—the Old Taylor about

forty—the Old Crow when first built and operated by Gaines,
Berry & Co. had a capacity of eighty-four bushels, and it now
has a capacity of between eight and nine hundred bushels.

Q. 21. Please state the relative qualities of the waters used for dis-

tillation and the volume at each of these distilleries?

A. They were all considered of the finest quality for making whiskey. The volume of water at the Old Oscar Pepper Distillery is somewhat limited, as also at the Old Taylor. The Old Crow when built and has now an abundant supply of water.

Q. 22. If you know, state what was the reputation of William F. Mitchell as a distiller, and if you know, from whom he learned the

art or business of distilling.

Excepted to because incompetent.

A. Mitchell had the reputation of being a fine distiller, that is a man who made an excellent whiskey, and I have heard him say he learned from Crow himself, and that he used Crow's formula.

Q. 23. What has been and is the reputation of Van Johnson as a

distiller, and by whom was he taught to distill whiskey?

A. Van Johnson's reputation for making good whiskey, and as a distiller of whiskey is good and he learned from W. F. Mitchell.

Question and answer objected to because incompetent.

Q. 24. If you know, state where Van Johnson learned under Mitchell—at what house?

Objected to.

A. At the present Old Crow.

Q. 25. Are you acquainted with the quality of whiskey successively produced by Gaines, Berry & Co., W. A. Gaines & Co. and the corporation W. A. Gaines & Co., at the Crow Distillery; if so state what that quality is and if you know state the reputation that it has in the market and with the public generally?

A. I think I am acquainted with the quality of the whiskey, it is considered excellent and its reputation for being good whiskey is

excellent. In my judgment the whiskey is excellent.

Q. 26. Have you known the owners and operators of the Old Oscar Pepper Distillery and the Old Taylor Distillery since those distilleries ceased to be run by Gaines, Berry & Co.?

A. I have.

Q. 27. Have those owners and operators had knowledge of the fact that Gaines, Berry & Co. and their successors at the present Crow Distillery have given to their distillery the distinctive name Old

Crow and were branding their whiskey as Old Crow Whiskey?

750 A. I presume they have. There is no reason why they should not know it.

Q. 28. Have they in any way, so far as you have any knowledge or information, interposed or raised any objection or exception to such naming of the distillery or such naming or branding of the whiskey produced there?

A. They have not.

Q. 29. Who operated the distillery known as the Oscar Pepper Distillery after Gaines, Berry & Co. ceased to run that house?

A. James H. Graham was the first one—I am wrong about that, E. H. Taylor operated it first in the name of Jas. E. Pepper, then Graham operated it and then Labrot & Graham.

Q. 30. Who operated what you called the Old Taylor Distillery

after Gaines, Berry & Co. ceased to run it?

A. I think it was run in the name of J. Swigert Taylor, that is my

impression then, by E. H. Taylor, Jr. & Sons.

Q. 31. Is the Taylor you have mentioned as operating the Oscar Pepper Distillery and the E. H. Taylor, Jr., in the E. H. Taylor, Jr., & Sons, the same Edmund H. Taylor who was a partner in Gaines, Berry & Co. and also in W. A. Gaines & Co.?

A. He is the same person.

Q. 32. Where have the said E. H. Taylor, Jr., and his sons and James H. Graham and Labrot & Graham and the firm and corporation of W. A. Gaines & Co. resided and held their business offices during the time that Gaines, Berry & Co. and W. A. Gaines & Co. have been operating the Old Crow Distillery?

A. At Frankfort, Kentucky.

### Cross-examined.

# By B. G. Williams, Attorney for Defendant:

X Q. 1. Were Gaines, Berry & Co. operating the Old Oscar Pepper Distillery and also the Old Taylor Distillery during the same time?

A. Gaines, Berry & Co. ran the Oscar Pepper Distillery the first year alone and then the two succeeding years ran both of them.

X Q. 2. Who was the distiller at the Old Oscar Pepper Distillery and who was the distiller at the Old Taylor Distillery during those two years they operated both distilleries at the same time?

A. W. F. Mitchell ran the Old Taylor Distillery and J. W. John-

son operated the Oscar Pepper Distillery.

X Q. 3. Where did J. W. Johnson learn his business as a distiller? A. He worked with W. F. Mitchell the first year Mitchell ran the Oscar Pepper Distillery.

X Q. 4. Did Gaines, Berry & Co. brand their whiskey manufactured at the Old Taylor Distillery, Old Crow, the same as they did that manufactured at the Old Oscar Pepper Distillery?

A. They branded it all Old Crow.

X Q. 5. And yet it was manufactured by different distillers and at different distillery plants?

A. It was.

X Q. 6. Was it manufactured at these two separate distilleries by the same formula?

A. So far as I know it was. My impression is that it was.

X Q. 7. John Will Johnson was the distiller at the Old Oscar Pepper operated by Gaines, Berry & Co., and is now making whiskey by the same formula in South Carolina, is he not?

A. I do not know.

X Q. 8. You do know however that he is following his busines as a distiller and that he is in South Carolina, is he not?

A. I understand he is following his business as a distiller in the

South somewhere?

X Q. 9. Do you use the same formula for the manufacture of whiskey at the Hermitage Distillery operated by W. A. Gaines & Co. as you do at what is now known as the Old Crow owned by the same firm?

A. No, sir. X Q. 10. Are they both hand-made, sour mash copper distilled whiskeys?

A. No, sir.

X Q. 11. Are they both copper distilled sour mash whiskeys?

A. They are known to the trade as copper distilled sour mash whiskeys.

X Q. 12. By that answer do you mean that though so known to the trade that in reality they are not sour mash copper distilled whiskeys?

A. I do not mean anything of the kind, no, sir. X Q. 13. Would you kindly explain that answer?

A. Both the Crow and Hermitage whiskeys are copper distilled sour mash whiskeys, but there is a difference in the way the mash is made-the Crow whiskey is hand-made sour mash whiskey and the Hermitage is not hand-made.

X Q. 14. You say that Mitchell said in your presence that he made whiskey according to Crow's formula-didn't John Will John-

son do the same thing or claim to do so?

A. I heard Mitchell so say. I never heard John Will Johnson

say so, he was taught by W. F. Mitchell.

X Q. 15. Do you know anything of the custom of branding or labeling whiskeys or using trade-marks or symbols thereon outside of Franklin and Woodford Counties, Kentucky?

A. I do somewhat but my acquaintance in that regard is limited outside of those counties. As a U.S. storekeeper I have been located at the distilling points nearly all over the 7th Internal Revenue Dis-

trict and am somewhat familiar with the brands there. X Q. 16. Does the W. A. Gaines & Co. corporation use as 752 a brand either on its bottles or barrels the symbol of a crow?

A. No, sir, they do not to my knowledge.

X Q. 17. Have they ever done so in the last twenty-five years to your knowledge?

A. No, sir.

X Q. 18. Is there another firm of whiskey distillers, W. A. Gaines & Co., if so, where are they located?

A. Not that I know of as distillers—I have heard that there is a

firm in the east that are dealers, but I don't know that.

X Q. 19. You do know, however, that upon each package or barrel of W. A. Gaines & Co.'s whiskey they place their names, W. A. Gaines & Co., Distillers?

A. Yes, sir.

Re-examined.

By D. W. Lindsey, attorney for plaintiff:

Q. 1. You have stated in one of your answers on cross-examination that your duties as U. S. storekeeper caused you to become acquainted more or less with all the distilleries and brands of whiskeys at all the distilling points in the 7th Internal Revenue Dsitrict of Kentucky. Have you ever known or heard of any distillery other than that of W. A. Gaines & Co., and its predecessors, named Old Crow Distillery?

A. I have not.

Q. 2. Have you known of any distiller or heard of any other than W.A.Gaines & Co. who have branded or called their make of whiskey Old Crow whiskey?

A. No, I have not.

Recross-examined.

By B. G. Williams, attorney for defendant:

X Q. 1. Didn't Oscar Pepper call his whiskey Old Crow? A. No, I have not.

C. C. FURR.

Witness fee two days, \$2.

Subscribed and sworn to before me, on the 15th day of May, A. D. 1901, at the place and within the hours first aforesaid.

SEAL.

T. N. LINDSEY, Notary Public, Franklin Co., Ky.

My commission expires January 19th, 1902.

At this point the further hearing of this cause was adjourned until to-morrow, Wednesday, July 2, 1902, at 9:30 o'clock a. m.

Kansas City, Missouri, Wednesday, July 2, 1902.

Court met pursuant to adjournment and the further hearing of this cause was resumed as follows, to-wit:

HARRY E. Blood, called as a witness on the part of plaintiff, being duly sworn, testified as follows:

753 Direct examination.

By Mr. Ladd:

Q. What is your name, age and residence?

A. My name is Harry E. Blood; I am 43 years of age; and my home is in New York.

Q. What is your business, Mr. Blood?

- A. I am the agent for a New York house by the name of Paris, Allen & Co.
  - Q. What connection have they with W. A. Gaines & Company? A. They are the owners of the Old Crow Distillery.

Q. They handle these goods, W. A. Gaines & Company goods?

A. Yes, sir.

- Q. What are your duties in connection with your agency for that house?
- A. I take orders from wholesalers for all of their lines that they handle.

Q. You travel, do you? A. Yes, sir.

Yes, sir.

Q. Did you come from New York here to attend to this case?

A. I did, sir.

Q. Has you deposition been taken in this case?

A. Yes, sir.

Q. Where was that taken?

A. Last April in Denver, I believe.

Q. In Denver?

A. Yes, sir; March or April.

Q. You were expecting the case to come up and you could not be here at that time?

A. Yes, sir.

Q. Now, Mr. Blood, were you here in June, 1900? A. Yes, sir, I was.

Q. June and July?

A. Yes, sir.

Q. What was your business here—business connected with your house?

A. Yes, sir, my regular line, yes, sir.

Q. I will ask you what you know, if anything, about the purchase of a couple of bottles of whiskey from the defendant, the E. Whyte Grocery, Fruit & Wine Company in the latter part of June or first of July. Just state what connection you had with it, if anything? A. I heard that-

Q. State first, whether you went up to the store of the defendant

on Main and Walnut street-?

A. I was told that they were-

Defendant objects to what witness was told.

Q. Well, I just wanted to get the reason why he went, that's all; it is preliminary.

A. They were selling some "Old Crow" whiskey at 67 -ents for the full quart bottle, and so I called at the store; I saw Mr.

Whyte.

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Q. Mr. Ebenezer Whyte, the president?

A. Yes, sir.

Q. The old gentleman?

A. Yes. sir.

Mr. Pence: Now dead.

A. Yes, sir. I handed him my card. He said he had all the "Old Crow" whiskey that he wanted; had enough to last him for years to come. I then asked him if he did not want something young, and he said no, he didn't want any young whiskey at all: and I saw behind him three or four barrels with large cards on them. which read "Old Crow, \$2.50 a gallon," and "Old Crow, 8 years old," I think it was \$2.75 a gallon, and all of those cards were set over barrels that were branded the "Elk Run" which is a very cheap whiskey, in fact, the cheapest whiskey made in America. And I then asked Mr. Whyte if he thought that was fair, that he should sell that old whiskey for the "Old Crow" whiskey, and he said, "why." he says, "that is my business," he says "you get out of here;" and I said "all right, Mr. Whyte," and then he commenced to talk very loud, and I believe he called for one of his sons, and I said "Mr. Whyte, I am going out; you need not worry, sir." So I walked out. On the way out I noticed there was a whole lot of bottles labeled "Old Crow," and in fact there was four or five shelves full of them, and there were also other barrels with these cards on them, and I went out, and went down to the office of Morrin & Powers, and I asked them the name of a lawyer here; he told me to go to your firm, Mr. Ladd, and I then got Mr. Frank Smith-

Q. Wait-did you come to my office with Mr. Morrin?

A. Yes, sir, ves.

Q. That same day?

A. Yes, sir.

Q. That you met Mr. Whyte?

A. Yes, sir.

Q. Do you remember what time it was you came to my office, what time of day?

A. No, I don't remember, Mr. Ladd.

Q. Well, was it the middle of the day, about?

A. Why, I should think about 11 o'clock, or 12 o'clock possibly. Q. Now do you remember anything about a letter which was written to Mr. Whyte?

A. Yes, sir.

Q. Under your direction?

A. Yes, sir.

Q. Who wrote the letter?

A. You did.

Q. I will get you to look at this and see if that is the letter, (handing letter to witness)?

A. Yes, that is the same letter.

- Q. Just look at it and see; read it over and see to be certain of it.
- A. Yes, sir, that is the same letter. Q. Was this sent up to Mr. Whyte?

A. Yes, sir.

Q. By whom?

A. By your boy from your office, and I went up with him.

Mr. Pence: I don't think the letter is competent. We admit that we refused to refrain from using the label that we were using.

Mr. Ladd: You admit the letter was delivered to Mr. Whyte?

Mr. Pence: Oh yes.

Mr. Ladd: This letter is dated June 29, 1900, signed Gage, Ladd & Small, addressed to Mr. Ebenezer Whyte, Kansas City, Missouri, and is as follows:

Law Offices of Gage, Ladd & Small, New York Life Building, 18 West 9th Street. John C. Gage, Sandford B. Ladd, Charles E. Small, Porter B. Godard.

Kansas City, Mo., June 29, 1900.

Mr. Ebenezer Whyte, Kansas City, Mo.

DEAR SIR: Mr. Harry E. Blood who represents W. A. Gaines & Company, of Frankfort, Kentucky, distillers of "Old Crow" whiskey, has called to see us this afternoon, and informs us that you are selling other whiskey than "Old Crow" in bottles which have an "Old

Crow" label on them.

The distillers, in justice to their customers who buy "Old Crow" from them, and in order to protect their customers, are bound to prevent, so far as they can, the sale of whiskey as "Old Crow" which is not such. They can, of course, do this by a suit in Court. The question is not a new one and has frequently been decided, and any person who uses "Old Crow" labels in this manner can be enjoined by an order of Court from doing so in future, and compelled also to pay damages and costs. Mr. Blood does not wish to commence such a proceeding as this, and all he wishes is that you will agree, as other dealers in town have also agreed with him, that you will not sell whiskey under "Old Crow" labels which is not "Old Crow" whiskey.

This is all he asks of you, and we think upon reflection you will

regard it as no more than a fair request.

He is at our office now, and if you feel like coming down here to meet him and saying to him in writing that you will not use these labels any more except as they cover genuine "Old Crow" whiskey, the whole matter will be regarded as settled in a friendly way. Otherwise Mr. Blood will be compelled, much to his regret, to protect his customers in the way pointed out to him by law.

Mr. Blood has another engagement at 5 o'clock this afternoon, but will wait here until that time to see you; or, if you prefer, and will telephone to our office, (telephone 550) he will call

to see you.

Yours very truly,

# GADGE, LADD & SMALL.

Q. I will ask you if you waited at my office until the time mentioned?

A. I did, yes, sir.

Q. Did you hear anything from Mr. Whyte?

A. I did not, sir.

Q. Now, that was on the 29th of June. Now proceed and tell the Court what, if anything, you had to do with the purchase of two bottles of whiskey from that establishment?

A. I met Mr. Frank Smith of the Morrin-Powers Company and

Q. Now what day was that; is this your handwriting on here, (handing bottle to witness)?

A. Yes, sir.

Q. Now what day? A. June 30th.

Q. The next day?

A. Yes, sir. Q. You met who?

A. I met Mr. Frank Smith, of the Morrin-Powers Mercantile Company, city salesman, and I asked him if he knew of any one that I could send up to the Whyte Grocery Company for two bottles of whiskey, and he happened to meet a man by the name of Mr. Moffett; we were in some saloon up there, Bill Dixon's saloon, something like that.

Q. Where was it?

A. Here in Kansas City. Q. Well, whereabouts?

A. Right near the old postoffice.

Q. Yes.

A. Mr. Moffett said he says, "I can buy the whiskey," he said, "I know," he said, "the Whytes very well," he says, "I can buy it all right." So I gave him a five dollar bill. He came back with \$3.75, and the two bottles of whiskey.

Q. He came back to Dixon's saloon?

A. Yes, sir.

Q. What did you do, in the first place, did you mark the bottles in that way when he brought them back up there?

A. Yes, sir, I did.

Q. Are these the two bottles I show you now?

A. Yes, sir.

Q. One which is referred to and attached to Mr. Edson Bradley's deposition—is that one of them?

A. Yes, sir. Q. There are two labels?

A. Yes, sir.

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Q. On the back of this bottle, white labels with red borders with some writing on them?

A. That is my handwriting.Q. That is your handwriting?A. Yes, sir.

Q. Now what did you do with that bottle?

A. I sent this to New York to my firm.

Mr. Ladd: I will read these two labels and offer them in evidence. "Bought Whyte Grocery & Fruit Company, Kansas City, Mo., 6-30-00. Paid 621/2 cents or \$1.25 for two bottles. One of the bottles I left sealed with attorneys.

Q. What does that mean "sealed with attorneys"?

A. The other bottle you kept there so that it could not be opened.

Q. Who did you leave it with?

A. You.

Mr. Ladd: The other label reads, "Bought 6-30-1900. Time, 3:30 p. m., by Moffett. Witness, F. Smith—contents."

Q. This is the bottle you sent to New York?

A. Yes, sir.

Q. Now is this the bottle you left with me? A. Yes, sir; that is the bottle I left with you.

Q. I see some writing in pencil on the paper pasteboard wrapper enclosed in this bottle. Whose handwriting is that?

A. That is mine.

Q. Now where did you put that on—up there at Dixon's saloon?

A. Yes, sir.

Q. As soon as it was brought back to you?

A. Yes, sir.

Mr. Ladd: I will offer this in evidence and read it; "6-30-00, Kansas City. Pd. 62½ cents by Moffett. See Smith of Morrin-Powers Company. Sent for analysis. H. E. Blood—is that your signature?

A. Yes, sir.

Mr. Ladd: And off to the left "keep sealed"—is that yours?

A. Yes, sir.

Q. That was all written at the same time?

A. Yes, sir. The seal meant these two stamps that I put on there

on the cap. Here is one; there is the other one.

Q. I see a copule of two cent stamps on this bottle which you left with your attorneys, the stamps reaching from the neck of the bottle up to the middle of the cap. Who put those two stamps on?

A. I did.

Mr. Ladd: I offer this bottle, so far — a bottle can be offered in evidence, but particularly the labels on it; and also—I have already offered this handwriting of Mr. Blood's on the pasteboard wrapper.

Q. Have you ever tasted of this whiskey?

A. No, sir.

Q. Never have seen it unsealed?

A. No, sir.

758 Q. How long have you been in the whiskey business, Mr. Blood?

A. Almost nine years.

Q. How?

A. Almost nine years.

Q. How long have you been familiar with "Old Crow" whiskey?
A. Well, it was only since I have been in the employ of my firm.
Of course, I heard of the whiskey.

Q. How long is that?

A. About nine years, yes, sir.

Q. Often tasted it?

A. Yes, sir.

Q. You think you are a judge of "Old Crow" whiskey?

A. I am, sir.

Q. How much of it do you suppose you have sold?

A. How much of it I have sold?

Q. Yes.

A. Oh, thousand- and thousands and thousands of barrels.

Q. Now I wish you would unseal this bottle that you sent to New York and taste of that liquor inside, and tell the Court whether in your judgment it is "Old Crow" whiskey—I will ask you if you have ever tasted of it?

A. No. sir. I never have.

Q. Or any whiskey out of any bottle like it?

A. No.

Mr. Pence: It is no use going through all this formality and performance here. We will conceded that if that liquor came from the defendant's place of business, that it is not Gaines & Company's brand of "Old Crow."

Mr. Ladd: I would like to-

Mr. Pence: Of course, I have no objection to the gentleman taking a drink if he wants to take a drink.

Mr. Ladd: I want to see what kind of stuff it is.

A. (Witness unseals bottle, takes sample of contents and tastes it.) It is nothing but common spirits, it is about 85 proof spirits, of very poor quality.

Q. How much whiskey is there in it?

A. I don't think there is any at all; there may be just a little bit, but it is very faint if there is any.

Q. Mr. Blood, I will ask you to state to the Court—first, though, is this bottle what is called full quart?

A. Yes, sir.

Q. I will get you to state what a full quart of "Old Crow"—genuine "Old Crow" whiskey in a bottle could have been sold for at that time by the retailer, allowing the reasonable or customary profit to the different dealers through whose hands it would reach the retailer?

Mr. Pence: I object to that. I am willing for him to ask him what it was sold for as a matter of fact on the market. I don't think that question is competent.

The Court: What is the usual market price for it?

By Mr. Ladd: Well, what was the usual market price then, which the retailer, handling genuine "Old Crow" whiskey would get for a quart of it in a bottle at that time?

A. The wholesaler at that time had to pay us \$2.80 a gallon.

Mr. Pence: I object to that.

Mr. Ladd: He is getting at it step by step, it seems to me. He may not actually know what the retailer did sell it at. I don't know.

Mr. Pence: Let him state if he does not know.

A. I don't know what they have to pay the wholesalers for the whiskey.

Q. Just go on and state?

A. Yes, sir, but the wholesalers at that time had to pay us \$2.80 a gallon.

Q. In what quantities?

A. Oh, all the way from fifty barrels up to almost any amount. Q. Did your house—did the distillers sell to retailers at all?

A. No, sir.

Q. You just sold wholesale? A. Yes, sir.

Q. How much did you say by the barrels at wholesale?

A. \$2.80. Now they had to pay the freight to here on the whiskey.

Q. From the distillery?

A. Yes, so that would make, that would make "Old Crow" whiskey at that time—two years ago—cost the wholesaler about \$2.85, or about 713/4 cents a gallon—I mean a quart. Then he has to make his profit out of the retailer, of course. Therefore I presume he would have to pay in the neighborhood of about \$3.25 a gallon for it.

Defendant objects as being speculative.

Q. Who would? A. The retailer.

Q. By the barrel?

A. Yes, sir.

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The Court: He may state facts, what he knows about the price, not his presumption, Mr. Ladd.

Q. Well, what would it cost—that is by the barrel?

A. Yes, sir.

Q. What would it cost to bottle it?

A. It averages about a dollar a case.

Q. What do you mean by a case—12 bottles? A. Yes, sir, 12 bottles, with the corks, labels and caps.

- Q. So that it would cost \$2.80 here in the barrels, delivered to the wholesaler?
  - A. No, \$2.80 at the distillery.

Q. \$2.80 at the distillery?

A. Yes, sir.

Q. And how much would it cost here?

A. About 5 cents a gallon freight.

Q. \$2.80 a gallon?

A. Yes, sir.

Q. Delivered here?

A. Yes, sir.

Q. By the barrel?

A. Yes, sir.Q. Then there is the wholesaler's profit?

A. Yes, sir.

Q. And the retailer's profit?

A. Yes, sir.

Q. And the cost of the bottles?

A. Yes, sir.

Q. Mr. Blood, do you know what this liquor in this bottle that you sampled, do you know what it is worth?

A. I should say from the taste, about \$1.35 a gallon.

Q. Have you any familiarity or how is it as to the various brands and manufactures of whisky in the country?

A. Yes. sir.

Q. Does your business make you familiar with it?

A. Yes, sir.

Q. And with the distilleries by reputation?

A. Yes, sir.

Q. I will ask you if since your connection with W. A. Gaines & Company—I think you said you had been with them nine years?

A. Yes, sir. Q. What other distillery, if any, is there, except the one operated by W. A. Gaines & Company, in Woodford County, Kentucky, at which whisky known as "Old Crow" whisky is manufactured?

A. None.

Q. If you were to see such a label upon a bottle of whisky, such a label as appears upon this bottle bought of the Whytes, with the words upon the label, "Hand made Old Crow Sour Mash whisky, This whisky is bottled by us and we are responsible for its purity and fine quality. E. Whyte & Co.," and you knew or suspected nothing to the contrary, what would be the information conveyed by that label to your mind, or the mind of any purchaser?

A. That it was the genuine "Old Crow" whisky in this one.

Q. What does this indicate below here?

A. That it is the real "Old Crow" whisky, put up by E. Whyte & Company.

Q. Bottled by them?

A. Yes, sir.

- Q. Now what is the effect, natural effect, you may state, from your knowledge of the business, of spurious cheap whisky or liquors of any kind being put up or sold under a label of this sort?
- 761 Defendant objects as entirely incompetent, irrelevant and immaterial, and calling merely for the opinion or conclusion of this witness.

The Court: Let him answer.

To which ruling of the court defendant then and there duly excepted.

Q. Now just state what the effect of that would be? A. Why, very injurious to our business, naturally.

Q. Well, whose business?

A. W. A. Gaines & Company. Q. Well, in what way?

A. When a man drinks anything like that, and if he thinks it is the "Old Crow," as he will from the label, he would say, "well, if that's 'Old Crow' whisky, I don't want any more of it."

Q. Well, who else does it affect beside W. A. Gaines & Company? A. All of the wholesale trade, because they won't buy our whiskies unless we protect them, you see, and prevent these fakirs from handling the label.

Defendant objects and moves that it be stricken out as not competent evidence.

Objection and motion overruled by the court.

To which ruling of the court defendant then and there duly excepted.

Q. Who do you mean by wholesale trade, who do you sell to here?

A. All of the wholesale houses here.

Q. Mention some of them.

A. Morrin-Powers and Glasner & Barzen. I can't think of all

now; I haven't my book with me.

Q. Now how does the sale of such material as that, whatever it may be, in that bottle, under a label of that sort, affect the wholesale dealers who are purchasing of you and dealing in genuine "Old Crow" whisky?

Defendant objects as not being competent, relevant or material what its effect is upon the wholesale dealers.

The Court: Answer the question.

To which ruling of the court defendant then and there duly excepted.

A. They say that they can not sell—

The Court: Oh, no, Mr. Blood, not what they say.

By Mr. Ladd: What is the effect, what do you know?

762 A. They won't buy our whiskies unless we protect them, that's all.

Q. Well, how does it affect their trade, if at all, the wholesaler's trade?

A. Naturally it hurts them wonderfully.

Q. Well, in what way?

A. If they have got the whisky on hand, you see they can not sell it.

Q. Mr. Blood, you say in your examination before this, that you learned or heard something which led you to suspect that they were selling spurious "Old Crow" up there?
A. Yes, sir.

Q. Do you remember now how you heard that?

A. No, sir, I do not.

Q. Well, when did you hear it, on your visit there at Kansas City on that occasion?

A. Yes, sir, at that time I heard it, I went up there.

Q. Had you heard it before that, that this Company was selling spurious "Old Crow?"

A. No, sir.

Q. Now what kind of whisky is "Old Crow?" How does it stand in the market as compared with other whiskies?

A. It is the highest priced whisky in America.

Q. Attached to Mr. Bradley's deposition there is a copy of what is called "Biles' Semi-Monthly Whisky Price List."

A. Yes. sir.

Q. "Journal and Price list devoted to the interest of the straight whisky trade."

A. Yes, sir.
Q. What do you know about that list; how is it regarded in the trade?

A. Why, as the standard.

Q. It is reliable, is it? A. Oh, yes.

Q. It is referred to by dealers?

A. Oh ves, entirely so.

Q. Sir?

A. Yes, sir, entirely so.

Q. Something has been said here in some depositions about "Hermitage" whisky; what is that? Is that a bourbon or a rye whisky?

A. It is both. It is either one, one or the other; they make rye one month and next month make bourbon.

#### Cross-examination

# By Mr. Pence:

Q. What is your territory, Mr. Blood?

A. From St. Louis all the river towns up to Chicago, out to 'Frisco.

Q. How long has that been your territory?

A. Since last October. Q. Since last October?

A. Yes, sir.

Q. Then you have not been making this territory, or selling whisky in this territory prior to last October?

763 A. Yes, sir, I made three trips here prior to that.

Q. You mean three trips here?

A. Yes, sir.

Q. When were those trips made? A. The first was in June, 1900; the next was in the fall of 1900, and the next was in the spring of 1901, and then last October, and I was here last March again.

Q. Those are the only trips that you have made here to Kansas

City, as the agent of Paris, Allen & Company?

A. Yes, sir.

Q. Who was Paris, Allen & Company's agent here in Kansas City prior to October, 1901?

A. A man by the name of E. C. Homan. Q. How long had he been their agent?

A. About 28 years.

Q. 28 years?

A. Yes.

Q. For 28 years, then, Mr. Homan had been coming to Kansas City and selling here the whisky of W. A. Gaines & Company?

A. Yes, sir.

Q. Or Paris, Allen & Company?

A. Yes, sir.
Q. Twenty-eight years—where is Mr. Homan now?
A. He is dead.

Q. He is dead-he died in what time-what time?

A. August of last year.

[So all the trips that you have made here to Kansas City.]

Q. August of last year.

[A.] So all the trips that you have made here to Kansas City you have made since the beginning of this suit?

A. Yes, sir.

Q. Your first trip was when you came here and started the suit against the E. Whyte Grocery, Fruit & Wine Company?

A. Yes, sir. Q. Now you say that you were the traveling representative of Paris, Allen & Company?

A. Yes, sir. Q. Is that a corporation?

A. No, sir.

Q. It is not a corporation? A. No, sir.

Q. Where do they reside? A. In New York. Q. In New York?

A. Yes, sir.
Q. You say they own this "Old Crow" Distillery?
A. Yes, sir, and the Hermitage.
Q. They own the Hermitage and the "Old Crow" Distillery?

A. And a whole lot of others.

Q. And they own the output of the distillery?

A. Yes, sir.
Q. And do they also sell all the liquor that is manufactured at these distilleries?

A. Yes, sir.Q. And they own this brand of "Old Crow"?

A. Yes, sir.

Q. Paris, Allen & Company?

A. Yes, sir.

764 Q. Of the City of New York?

A. Yes, sir.

Q. Now, Mr. Blood, you say that you heard that Whyte & Company were selling "Old Crow" whisky for 67 cents a quart?
A. Yes.

Q. And you went up there to investigate, did you?

A. Yes. Q. Well, now, what did you do when you went there?

A. I went in to see Mr. Whyte, handed him my card; he thought I wanted to sell him something; I didn't want to sell him anything because he was a retailer, he had no wholesale license, and he looked at my card, and he said, "I don't want any whisky. I have got all the "Old Crow" whisky I want for years to come," and right behind him was an "Elk Run" barrel.

Q. Right behind him was an "Elk Run" barrel?

A. Yes, sir.

Q. You are positive of that, are you, Mr. Blood?

A. Yes, sir, because I have sold——

Q. You are as certain of that as you are of knowing that you testified here?

A. Well, right behind him, or rather off to one side.

Q. That you saw "Elk Run" barrels in the establishment of E. Whyte & Company?

A. Yes, sir.

Q. Did E. Whyte say that this whisky that he was selling there is "Old Crow" was the "Elk Run" whisky?

A. He didn't say anything about it. He said he had all that

he wanted.

Q. That "Elk Run" barrel was labeled "Old Crow"?

A. It had a placard on there. Q. Labeled "Old Crow"?

A. Yes, sir, it was fastened on the barrel with a tag.

Q. And anything else on that placard?

A. "Old Crow whiskey, 8 years old, \$2.50 a gallon."

Q. Eight years old?

A. Yes, sir.

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Q. You think the age of it was also on there?

A. I remember that distinctly, because he had it there six years old for \$2.25, all on the "Elk Run" barrel.

Q. Then you asked him if it was fair for him to sell the "Elk Run" whiskey——

A. Under the "Old Crow" label. Then he ordered me out of the store.

Q. Then he told you that was none of your business?

A. Yes, sir, and for me to get out of the store.

Q. Who was present there during that time you had this conversation?

A. There was not anybody, not any one present at all.

Q. Where were you standing?

A. I was standing on the outside of his office.

Q. Outside of his office?

A. If I remember it right he was in his office, or he was in front of a kind of a desk, one of these little desks of some kind—I don't know whether it was——

Q. Well, was there an office there inside, inside of any room?

A. Oh no, there was not a railing around there at all; it was only in front, that is, if I remember that rightly; now I am not sure about it.

Q. You are not sure now whether there was an office or what there was?

A. That was his office, I know that, that was his office, because he was working on the books there.

Q. Was there a railing around or a partition around it?
A. I don't remember that, sir.
Q. You don't remember whether there was a partition or not?

A. No, I don't think there was.

Q. But you do remember of seeing "Elk Run" barrels there, and you are positive of that?

A. Yes, sir, because we used to own that distillery. Q. Now you say there was nobody there except you and E. Whyte, senior?

A. That is right, yes, sir.

Q. He is now dead?

A. Yes, sir.

Q. He was an elderly gentleman at that time?

A. Yes, sir. Q. You did not go there to sell him any "Old Crow" whiskey; you went there to ascertain about his whiskey and what he was selling?

A. Wanted him to stop.

Q. You were doing a little detective business?
A. Wanted him to stop, just like other people, to stop.
Q. Wanted him to stop?
A. Yes, using cheap whiskey and calling it "Old Crow," that is all, just wanted fair treatment from him, that is all; I wasn't after any money.

Q. You didn't try to sell him any whiskey at all?

A. No, sir.

Q. Didn't try to sell him any whiskey?

A. Not a bit.

Q. Now after you had your conversation-you say nobody was present at any time during the conversation with him?

A. Until he told me to get out; then when he told me to get out

one of his sons came over there.

Q. One of his sons came over there? A. Yes, sir, he heard him.

Q. Where was his son?

A. I didn't notice where he came from.

Q. You didn't notice where he came from?

766 A. No. sir.

Q. For all you know he was right there at the desk during this time?

A. No, sir, there was not a soul there except Mr. Whyte.

Q. Now, when you left the office you say that you passed outwhich way did you go, which way did you pass out?

A. Out in front.

Q. Which side of the store did you pass out of?A. On the right hand side as you go out.

Q. The store fronts west, doesn't it?

A. I don't know which is east or west here.

Q. You went out on the right hand side?

A. Yes, sir, past the cigar counter.

Q. As you went out you noticed a large number of bottles bearing the label "Old Crow" on the shelves?

A. Yes, sir.

Q. Along the shelves?

A. Along there, but they were back further, these shelves were.

Q. Ranged along side of the wall? A. Along the wall, that is right.

Q. They were up there ranged along the wall, these bottles, labeled "Old Crow":

A. That is right.

Q. You are sure of that, are you?A. Yes, sir.

Q. And you say you saw some other barrels too there labeled "Old Crow"?

A. Yes, sir.

Q. Besides this one?

A. Yes, sir.

Q. Do you know how many barrels additional you saw there labeled "Old Crow"?

A. About four or five altogether.

Q. Four or five barrels?

A. Yes, sir.

Q. Do you know what kind of whisky that was?

A. No, I did not look at it.

Q. You don't know anything about that?

A. No, I was going out quick for fear I'd get hurt.

Q. You thought you'd get hurt, did you, you thought that that old man about seventy years old would hurt you?

A. No, he had a couple of large sons.

Q. Did you have any conversation with the sons?

A. Not while I was there.

Q. No conversation with them at all?

A. But they talked after I left, I presume.

Q. Now just tell us Mr. Blood, what this Gaines & Company "Old Crow" whiskey sells for at retail per quart?

A. At retail per quart?

Q. Yes, sir, quart bottles of "Old Crow" whiskey, I mean Gaines & Company?

A. You mean Gaines & Company?

Q. Yes, sir. 767

A. In the nine years that I have been in the business I never seen it sold for less than \$1.25, and from that upwards.

Q. How high up?

A. Oh, if it was twenty-five years old, it is liable to be ten dollars a

Q. I am not speaking now of fancy brands. What does the ordinary Gaines & Company's "Old Crow" whiskey sell for per quart in quart bottles?

A. \$1.25 to \$1.75—not a quart; they never sell them in quarts.

Q. Not quite a full quart?

A. They are fives.

Q. It takes five of them to make a gallon?

A. That's right.

Q. And these bottles bearing Gaines & Company's label, the "Old Crow" Distillery in Woodford -, Kentucky-

A. 1es.
Q. Those bottles sell at from \$1.25 to \$1.75?
A. Yes, sir.
Q. That is the universal price?
A. The universal price all over the country.

Q. Now Mr. Blood, do you mean to tell the Court that if you would see a bottle of whiskey in a show window, bearing that label, "Old Crow" whiskey, without the name of W. A. Gaines & Company, distillers, "Old Crow" Distillery, Woodford County, Kentucky, that you would suppose for one minute that 't was W. A. Gaines & Company's "Old Crow" whiskey distilled in Woodford County, Kentucky?

A. Why, certainly.
Q. You state to the Court that you would believe that it was?
A. Yes, sir, absolutely.

Q. Do you think that any dealer in whiskey would have little enough sense, who was selling Gaines & Company's high priced "Old Crow" whiskey, to put it up in bottles without a label—bearing their label, W. A. Gaines & Company, distillers, Woodford County, Kentucky?

A. Everybody that would buy that would absolutely believe it was

"Old Crow" whiskey.

Q. Just answer my question.

A. Well, for the reason that there is not one in thirty millions that knows that W. A. Gaines is in Woodford County, Kentucky, or whether he is in New York, or where he is; that don't cut any figure,

Q. Just answer my question and don't argue the case. Let me change that a little, that is a little awkward. Do you mean to say that any dealer was selling W. A. Gaines & Company "Old Crow"

whiskey, manufactured at their distillery, at the "Old Crow" 768 Distillery in Woodford County, Kentucky, would bottle that liquor and sell it under a label of that kind, without the name of W. A. Gaines & Company upon the label?

A. Yes, sir, those labels can be purchased.

Q. Now I am not talking about that.

Mr. Ladd: He has answered your question, yes.

Q. You say that they would? A. Yes, sir.

Q. You say that they would?

A. Yes, sir.

Q. That they would put up a W. A. Gaines & Company whiskey in bottles and put a label of that kind on it, and omit to put the name W. A. Gaines & Company, distillers, upon the brand?

A. Yes, sir.

Q. Or a lithograph of the "Old Crow" Distillery?

A. Yes. sir.

Q. Now you tell this Court that if you would see that bottle, that you would suppose that it was W. A. Gaines & Company's "Old Crow" whiskey?

A. I do, sir, because it has the name of E. Whyte on there as a

guaranty that it is "Old Crow" whiskey.

Q. Just read that, read what it says?

A. "E. Whyte & Company," and there is "Old Crow" right there.

Q. Exactly, just read what it says above there?

A. "This whiskey is bottled by us and we are responsible for its purity and fine quality. Now what kind of whiskey—"Old Crow."

Q. And that is signed "E. Whyte & Co."

A. There it is, "E. Whyte & Co."

Q. Now suppose, Mr. Blood, that you see this bottle of whiskey exposed for sale, and you would go in there and ask the price of it, and they told you that it was 65 cents or 75 cents a bottle; then would you think that it was W. A. Gaines & Company's "Old Crow" whiskey?

A. I would know it was not.

Q. You would know that it was not?

A. Yes. sir.

Q. And anybody else would know it was not?

A. No, sir, they would not because they are not posted in the whiskey business.

Q. They would not?

A. No.

Q. Now Mr. Blood, do you say that you sell to all the houses here?
A. Nearly all of the wholesale houses, not all "Old Crow." We have other lines of whiskies that we own, you know, that my firm

own, made in Kentucky.

Q. But you sell to nearly all of the houses?

A. I guess I do, nearly all of them. Q. Nearly all of the houses?

A. Yes. sir.

Q. And how long have you been selling to them?

A. Oh, there are some houses here that my firm have been selling ever since they have been in business for years and years back.

Q. Morrin-Powers handle your whiskey; did they not?

A. Yes, sir.

Q. They were your agents here?

A. No. sir.

Q. They were not?

A. No, they were just very large holders.

Q. Weren't they your distributors here?

A. No, sir.

Q. They were not?

A. We have no distributors, beyond, you see, they buy more than anybody else in town, in fact than all the rest of the town put together, of the "Old Crow" and the "Hermitage" whiskey.

Q. Make any specialty of "Hermitage" and "Old Crow?"

A. It seems so.

Q. And take orders from other dealers?

A. Oh, no.

Q. They send in to you?

A. Yes, sir.
Q. They never do?
A. Not that I know of; I don't know anything about it.

Q. Not that you know of?

A. Not any of the wholesalers, any other wholesaler,

Q. Do you know anything about that.

A. No, I don't know anything about that. I don't care anything about that.

Q. Now Mr. Blood, you know that these labels of this kind—this

is what is called a stock label, isn't it?

A. No, it is a special label Mr. Whyte had made, I should judge, because it has his name on it, although it may be a stock label.

Q. It may be a stock label?

A. Yes, sir, it may be a stock label.

Q. Do you know that these stock labels are made by a number of the printing establishments all over the country?

A. All over the United States, ves. sir.

Q. And they are sold to everybody that wants to buy them?

A. Yes, sir, largely "Old Crow."
Q. And a large percentage of these stock labels contain the words "Old Crow?"

A. And "Hermitage."

Q. Yes, and some of them were "H. McBayer," aren't they? A. Yes, sir.
Q. And some "Sherwood?"

A. That is right.

Q. And they are printed without the name of the distillery? A. Oh, a whole lot of them have those on; some have not.

Q. Don't the great majority of them simply print it without the name of the distillery? 770

A. Oh, no, a whole lot of them have their names on it; a lot of different varieties have their names on.

Q. Did you ever see a stock "Old Crow" label—a stock label— "Old Crow" label with the name of W. A. Gaines & Company on it?

A. Yes, sir. Q. You did?

A. Scores of them.

Q. You have? A. Yes, sir.

Q. And where did you see those?

A. In the hands of wholesalers around the country.

Q. Now you know as a matter of fact that these stock labels are used generally by bottlers and dealers in whiskey, do you not?

A. Yes, sir.

Q. You know that? A. Yes.

Q. Everywhere?

A. If they will ask us for labels we will give it to them all they want for nothing.

Q. But you know that these stock labels are used by bottlers and

dealers generally?

A. I see them all over the country.

Q. You can not pass a window, can you, of a retail dealer in bottled whiskey, without seeing in his window some of those stock labels on bottles there, containing the words "Old Crow?"

A. Oh, yes, Q. You can?

A. Yes, sir, indeed; why it isn't everybody that handles "Old Crow" whiskey.

Q. No, it isn't everybody that handles Gaines & Company "Old

Crow" whiskey?

A. That is the only "Old Crow" made.

Q. That is your view of it?

A. Yes.

Q. You know as a matter of fact, don't you, those bottles are in

every dealer's window?

A. They buy all kinds of labels, and they fill these up, you see, with water, you understand, and put in there just a little, what you call it, brown sugar, or something, you know, to make the color of it, and there would be no whiskey in the bottles at all, you know, you understand they are not for sale, only there for show, that's all.

Q. Then these bottles that you see are not for sale, those labeled

"Old Crow?"

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A. A whole lot of them I say, in a whole lot of these places.

Q. Then as a matter of fact those labels are attached to bottles containing various brands and manufactures of whiskey, are they not?

A. You see them all over the country, I presume. Wherever I find them I stop it.

Q. Hasn't that been true for the last thirty years? A. No, sir, not to my knowledge.

Q. Not to your knowledge?

A. No, sir.

Q. That has not been true for the last thirty years?

A. Not to the knowledge of my firm.

Q. That the people generally, dealers generally have been bottling all kinds and sorts of whiskey and putting on these stock labels on the bottles—why, don't you know that it is done all the time?

A. No, I do not.

Q. You do not?
A. No, sir.
Q. Don't you know that there is hardly a dealer in Kansas City that has not got that "Old Crow" label?

A. They are for use in the "Old Crow" whiskey.

Q. They are using the Gaines & Company "Old Crow" whiskey?

A. Yes, sir. Q. These retail houses you see along here on Walnut street, don't you know they sell their whiskey at 65 and 70 cents a bottle?

A. They can not put any "Old Crow" there, no label "Old Crow" or "Old Crow."

Q. But you can buy whiskey containing that label, can't you, "Old Crow?"

A. No, sir, they all signed a piece of paper with me never to do so any more.

Q. Now we will get to that later on. What I am saying is that you can buy whiskey—it may not be as good whiskey as Gaines & Company's "Old Crow," but you can buy whiskey all over this town, over there, barrel houses and bottle houses, containing these "Old Crow" stock labels on it?

A. You can?

Q. Isn't that true?

A. No, sir, you can not.

Q. About what percentage of them that you can't?

A. Not one place in Kansas City. Q. Not one place in Kansas City?

A. No, sir, to my knowledge, not one place.

Q. To your knowledge?

A. Yes, sir, and I have been around all over the places here.

Q. You have been around all over here and you never saw these bottles containing these stock labels with the words "Old Crow" on them?

A. Where I see them I had it stopped.

Q. You have been here four times, I believe, in Kansas City, since you began this suit?

A. No, this makes six times.

Q. Have you made the rounds of the retailers in Kansas City?

A. I did last March when I was here.

- Q. You did last March?
  A. I was here two weeks.
- Q. And you notified all these people not to use that label?

A. Every one of them.

Q. They are still using it, are they not?

A. No, sir.

Q. They are not? A. No, sir. 772

Q. Did you ever begin suit against anybody out here?

A. No, sir.

Q. Except E. Whyte & Company?

A. No, sir, I did not. Q. Never have?

A. Never have.

Q. Did you ever bring suit anywhere, you yourself?

A. Why, yes, lots of places.

Q. Where?

A. I had over-in the neighborhood of between four and five hundred in New York.

Q. Were those your cases—those New York cases?

A. I had charge of them.

Q. When did you begin these suits in New York?

A. 1896 or '97, I have forgotten.

Q. Did you ever bring suit against anybody prior to 1879?

- A. Not to my knowledge. Oh, the firm has, yes, hundreds of cases.
  - Q. I'm asking you what you know, Mr. Blood.

A. No, sir.

Q. You don't know of any suit having been brought prior to 1897?

A. You mean by my firm? Q. Yes.

A. Yes, sir. Q. What suit is that?

A. A suit in Indianapolis and two suits in Cincinnati.

Q. That is your signature, isn't it (handing paper to witness).

A. Yes, sir.

Q. You swore to that petition?

A. Yes, sir.

Q. That is the original petition in this case?

A. Yes. Q. You state in this original petition, Mr. Blood, "That the business now operated by plaintiff corporation was founded by James Crow about the year 1835"?

A. Yes, sir.

Q. Is that true?

A. As far as I know, yes—that is before my time.

Q. (Reading from original petition:) "That said Crow was a distiller and originated and devised the trade mark "Old Crow" for whiskies distilled by him at his distillery in Woodford County, Kentucky, which became known as the "Old Crow Distillery?"

A. Yes, sir.

Q. Is that correct?

A. Yes, sir. Q. That is true, is it?

A. Yes, that is true.

Q. "And the 'Old Crow' whiskey distilled and sold by the said James Crow, by reason of its purity, high standard of quality and excellence of manufacture, obtained a most excellent reputation." That is correct, is it?

A. Yes, sir.

Q. That is true? A. That is true.

Q. "That thereafter, and about the year 1866, the firm of Gaines, Berry & Company purchased and succeeded to the business, dis-

tillery, good will and trade marks of the business originated 773 by the said James Crow, and continued the distilling, preparing and selling of whiskies at said distillery in Woodford

County, Kentucky?"

A. Yes, sir.

Q. Is that true?

A. That is true. Q. You further say "that among the trade marks originated and devised by the said James Crow and used by him and continued to be used by the plaintiff and its predecessors, was the certain trade mark for whiskey known as, and consisting of the arbitrary words "Old Crow," which were attached to the packages, barrels and bottles containing the genuine "Old Crow" whiskey distilled by the said James Crow and succeeding parties in interest, which became, and is the distinguishing mark of the whiskies distilled and sold by this plaintiff and its predecessors at the said "Old Crow distillery in Woodford County, in the state of Kentucky." Is that correct?

A. That is correct.

Q. "And which brand of "Old Crow" whiskey commanded and still does command a large and ready sale on the market, and was and is well known to the dealers in and purchasers and consumers of whiskey in the United States and elsewhere." That is correct, is it?

A. That is correct.
Q. Look at that document and see what that is; see if you recognize that (handing paper to witness)?

A. Yes.

Q. Is that a copy of one of your petitions in the four hundred New York cases which you brought?

A. Yes, sir.

Q. They were so numerous that you had the petitions printed?

A. Yes, we had a score of them there.

Q. And upon this petition these suits were brought?

A. Just turned them over to the lawyers and let them settle it after we found out what it was.

Q. You say here in this petition, you say that "this plaintiff is informed and verily believes, the business now operated by plaintiff corporation"-

Mr. Ladd: Did Mr. Blood have anything to do with it? Mr. Pence: He says, he did, that is my understanding.

Mr. Ladd: Let's see whether he said that.

Mr. Pence: He did not swear to that petition but he brought the

Witness: The lawyers brought the suits through me. I done the work, turned them over to the lawyers, and that was the end of it.

Q. The suits were all brought through you? A. No, sir, the lawyers there, signed there.

Q. Didn't you bring the suits?

A. No.

Q. Well, who did?

A. Mr. Bradley did.

774 Q. I thought just now [--] you brought four hundred suits?

A. I had charge of the matter and always turned it over to the firm, that's all.

Q. You had charge of the matter then, bringing of these suits?

A. Of trying to find out where these—all these firms were that had the "Old Crow" label but not the "Old Crow" whiskey, and I sent the names in to the firm, that is the way I had charge of the matter; there was about between five and six hundred of them.

Q. Did you consult with the attorneys who brought the suits?

A. I had nothing to do with it at all. Q. Did you ever see any of the attorneys?

A. Oh yes, know them very well.

Q. Did you have any talk with them in regard to the bringing of this suit?

A. No, I had nothing to do with it at all.

Q. You had nothing to do with the bringing of these four hundred suits?

A. No, sir, just simply to find the men, that's all.

Q. How do you know then this is a copy of the petition that was filed in these suits?

Q. Because I have seen hundreds of them.

Q. You have seen hundreds of them?

A. Yes, sir.

Q. Are they all the same?

A. A printed form, yes, had so many of them they had to have them printed.

Q. Do you know the statements contained in here are true?

A. I don't know anything about it.

Q. You don't know anything about it?

A. Whether they are true or not; I suppose they are, they would

not be otherwise.

Q. You state in this petition, "that, as this plaintiff is informed and verily believes, the business now operated by plaintiff corporation was founded by James Crow, in about the year 1835, a period of over sixty years ago; the said Crow was a distiller, and he originated and devised the trade mark "Old Crow" for whiskies distilled by him at his distillery in Woodford County, Kentucky, which became known as the "Old Crow Distillery." Is that correct?

A. Yes that is right.

Q. "And the 'Old Crow' whiskey distilled and sold by the said James Crow by reason of its purity, high standard of quality and excellence of manufacture, obtained a most excellent reputation. That thereafter, and in about the year 1866, the firm of Gaines, Berry & Company purchased and succeeded to the business, distillery, good will and trade marks of the business originated by the

said James Crow, and continued the distilling, preparing and selling of whiskies at said distillery in Woodford County, 775

Kentucky, and which partnership of Gaines, Berry & Company was thereafter changed to the firm of W. A. Gaines & Company, who acquired the business, property, trade marks, good will and distillery of said preceding firm, and continued the business of distilling and selling 'Old Crow' whiskey." You are familiar with that allegation, are you?

A. Yes, sir.

Q. And that is correct?

A. As far as I knew. Q. Now, Mr. Blood, you have tasted some whiskey; you are a pretty good taster, are you?

A. Oh yes, sir.

Q. You may tell this Court, Mr. Blood, if you can tell by tasting Gaines & Company's "Old Crow" whiskey, if you didn't know that it was Gaines & Company's "Old Crow" whiskey; that you can tell it, distinguish it, from other brands?

A. Yes, sir, very easily.

Q. Just simply by the taste of it?

A. Or either by the smell. Q. By either taste or smell?

A. Yes, sir. . Q. You can tell Gaines & Company's "Old Crow" whiskey from any other kind of whiskey?

A. Yes, sir.

Q. Can you also tell the "Hermitage" from any other kind?

A. I can tell the rye, not the bourbon.

#### Redirect examination.

#### By Mr. Ladd:

Q. Here are five labels attached to your deposition which was taken in Denver, marked "A, B, C, D and E." Now I wish you would tell the Court who gets up these five labels?

A. We have them printed. Q. Well, Gaines & Company?

- A. Yes, sir. "B" and "C" we furnish to the wholesale trade and
- Q. Now what do you mean by furnish to the wholesale trade? Just go on and tell it?

A. Who handle our whiskies in bulk.

Q. That is if they want them, you furnish them both?
A. Yes, sir, and "D" we use ourselves on the in bond bottling "Old Crow" whiskies.

- Q. That is your own bottling? A. That is our own bottling. The "E" label is used in bottling a very old whiskey. Neither of the "D" and "E" do we furnish to any one.
  - Q. "D" and "E" go on the whiskey which you bottle yourselves?

A. That is right, at the distillery.

Q. At the distillery?

A. Yes, sir.

- Q. And these other three are furnished to dealers if they want them?
  - A. If they want them [them], with their names printed on them.

Q. What is your age? 776

A. I am forty-three-forty-four.

Q. How long have you been in the whiskey business?

A. Nine years.

Q. Before that what were you engaged in?

A. Manager of the National Cash Register Company in Chicago.

Q. Had nothing to do with the whiskey business until about nine years ago?

A. No. sir.

Q. Now on cross-examination, you spoke about Paris, Allen & Company, you said they owned these whiskies, these distilleries, What do you mean, they own the stock in the corporation, W. A. Gaines & Company?

A. They control the output.

Defendant objected.

Q. They own the stock in the corporation, is that it?

A. Yes, sir, that is right.

Q. Now just a word. Here are attached to the deposition of Mr. Leonard which has not been read, and which will be read, there are a lot of labels. Now what are these labels called that are attached to Mr. Leonard's deposition?

A. These are what they call regular stock labels.

Q. Stock labels?

A. Yes, sir.

Q. Well, who are they made by?

A. All kinds of printing houses all over the country.

Q. What house were these made by—it will appear from Mr. Leonard's deposition—what house were these labels made by?

A. A house I think in Chicago.

Q. Do you remember the name of it?

A. No, sir.

Q. Mr. Leonard was the manager?

A. Yes, sir.

Q. These were made by his house?

A. Yes, sir.

Q. Are they offered for sale?

A. They are to the trade.Q. These are samples of them.

A. Those are samples which their salesmen carry around in boxes, you know, to show the trade, for them to order.

Q. And sell to dealers of whiskies?

A. Yes, sir.

Q. Now here is a bottle of whiskey with the label on-

A. "D."

Q. No. "D"?

A. Yes.

Q. Or "Exhibit D" attached to your deposition?

A. Yes, sir.

Q. Where was that bottle of whiskey bottled?

A. Frankfort, Kentucky, at the distillery.
Q. Now I show you a bottle of whiskey with a label on "Exhibit E" attached to your deposition. Where was that whiskey bottled?

A. At the same place. Q. At the distillery?

A. At the distillery; that is very old.

Q. Do you know where these two bottles came from?

A. No, sir, I do not.

Mr. Ladd: I will offer in evidence in connection with Mr. Blood's testimony, Exhibits "A," "B," "C," "D" and "E" which were at-

tached to his deposition which was taken in Denver:

Exhibit "A": "Old Crow Hand Made Sour Mash Bourbon whiskey. W. A. Gaines & Company, Distillers, Woodford County, Kentucky. Old Crow Distillery, Copper Distilled Bourbon whiskey. W. A. Gaines & Company, Distillers, Woodford County, Kentucky."

Exhibit "B": "Old Crow Hand Made Sour Mash Bourbon whiskey. W. A. Gaines & Company, Distillers, Woodford County, Kentucky. Old Crow Distillery, Copper Distilled Bourbon whiskey. W. A. Gaines & Company, Distillers, Woodford County, Kentucky."

Exhibit "C": "Old Crow Sour Mash Whiskey."

Exhibit "D": "Old Crow. Old Crow Distillery, Woodford County, Kentucky. W. A. Gaines & Company, Proprietors. Bourbon Whiskey. Bottled at the Distillery in Bond under supervision of the officers of the Internal Revenue and guaranteed by the U. S. Government pure and of age indicated by stamp over Cork and Capsule. Caution: Be sure that the Internal Revenue Stamp over the Cork and Capsule is unbroken as this guarantees the genuineness, purity and age of the contents of this bottle. Old Crow Distillery, Copper Distilled Whiskey. W. A. Gaines & Company, Distillers, Woodford County, Kentucky."

Exhibit "E": "Old Crow Sour Mash Whiskey, Distilled at the Old Crow Distillery. Bottled at the Distillery under our personal supervision, and guaranteed absolutely pure and unadulterated. Old Crow Distillery, Copper Distilled Whiskey. W. A. Gaines & Company, Distillers, Woodford County, Kentucky. Woodford County,

Ky., W. A. Gaines & Co., Distillers."

Recross-examination.

# My Mr. Pence:

Q. Did you mention Mr. Quinn—M. Quinn, as one of the gentlemen that was using the stock label "Old Crow" on whiskey that was not manufactured by Gaines & Company?

A. I don't remember whether he was one of the men or not, but it

seems to me that he was.

Q. He was one of them that was doing that?

A. Yes, sir.

Q. What did he say to you when you-

778 Plaintiff objects to what Mr. Quinn said.

Mr. Pence: I don't care.

The Court: I don't think that is material.

- Q. You know that Mr. Quinn is right now selling just the same as he always did, don't you?
  - A. I do not, sir.

Q. You do not? A. No, sir.

Q. When was you first at his store?

A. When I was here on my way to California in March or April.

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Q. Did you go to his store then?

A. I did, sir.

Q. Have you been there since? A. No, I have not been here since?

Q. You have not been here since?

A. I just arrived here yesterday.
Q. You have not been there since you have arrived?

A. No. I have not had time.

Q. And you don't know whether he is or not?

A. No, sir; I will find out though.

Q. Now these are the labels that are prepared by W. A. Gaines & Company?

A. Yes.

Q. And sent to persons who buy their whiskey?

A. Only these two top ones. Q. Only these two top ones?

A. These three top ones—that one there too.

Q. You say that one is sent too?

A. No, not any more. Q. Not any more?

A. No, sir.

Q. Only these two?

A. Yes, sir.

Q. And they both contain the name of W. A. Gaines & Company. distillers, Woodford County, Kentucky?

A. That is right.

Q. You say that is not sent any more?

A. No.

Q. And these are the labels which you use upon your own bottling?

A. That is right; these two whiskies here.
Q. Now Mr. Ladd called your attention to a lot of these stock labels. These are the stock labels?

A. Yes, sir.
Q. The whole pile of them here—how many of those contain the name of W. A. Gaines & Company, distillers?

A. I have not looked them over.

Q. Look it over and see.

A. There may not any of them for all I know—there is one, W. A. Gaines & Company, distillers, "Exhibit 7"-W. A. Gaines & Company, distillers, W. A. Gaines & Company. There seems to be four or five of them there.

779 Q. Do any of them contain the words "Old Crow Distillery. Woodford County, Kentucky?"

A. I didn't notice that, whether they did or not; I was only looking for Gaines & Company—no, there ain't any of them, I guess.

Q. Do any of them contain a lithograph-

A. Yes, sir, here is that one "Old Crow Distillery, copper distilled whiskey, W. A. Gaines & Company, distillers, Woodford County, Kentucky."

Q. Do any of them contain a lithograph of W. A. Gaines & Company's Distillery?

A. No, sir, none that I see.

J. Q. Moffett, called as a witness on the part of plaintiff, being duly sworn, testified as follows:

Direct examination.

#### By Mr. Ladd:

Q. Mr. Moffett, do you live here?

A. Yes, sir.

Q. Been living here a number of years?

A. About 14 years.

Q. You heard Mr. Blood's testimony?

A. Yes. sir.

Q. Are you, the Mr. Moffett that he spoke about as having bought this whiskey?

A. Yes, sir.

Q. Well, did you go up to Whyte's & Company's Grocery, Fruit & Wine Company—did you ever go there more than once for Mr. Smith?

A. No, sir.

Q. Who asked you to go?

A. Mr. Smith.

Q. Where did you meet, if you met him at all?

A. Right along about the postoffice, just this side of Bill Dixon's saloon, 916 Walnut, I guess, I met him.

Q. Now Smith asked you to go up there, did he, and buy some

whiskey?

A. Well, Mr. Blood was with him, and he introduced me to Mr. Blood. Mr. Smith says, "I want you to go up to Whyte's and get me a couple of bottles of whiskey." I told him all right, I'd go up and get it for him, and Blood gave me a five dollars bill to go up and get it with. Well I goes up and met Mr. Whyte, this gentleman here.

Q. One of the young Mr. Whytes?

A. This gentleman here, I think positively it is him, and so he was in the front part of the store and I told him what I wanted, what whiskey. I told him I wanted a couple of bottles of "Old Crow" whiskey, and he looked along for it, and went back near the desk and picked up a couple of bottles of this whiskey, wrapped it up and gave it to me, and I gave him the five dollar bill, and he gave

780 me the change, and I came on back up to Dixon's with this whiskey, and walked in there, and Blood and Smith were waiting there for me to get in, and Blood took one of these bottles and wrote something on it. I says, "what are you going to do with

that whiskey?" He said he was going to-

Defendant objects to the conversation.

Q. Well, you brought the whiskey back to Dixon's and gave it to Blood?

A. Yes, sir.

Q. Did you ever do that for Mr. Blood or Mr. Smith on another occasion?

A. No, sir.

Q. How long ago was that?

A. Well, it is about two years ago.

Q. Was it in a package that looked like this—the whiskey?

A. I could tell if I could see the label—that is the bottle he wrote on, I guess, and I didn't know what he was going to do with this whiskey when I went and bought it.

Cross-examination.

By Mr. Pence:

- Q. Where did he go, Mr. Moffett, to get the whiskey, what part of the store?
  - A. He went back near the desk there. Q. And where did he get it from?
- A. I believe he got it on a barrel, setting on a barrel; it was not setting on shelves at all, he went back in the house and got it.

Q. Do you remember what you paid for these two bottles?

A. A dollar and a quarter, I think, for the two.

Q. You think it was a dollar and a quarter? Are you right certain that it was Mr. Will Whyte that sold it to you?

A. I was not very well acquainted with Mr. Whyte at the time, but I think it was.

Q. But you are not certain of it?

A. Well, it was one of the Whytes, now I don't know which one.

If there is only one looks anything like him, why it's him.

Q. There are five boys, ain't there?

A. I couldn't say; I couldn't say; not knowing.

Q. You are not certain about which one it was that sold the whis-

kev?

A. If you allow me to ask you a question, if he ever hired a horse from me, why it was him. It was the gentleman that hired a horse from me one time about two years and — half ago, the picture of the man, whoever he is, I don't know whether this gentleman or not.

Q. You just went in and asked for a couple of bottles of "Old

Crow?"

A. Yes, sir.

781 Q. A couple of bottles of whiskey; you said "Old Crow?" A. Yes, sir.

Q. And that is all that was said?

A. Yes, sir.

Q. And these bottles were given to you, and he charged you a dollar and a quarter for them, and you went out and gave the whiskey to these parties who has already testified—this Mr. Blood?

A. I gave it to Mr. Smith, I think I am positive I gave it to him,

but they were both there together, I wouldn't say positive.

Q. And you don't know anything about the whiskey, having turned it over to them?

A. I don't know a thing about it.

Q. Whatever happened to it?

A. No, sir, never knew where it was going to.

WILLIAM H. LEE, called as a witness on the part of the plaintiff, being duly sworn, testified as follows:

Direct examination

## By Mr. Ladd:

Q. What is your name? A. William H. Lee.

Q. Where do you live, Mr. Lee? A. St. Louis.

Q. How long have you lived there?

A. All my life-49 years.

Q. What is your business there, Mr. Lee?

A. Wholesale liquor business.

Q. What is your firm?

A. William H. Lee & Company; I am the sole proprietor, I have no company.

Q. How long have you been in that business?

A. About 28 years.

O. Mr. Lee would you mind stating what the volume of your business as wholesale dealer is in St. Louis as compared with other wholesale liquor dealers in St. Louis?

Mr. Pence: I don't see the relevancy of that.

Mr. Ladd. Whether it is a large business or a small business.

Mr. Pence: I don't see the relevanvy of that.

The Court: Let him answer; to which ruling of the Court defendant then and there duly excepted.

A. It is the largest business in St. Louis of the kind.

Q. Are you acquainted with the brand of whisky known as "Old Crow?"

A. Yes, sir. Q. Do you handle it?

A. Very extensively.

Q. How long have you been handling it?

A. Well, ever since 1878.

782 Q. How large purchases do you make at times?

A. I buy about a thousand barrels a year. Q. What is the quality of "Old Crow" whiskey; is it inferior or

A. It is the highest grade of bourbon whiskey made in the United States.

Q. How does it compare with other bourbon whiskies as to the price which it brings in the market?

A. It is the highest priced whiskey that is made in the United States.

Q. I show you now a bottle of whiskey which is referred to as an

exhibit to the deposition of Edson Bradley, said to have been bought at the store of the defendant, and I will ask you, if you knew nothing to the contrary, on seeing that bottle, and that label on it, "Handmade 'Old Crow' Sour Mash whiskey? This whiskey is bottled by us and we are responsible for its purity and fine quality. E. Whyte & Company," what you would suppose as to its origin that it contained?

A. "Old Crow" whiskey, made by W. A. Gaines & Company, sir, naturally. They are the only people that make "Old Crow" whis-

key.

Q. Well, what would you say, what would you suppose that E.

Whyte & Company had to do with it?

A. They had just bottled it from purchases made from some jobber of "Old Crow" whiskey. They simply say so here, or as much as say so.

Defendant objects and moves that the answer be stricken out.

The Court: To the last remark?
Mr. Pence: Yes, that last remark?
The Court: That is immaterial.

Q. I will ask you, Mr. Lee, if you can state from your experience in the liquor trade, what effect upon the distiller and upon the dealer in genuine "Old Crow" whiskey, the sale of inferior liquors, which are not "Old Crow" at all, under such labels as that has?

Defendant objects to the question as calling for the conclusion and opinion of the witness.

The Court: Let him answer.

To which ruling of the Court defendant then and there duly excepted.

A. Well, it would naturally injure the genuine "Old Crow" if this is not "Old Crow" whiskey.

Q. Well, how?

A. In every way. First, quality; second, by the amount of whiskey sold this way that is not "Old Crow."

Q. Well, how does it injure the buyers of genuine "Old Crow," what effect does it have upon that—I mean the buyers who are

dealers in genuine "Old Crow"?

A. If they buy an article marked and branded "Old Crow" that is not "Old Crow" then they don't get what they buy, they do not get the genuine "Old Crow" which is a fine article of whiskey. Anything which may be substituted for it by fraud or misrepresentation, or whatever you may call it, does an injury to every one that handles the goods, excepting the man that sells it this way.

Q. Do you regard yourself as a judge of whiskies, Mr. Lee?

A. Well, I do not claim to be.

Q. Are you sufficiently familiar with—you have tasted whiskies, have you?

A. Oh, yes, yes, that is my business. Q. Would you mind tasting this?

A. Not at all.

Q. And state whether you are able to state whether that is "Old Crow" or not.

Defendant objects for the reason that witness has already stated that he is not a judge of these things.

The Court: Let him try it.

To which ruling of the Court defendant then and there duly excepted.

(Witness here samples and tastes contents of Whyte bottle). That is not good at all. That is not "Old Crow" whiskey, nor is it a sour mash. That is certainly an ordinary article of common whiskey, and very common at that.

Q. What, if you know, is the usual retail price to the consumer of genuine "Old Crow" whiskey by the quart bottle, or what is

called a quart bottle—five to the quart?

A. Well in my trade \$1.50 per quart.
Q. Five bottles to the gallon?

A. No, four bottles. Q. A full quart?

A. We only use full quarts; that is the only size package we put

Q. I will ask you, Mr. Lee, if it is possible for a retailer to sell genuine and a full quart in a bottle of genuine "Old Crow" whiskey at 671/2 cents, without losing money?

A. Absolutely impossible, sir.

Q. Do you know of any other distillery in the country, Mr. Lee, whose product is known as "Old Crow" whiskey except that of W. A. Gaines & Company, in Woodford County?

A. None, sir. Q. Have you ever known of any?

A. Never.

## 784 Cross-examination.

## By Mr. Pence:

Q. Mr. Lee, you know that they have a large number of what are called stock labels?

A. Yes, sir.
Q. "Old Crow" stock labels?
A. Yes, sir.
Q. You are aware of the fact that these "Old Crow" stock labels are extensively used by bottlers upon cheaper grades of whiskey than the genuine "Old Crow"?

A. Yes, sir.

Q. It is a general custom, is it not, their general use?

A. No, no; no, sir.

Q. Well, they are generally used?

A. Only where there is an intention of misleading people. I don't know of it, because I would try and have it stopped if I did.

Q. Have you an interest in this "Old Crow" brand?

A. Absolutely not, sir.

Q. You say you would try to have it stopped?

A. Well I would make an effort to have it stopped through the firm that I buy the goods from. They owe me that protection.

Q. You do know as a matter of fact that there is an extensive use upon cheaper grades of whiskey than W. A. Gaines' "Old Crow" of stock "Old Crow" labels?

A. For the last twenty or twenty-five years I do know of such

occurrences.

Q. Now you bottle this "Old Crow" whiskey?

A. Yes, sir.

Q. And you use a label?

A. Yes, sir.

Q. Does it refer to W. A. Gaines & Company, distillers?

A. Yes, sir. Q. It does?

A. Yes, sir, I would not have any right to use it the way I do unless I stated that it was.

Q. They do-W. A. Gaines & Company, distillers?

A. Yes, sir.

Q. What would you think of a man who was selling W. A. Gaines Company's "Old Crow" whiskey under a stock label which made no reference to W. A. Gaines & Company, contained no statement that it was distilled at the "Old Crow" distillery, and by W. A. Gaines & Company, in Woodford County, Kentucky?

A. Well, if those sales were made direct—that is, themselves, I

should think it would be all right.

Q. Well I say what would you think of a retailer, of a bottler, who would bottle the genuine "Old Crow" whiskey under that kind of a label wouldn't he be very foolish to do that?

A. Well, that is a matter that would concern himself; I don't

know, it would injure his business.

Q. If he had W. A. Gaines & Company's "Old Crow" whiskey, wouldn't he want that stated on the labels, on his bottles, when he sold his whiskey?

A. I cannot answer the question any more than that; I don't

know.

Q. Why, when you say there is such a general use of these stock labels which do not contain the name of W. A. Gaines & Company, when there is such a general use upon this brand of whiskey that is not manufactured by W. A. Gaines & Company, wouldn't a man who sold the W. A. Gaines & Company whiskey want a label that contained their name?

Plaintiff objects to the question because Mr. Lee has not stated that there is a general use of these labels for whiskey which is not genuine.

The Court: That is an argument anyhow.

To which ruling of the Court defendant then and there duly excepted.

Q. Now you say, Mr. Lee, that if you saw a bottle of this whiskey exposed for sale, that you would suppose, not knowing anything

about it, that you would suppose that that was Gaines & Company's "Old Crow" whiskey?

A. Yes, sir.

Q. With that kind of a label?

A. Yes, sir.
Q. With that label?

A. Yes, sir.

Q. Suppose you asked the price of it; you went in to buy and asked the price of it, and learned that it was 65 cents a bottle, would you then say that it was Gaines & Company's "Old Crow" whiskey?

A. I would say that was not Gaines & Company's.

Q. You have been in business down there for a good many years, have you not, Mr. Lee?

A. Yes, sir.

Q. And you have been selling this "Old Crow" whiskey?

A. Well, since 1878.

Q. Has your business prospered and extended during that time?

A. Oh, yes.

Q. You have constantly sold more and more "Old Crow" whiskey? A. Yes, sir.

Redirect examination.

### By Mr. Ladd:

Q. Mr. Lee, I will ask you what is the distinguishing feature of this label which indicates the whiskey?

A. "Old Crow." .

Defendant objects to that as calling for the conclusion of the witness; the label itself is the best evidence of what its distinguishing feature is.

The Court: Let him answer.

To which ruling of the Court defendant then and there duly excepted.

786 A. "Old Crow" is the distinguishing feature.

Mr. Pence: The Words "Old Crow"?

A. Yes, sir.

JOHN S. MORRIN, called as a witness on the part of the plaintiff, being duly sworn, testified as follows:

Direct examination.

# By Mr. Ladd:

Q. Where do you reside, Mr. Morrin?

A. This city-Kansas City, Mo.

Q. What is your business?

A. Wholesale liquor.

Q. What is the name of your firm?
A. The Morrin-Powers Mercantile Company.

Q. A corporation, is it?

A. Yes, sir.

Q. Are you an officer of it?

A. Yes, sir.

Q. President? A. Yes, sir.

Q. It is a wholesale business, is it?

A. Yes, sir.

Q. How long have you been engaged in the liquor business in this city?

A. About 22 years.

Q. You are familiar with the trade then, are you?

A. Yes, sir—now, when you ask how long I have been in the wholesale business, you mean how long I have been connected with the liquor trade?

Q. Yes, sir. A. 22 years.

Q. How long have you been in business for yourself or other firms or corporations of which you were a member?

A. Eleven years.

Q. During that 22 years where have you been located all the time—in Kansas City?

A. Yes, sir.

Q. Do you handle "Old Crow" whiskey?

A. Yes, sir.

Q. How long have you been familiar with "Old Crow" whiskey, both in your business and the business of others that you have been connected with?

A. Why, about 18 or 20 years—no, about 16 years, that is com-

ing in close contact with it and handling it.

Q. Do you handle the "Old Crow" product now in large quantities?

A. Yes, sir.

Q. Who do you purchase from-W. A. Gaines & Company?

A. Well, Paris, Allen & Company.

- Q. Yes, they handle the product in New York?
  A. They handle the product for the distillery.
- Q. How does "Old Crow" bourbon compare in reputation and in actual quality in the estimation of the trade and the public with other brands of bourbon whisky?

A. It stands at the head.

Q. How does it compare in market price with other product of other distilleries?

787 A. It is the highest priced bourbon.

Q. I will show you a bottle of whiskey referred to in Mr. Edson Bradley's deposition, and ask you to look at the label of the bottle, which has a picture of a crow, among other things, and the words, "Hand Made Old Crow Sour Mash Whiskey. This whiskey is bottled by us and we are responsible for its purity and fine quality. E. Whyte & Company," without knowing anything to the contrary, seeing that bottle labeled in that way, what would you suppose its contents were, Mr. Morrin?

A. Well, "Old Crow" whiskey.

Q. Well, what "Old Crow"—the Gaines & Company?

A. Well, that is the only "Old Crow" I know.

Q. What would you suppose that Whyte & Company had had to do with it from that language there?

A. I would suppose they bottled it.

Q. Bought it by the barrel and then put it in the bottles themselves?

A. Yes, sir.

Q. Now suppose an inferior quality of whiskey, not the product of the "Old Crow" Distillery is put into bottles, and sold under such a label as that, to the public, what is the effect upon the distillers, upon the wholesale trade and upon other dealers who do handle genuine "Old Crow" whiskey?

A. It injures the business and brand of the distiller and demoralizes the business of the wholesale and retail trade on that brand.

Q. Will you try the contents of this bottle and state if you are able to, whether it is "Old Crow" in your judgment?

Mr. Pence: I don't see the purpose of that, and taking up the time of the Court, when we have admitted that that was not Gaines & Company's "Old Crow" whiskey.

Mr. Ladd: I want his opinion as to what it is. Is that "Old Crow?"

(Witness samples contents of Whyte bottle.)

A. No, sir, it is not.

Q. What is it, I don't mean what brand of whiskey, but what quality of whiskey is it, if it is whiskey at all?

A. It is an inferior quality as a spirit, it is a cheap whiskey, a

cheap spirit.

Q. Do you know what such whiskey as that is worth; what can it be retailed for by the quart bottle?

A. Well, that whiskey is worth somewhere from \$1.20 to \$1.40.

Q. A gallon?

A. A gallon. It would cost the jobber say, thirty to-788 well, the retailer might buy it at that; it has to be sold at a close margin.

Q. What does genuine "Old Crow" whiskey retail for by the quart

bottle if it were sold?

A. Of course, the price varies; average price is \$1.50 quart.

Q. What would be the lowest price?

A. Well, one might, of course, make a very close figure, something like that, might possibly sell for a dollar, but it is not sold for that as a rule, \$1.25, \$1.50, I have known of cases where the older ages sold at \$2.00 a quart.

Q. Oh naturally. Did you know when Mr. Blood was here a couple of years ago or so, and sent up and bought this whiskey of

Whyte, did you hear about it at the time?

A. Yes, sir. Q. Now before that time had you known that Whyte was selling spurious whiskey under "Old Crow" labels?

Defendant objects as incompetent, irrelevant and immaterial.

The Court: Let him answer.

To which ruling of the Court defendant then and there duly excepted.

A. I did not know it.

Q. How much, approximately, "Old Crow" do you handle in a year, how many barrels?

A. Well, from one to two hundred barrels.

Q. One to two hundred?

A. Yes, sir. Q. You sell to retailers?

A. Yes. sir.

Q. I want to ask you if you have ever known during your experience in the liquor business of any other distillery in the country. except that of Gaines & Company, down in Woodford County, Kentucky, called the "Old Crow Distillery," or which manufactures whiskey which they brand "Old Crow?"

A. I have not.

Cross-examination.

By Mr. Pence:

Q. Mr. Morrin, you know about these stock labels that are printed by different printing houses all over the country, these "Old Crow" stock labels?

A. Yes.

Q. You know as a matter of fact that there is a general use of these stock labels, "Old Crow" stock labels, upon cheaper brands and grades of whiskey than W. A. Gaines & Company's "Old Crow."

A. Well, I certainly don't know that.

Q. Well, isn't it true, don't you know that as a matter of fact that there is a general use of those "Old Crow" stock labels upon cheaper brands, other whiskies?

A. I know there has been a great deal of fraud, not only in "Old

Crow" whiskey, but in other things as well.

Q. I am not asking you about that. I am asking you about the general use of those "Old Crow" stock labels upon cheaper and other whiskies than Gaines & Company's whiskey; don't you know that, isn't that true?

A. As to what I know and as to what I hear of concerning it in

the trade; which do you want to know?

Q. I want to know what you know about these matters in your knowledge of the trade, and your information, and what you have seen yourself, these whiskies labeled and for sale in the windows of retail dealers?

A. I don't know that I have knowledge of this fraud, but I do know that the trade has been greatly troubled by attempted frauds

in "Old Crow" and other brands of goods.

Q. Mr. Morrin, won't you just answer my question and say now, whether or not there has not been a general use of these-and for many years—of these stock "Old Crow" labels upon cheaper and other brands of whiskey than Gaines & Company's whiskey?

A. Not to my knowledge.

Q. Not to your knowledge?

A. No.

- Q. Now what do you mean by that? Do you mean that you didn't see the whiskey bottled and therefore can't say what kind of whiskey was in the bottles?
- A. I mean that no man has told me he was perpetrating a fraud of that kind.
- Q. Don't you know that from your knowledge of the trade and your knowledge of the customs and habits of bottlers that there is a general use of these "Old Crow" stock—these stock "Old Crow" labels upon cheaper whiskies than Gaines & Company's whiskies?

A. In a fraudulent way.

Q. Will you answer the question; it is a plain question and can be answered yes or no.

A. I have answered it that to my knowledge I do not know.

Q. To your knowledge? A. Yes, sir.

Q. Can't you in almost every retail house see bottles of whiskey labeled with the stock "Old Crow" labels for sale for from 65 to 75 cents a quart bottle?

A. No, sir.

Q. You say it can't be bought here in Kansas City for that?

A. No, they have learned better; there was a time when they did something of that kind but it is not as frequent as it was.

Q. Don't you know that that has gone on for the last 25 or 30 years, tell the Court here, you are acquainted with the habits and customs of the trade?

A. I have noticed nothing of the kind recently; there was some-

thing of the kind formerly.

Q. You think you have not noticed so much of it since this litigation was started?

A. Yes, sir.

790 Q. But it has been customary and general for the last 25 or 30 years, hasn't it, amongst bottlers of whiskey?

A. I would not say it was customary and general.

Q. Quite frequently then?
A. These cut prices—we did not but there were some that did that— I think that was one of the things that called our attention to the matter, and interested us in it; we as handlers of the genuine article have felt competition of that kind and have been interested in stopping it.

Q. Were you an agent here at any time of the W. A. Gaines &

Company, or Paris, Allen & Company?

A. No, sir. Q. You made a specialty of their whiskey and bottled it?

A. Well, we have handled it; it is not our largest, we do not handle it more extensively than any other brand we have; we have other brands that we handle more extensively.

Q. Well, you bottle it yourselves?A. Yes, sir.

Q. Have you?

A. Yes, sir.

Q. Have you bottled any whiskey under the label of "Morrin-Powers' oldest Old Crow"?

A. Yes, sir. Q. You have?

A. Yes, sir.

Q. Oldest "Old Crow"?

A. Yes, sir.

Q. And what whiskey is that?

A. That was a lot of "Old Crow" very "Old Crow" we bought and paraded through the streets here, and bought it a hundred barrels at a time.

Q. What did you sell that per bottle?

A. We sold it to the trade at about \$12.00 a case, one dollar a quart.

Q. That was this Gaines & Company "Old Crow"? A. Yes, sir.

Q. Now you have said that if you were shown that bottle, and without knowing what kind of whiskey was in it, and that label appearing upon it there, that you would say that it was Gaines & Company's "Old Crow"?

A. That is the impression I would have, yes.

Q. Would you say that—do you tell the Court that you would believe that that was Gaines & Company's "Old Crow" whiskey if you would see that bottle in a window?

A. I never knew of any other "Old Crow."

Q. Just answer the question, will you please answer the question?

A. Yes, sir. Q. You say that you believe that that was Gaines & Company's "Old Crow"?

A. That is the impression that is conveyed to my mind.

Q. Do you say that anybody who is selling W. A. Gaines & Company's real "Old Crow" whiskey, their "Old Crow" whiskey distilled at the distillery in Woodford County. Kentucky, would sell it under a label which contained no reference whatever to W. A. 791 Gaines & Company in reference to their distillery?

A. Yes, sir. I can give you a good reason why.

Q. What is your reason?

A. In some towns we have as many as twelve customers, and we have got to send around and find different labels for them, because one man don't want the label of another man, and it is sometimes necessary to go outside of Gaines & Company's regular label and get a stock label and put it on the "Old Crow" whiskey.

Q. That is where you sell whiskey to people in bulk who bottle it

again, isn't that true?

A. Sometimes it is one way, sometimes the other; sometimes it is case goods.

Q. And they go ahead and take this "Old Crow" whiskey and blending it up with other whiskies, they put one of these labels on it?

A. I know nothing of it.

Q. Don't you know that they do? A. No, sir, I never saw them do it.

Q. You never saw them do it, that is the only reason that you say you don't know?

A. Well, that is the way I know things of that kind.

Q. If you saw this whiskey exposed for sale with [cate, and plaintiff failed to do so, he is not entitled to re-] that kind of a label on it, and you went in and asked the price of it, and they told you it was 65 cents a bottle, would you then think it was W. A. Gaines & Company's "Old Crow"?

A. That is you mean from my knowledge of the business?

Q. I am just asking you that question. Now if you go in and ask in regard to the price of the liquor, and they told you it was 65 cents a bottle, would you say that it was Gaines & Company's "Old Crow"?

A. Well, I might be from Missouri; I might want them to show

me.

Redirect examination.

By Mr. Ladd:

Q. Mr. Morrin, here are two bottles-did these come from your house?

A. Yes, sir, I believe so.Q. Where was this whiskey bottled?A. They were both bottled at the distillery.

Q. And these are for sale by you?

A. Yes, sir.

Mr. Ladd: Now, I want you to mark these. I want to offer these. I want to offer the labels on these two bottles that Mr. Morrin just referred to.

The labels on the two bottles just referred to are marked by the

stenographer "Exhibits X and Y."

Exhibit "X." "Old Crow. Old Crow Distillery, Woodford 792 County, Kentucky. W. A. Gaines & Company, proprietors. Bourbon Whiskey. Bottled at the Distillery in Bond under supervision of the officers of the Internal Revenue and guarantted by the U. S. Government pure and of age indicated by stamp over Cork and Capsule. Caution: Be sure that the Internal Revenue Stamp over the Cork and Capsule is unbroken as this guarantees the genuineness, purity and age of the contents of this bottle. Old Crow Distillery, copper Distilled Whiskey. W. A. Gaines & Company, Distillers, Woodford County, Kentucky."

Exhibit "Y." "Old Crow Sour Mash Whiskey, Distilled at the Old Crow Distillery. Bottled at the Distillery under our personal supervision, and guaranteed absolutely pure and unadulterated. Crow Distillery, Copper Distilled Whiskey. W. A. Gaines & Company, Distillers, Woodford County, Kentucky, Woodford County,

Ky., W. A. Gaines & Co., Distillers.

Q. Mr. Morrin, here is a glass sign, framed with a red back ground, and letters of gold "Old Crow" and what I suppose is a picture of the distillery-a picture about 6 feet by 31/2 or 4. Where did this come from?

A. That has been in our office, our office sign.

Q. This is a wall sign, is it? A. Yes, sir.

Q. Is this furnished to you by the distillers?

A. Yes, sir.

Q. Are those frequently sent to wholesale houses?

A. Yes, sir.

Q. It is a matter of advertising?

A. Yes, sir.

Mr. Ladd: I will offer the words "Old Crow" on that glass sign in evidence.

Q. Mr. Morrin, which are the largest letters in all that lettering; which words are in the largest letters and the most conspicuous?

A. "Old Crow."

Q. They are at the top, are they?

A. Yes, "Old Crow."

Q. Just below it is "Old Crow Distillery, copper distilled whiskey, W. A. Gaines & Company, distillers, Woodford County, Kentucky. On the right is the same in a circle, and in the center is a pictureis that supposed to be a picture of the distillery, Mr. Morrin?

A. I so understood.

Q. A picture of some distillery, any way?

A. Plant.

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Q. And below the picture the words "Distillery, W. A. Gaines & Company, Proprietors, Frankfort, Kentucky," and at the foot of the sign "Morrin-Powers Mercantile Company." What is the size of the letters constituting the words "Old Crow"; how tall are they?

A. They are from five to—about five to seven inches.

Q. The other lettering is small, smaller letters?

A. Yes, sir; very much smaller.

Mr. Pence: Mr. Morrin, that is a sign in your establishment, is it?

A. Yes, sir.

Q. You brought it up here; it is one of your signs?

A. It was sent up.

Plaintiff's counsel read in evidence deposition of George F. Berry. taken on the 16th of May, 1901, at the office of G. W. Lindsay, Frankfort, Kentucky, which is in words and figures as follows, towit:

Not being able to complete the taking of said deposition by agreement of the parties by counsel, I adjourn the further taking of the same until to-morrow, then to be continued at the same place and between the same hours mentioned in the annexed notice:

T. N. LINDSEY, SEAL. Notary Public, Franklin Co., Ky.

My commission expires January 19th, 1902.

Pursuant to adjournment, as above stated, on the 16th day of May, 1901, between the hours of eight o'clock in the forenoon and six in the afternoon, at the law office of D. W. Lindsey in the City of Frankfort, Kentucky, I continued the taking of said deposition as follows:

GEORGE F. BERRY, of lawful age, being produced, sworn and examined on the part of plaintiff, deposeth and saith:

At this point B. G. Williams, attorney for defendant, made the following examination of the witness as to his competency at this time.

Q. 1. Are you a stockholder in the W. A. Gaines & Co. corpora-

A. Yes, sir.Q. 2. Are you an officer in that corporation?

A. Yes, sir.

Q. 3. What office or offices in that corporation do you hold?

A. I am secretary and a director.

The defendant now makes this objection to the competency of George F. Berry as a witness on behalf of plaintiff because he is a stockholder, director and also secretary of said company and under Code Section 606, Civil Code of Kentucky, having introduced other testimony of persons not stockholders, officers or members of said corporation, his testimony is not now competent.

794 It is the opinion of the officer taking the deposition that the witness is competent, and so rules and thereupon the wit-

ness is examined as follows:

By D. W. Lindsey, attorney for plaintiff:

Q. 1. State your residence and occupation?

A. Frankfort, Kentucky. I am secretary of the corporation W. A. Gaines & Co., which is engaged in the manufacture of whiskey.

Q. 2. Were you acquainted with the firm under the name and style of Gaines, Berry & Co.?

A. I was.

Q. 3. If you know, state when said firm was organized and commenced business, what its said business was, and who composed said firm?

A. Early in 1867. Its business was that of distillers and also wholesale liquor dealers. The firm was composed of W. A. Gaines, Hiram Berry, E. H. Taylor, Jr., and John W. Mastin. I knew all of said parties and Mr. Hiram Berry was my father.

Q. 4. Was there any change in the membership of said firm, if so,

when did that change occur and what was it?

A. Yes, there was. Mr. Mastin withdrew from the firm after the first distilling season, which was about July, 1867. There was no further change until the firm was dissolved some three years later.

Q. 5. You have stated that said firm were distillers. At what point

or locality did that firm commence business as distillers?

A. They leased a distillery on the site where the Old Oscar Pepper Distillery now stands in Woodford County, Kentucky, and began making whiskey there shortly after the distillery was leased. They also leased shortly afterwards another distillery on the site of the Old Taylor Distillery and which is about three miles from the Old Oscar Pepper Distillery. Finding the water supply meager at both of these distilleries they erected another distillery further down the creek where there was an abundant spring, in June, 1869, and began making whiskey there in July of the same year.

Q. 6. As near as you can remember, state when that firm commenced to operate the distillery first mentioned or the distillery on the Pepper site, and for what length of time it operated that distillery

lery?

A. In the spring of 1867, for about three years.

Q. 7. As near as you can remember, state when the firm of Gaines, Berry & Co. commence to operate the distillery which you have stated they leased on the site of the present Old Taylor Distillery and for what length of time they operated that distillery?

A. In 1867 or 1868, and operated it for a period of some two or

three years.

795 Q. 8. Did that firm adopt any distinctive name and trade mark brand for the whiskey produced by them at those distilleries, if so, state what name they gave to the whiskey produced by them, and what brand they branded and marked the packages of whiskey produced by them?

A. They did. They called the whiskey Old Crow that was produced at both of these houses and the barrels were branded Old Crow Distillery Copper Distilled Whiskey, Woodford County, Ky.

Q. 9. In your last answer you speak with reference to the two distilleries that were leased and operated by Gaines, Berry & Co., and I will now ask you if when they erected the distillery which you say was built by them in 1869, whether or not they gave to that distillery any distinctive name, if so, what was the name they gave to the distillery?

A. They gave it a distinctive name and called it the Old Crow

Distillery.

Q. 10. By what name is that distillery known to the whiskey trade and the public generally?

A. It is known as the Old Crow Distillery.

Q. 11. Did they give to the whiskey produced at that Old Crow Distillery any trade name, and did they brand the barrels or packages in which they placed the whiskey there produced with any trade mark or brand, if so, state what the trade name was for the whiskey produced there and with what brand or trade mark did they brand the same?

A. They did. They called the whiskey Old Crow whiskey and they branded the barrels Old Crow Distillery Copper Distilled

Whiskey, Woodford County, Ky.

Q. 12. Please state whether or not the three distilleries you have named are located upon any running stream or streams of water, and if so, give the name of the stream upon which each is situated.

Also please state the relative position of the three distilleries upon

such stream or streams and their distance from each other?

A. They are all situated on Glenn's creek, which is a small stream running through Woodford County and part of Franklin emptying into the Kentucky River. The distillery which was leased from Mrs. Pepper was about two miles and a half from the Johnson distillery and the latter being about a mile from the distillery which Gaines, Berry & Co. built in 1869, and which is now known as the Old Crow Distillery. I mean by the Johnson Distillery the one which is now known as the Old Taylor Distillery and which was the second one leased by Gaines, Berry & Co.

Q. 13. Please state in what county or counties these distilleries are

respectively situated?

A. They are all in Woodford County, Kentucky.

796 Q. 14. By whom, if you know, has the distillery which you have mentioned at the site of the Oscar Pepper distillery been owned and operated since Gaines, Berry & Co. ceased to operate the same?

A. By James E. Pepper and E. H. Taylor, Jr., then by Labrot &

Graham, a partnership firm who has operated it up to this time.

Q. 15. Was the distillery on that site which was operated after Gaines, Berry & Co. ceased there the same distillery that was operated by Pepper and Taylor and since then by Labrot & Graham, or was a new distillery erected at that point, and if so, by whom was the new distillery erected?

A. It was not the same. As Pepper and Taylor built a new dis-

tillery there and the house they erected stands there today.

Q. 16. Did those parties you have mentioned who have operated that distillery since Gaines, Berry & Co. ceased there [had] for it any distinctive name as a distillery, if so, what was that name?

A. They did, and called it the Old Oscar Pepper Distillery.

Q.17. Did they have a name and a trade mark brand for the whiskey they produced there, if so, what was the name of the whiskey and by what brand did they and have they marked the whiskey produced by them there?

A. They did. They called their whiskey Old Oscar Pepper whiskey and all the barrels that I ever saw produced at that distillery by them were branded with the brand Old Oscar Pepper Distillery.

Q. 18. If you know, state who have owned and operated the distillery located on the site which you have designated as now known as the Old Taylor Distillery after Gaines, Berry & Co. ceased to operate that distillery?

A. E. H. Taylor, Jr., rebuilt that distillery about the year 1880, and a firm with which he has been connected has operated it ever since. I don't know from whom Taylor bought the property.

Q. 19. Is the E. H. Taylor you have mentioned as buying that property rebuilding the distillery thereat the same E. H. Taylor, Jr., who you have stated was a member of the firm of Gaines, Berry & Co., or another person?

A. He is the same person.

Q. 20. By way of refreshing your recollection, I will ask you if

that distillery was ever owned and operated by J. Swigert Taylor, Jr., you have named? If so, as near as you can remember?

A. I am sure that the distillery when first started by Taylor was known as and run under the name of J. Swigert Taylor, 797 Distiller. J. Swigert Taylor was the son of E. H. Taylor, Jr., and was his bookkeeper and was employed by him.

Q. 21. State, if you know, whether the persons who owned and operated that distillery after Gaines, Berry & Co. ceased to run the same had, or gave to the distillery, any distinctive name or names, if so, state what they were and in the order in which they occurred?

A. It was first called the J. Swigert Taylor distillery and run as such for several years. I think by E. H. Taylor, Jr., and then by the corporation, E. H. Taylor, Jr., Co. The firm of E. H. Taylor, Jr., & Sons continued to run it and since which time they have called the distillery the Old Taylor Distillery.

Q. 22. Please state if you know by what distinctive name or names those parties respectively called their whiskey produced by them at that distillery and by what trade mark or brand they

branded the same?

A. The corporation E. H. Taylor, Jr., Co., of which I think Mr. E. H. Taylor, Jr., was president, called the whiskey J. Swigert Taylor whiskey and the firm of E. H. Taylor, Jr., & Sons changed the name to the Old Taylor whiskey. The barrels that I have seen produced by the several different parties were branded J. Swigert Taylor Distillery and the Old Taylor.

Q. 23. By what trade name or names and by what brand or trade mark has the product of that distillery been known to the whiskey trade and the public generally since Gaines, Berry & Co. ceased to

operate that distillery?

A. The J. Swigert Taylor and Old Taylor.

Q. 24. By what name and by what trade mark has the whiskey produced at the distillery which you stated — named Old Oscar Pepper distillery been known to the whiskey trade and the public generally since Gaines, Berry & Co. ceased to operate the same?

A. It has been known as Old Oscar Pepper whiskey and is so

called today.

Q. 25. Was the firm of Gaines, Berry & Co. succeeded in business and the ownership of the property which you have said was given the name of the Old Crow Distillery by any person or firm, if so, state what person or firm and if a firm name, the parties who composed it?

A. It was succeeded by a firm called W. A. Gaines & Co. The said firm being composed of W. A. Gaines, Hiram Berry, E. H. Taylor, Jr., Sherman Paris, Marshall J. Allen, Frank S. Stevens.

Q. 26. Please state the owners and successors in the order in which they came in the ownership and operation of the distillery which you have stated is known as the Old Crow Distillery down to the present time?

798 A. It was first operated by Gaines, Berry & Co., composed of W. A. Gaines, Hiram Berry and E. H. Taylor, Jr., running under that style from 1869 to the fall of 1870, they were then

succeeded by the firm called W. A. Gaines & Co., composed of W. A. Gaines, Hiram Berry, E. H. Taylor, Jr., Sherman Paris, Marshall J. Allen and Frank S. Stevens. Taylor withdrew from the firm that fall and George H. Allen was admitted as a member of the firm at the time of Taylor's withdrawal. The firm continued under the same name until the death of W. A. Gaines, which occurred in November, 1872. The surviving partners continued under the same name and style until the year 1882, at which time Sherman Paris withdrew and Edson Bradley was admitted as a partner. This firm then continued under the same name and style until February, 1887, at which time they sold and transferred the business to a corporation called W. A. Gaines & Co., and which corporation has continued under the same name up to the present time.

Q. 27. By what distinctive name, if any, have those parties successively from Gaines, Berry & Co., down to the present time, designated and called that distillery which you have stated was erected by Gaines, Berry & Co., in 1869, and which they gave the name of

Old Crow Distillery?

A. They called it the Old Crow Distillery.

Q. 28. Is there any distillery in this state or in this country, so far as you know, other than that distillery, which has been or is called the Old Crow Distillery, or elsewhere?

A. There is not.

Q. 29. By what name have the parties in succession from Gaines, Berry & Co. down to the present time in the ownership and operation of that distillery called and branded the whiskey produced thereat?

A. They have always called it Old Crow and branded the barrels

Old Crow.

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Q. 30. Under what name and brand is the produce of that distillery known to the whiskey trade and the public generally?

Excepted to by defendant, because both this question and the foregoing one have been asked and answered.

A. As Old Crow whiskey.

Q. 31. Have you ever known of any other person firm or corporation of distillers in this state or elsewhere who have given to any distillery operated by them the name of Old Crow distillery or Crow distillery or to the whiskey manufactured by them the name of Old Crow or Crow whiskey, save and except the firm of Gaines, Berry & Co. and their successors, as stated by you in your previous answer?

A. I have not.

799 Q. 32. State, if you know, if the respective parties who have owned and operated what you have designated as the Old Oscar Pepper Distillery and the Old Taylor Distillery since Gaines, Berry & Co. ceased to operate those distilleries have known the facts that Gaines, Berry & Co. and their successors have since the erection of the Old Crow Distillery by them in 1869, and up to this time called their said distillery Old Crow Distillery and called their whiskey Old Crow or Crow whiskey and branded the same as Old Crow or Crow whiskey?

A. They have.

Q. 33. Where have the said parties who have so owned and operated those distilleries resided and been engaged in business from 1869 to the present?

A. In Frankfort, Kentucky.

Q. 34. Where has the chief office of Gaines, Berry & Co. and their successors been during that time?

A. Frankfort, Kentucky.

Q. 35. Have you ever known or heard of any objection or exception of any kind by any of those parties to the use by Gaines, Berry & Co. and their successors, of the name Old Crow Distillery for the distillery erected by Gaines, Berry & Co., in 1869, as you have stated, or to the name of Old Crow or Crow whiskey, or the trade mark or brand Old Crow or Crow as a designation for the product of their whiskey?

A. I have not.

Q. 36. Have you ever heard the right of the parties Gaines, Berry & Co. and their successors to the use of said name Old Crow Distillery or Old Crow whiskey or the brand Old Crow by them questioned by any one?

A. I have not.

Q. 37. For what length of time and in what capacities have you been engaged in the manufacture and sale of whiskey?

A. About twenty-nine years. I was first connected with the firm of W. A. Gaines & Co. as a clerk in the fall of 1872, and shortly afterwards became bookkeeper and continued as such until 1882, when I became general office manager up to the formation of the corporation in 1887, at which time I was made secretary, and have continued

in that position up to this time.

Q. 38. What opportunities have you had to know and judge of the quality of the whiskey produced at the Old Crow Distillery by Gaines, Berry & Co. and their successors and of the reputation for quality that the same bears in the whiskey trade and with the public generally? Please state what has been and is the quality of the whiskey so produced and the reputation it has with the public and whiskey trade generally?

A. I have seen the whiskey produced every year at that distillery since it was started by Gaines, Berry & Co. and its successors, and it has been always of uniformly fine quality and so

considered by the trade generally. It has always demanded the highest price of any whiskey made in Kentucky or elsewhere. The trade also recognizes it as a whiskey of the highest quality. I have been acquainted with many dealers throughout the country and have heard them express themselves in the highest terms of the quality of the whiskey produced at that distillery.

Q. 39. Please describe in words as accurately as you can the trade mark brand placed by Gaines, Berry & Co. and its successors upon the product of their Old Crow Distillery and the other distillers that were previously operated by them in Woodford county that you have mentioned. And also state to what extent in branding the packages

or barrels that brand has been used by Gaines, Berry & Co. and its

successors in branding the whiskey produced by them?

A. The barrels at all of the distilleries run by Gaines, Berry & Co. were branded with a burning brand. The words Old Crow Distillery, Woodford Co., Ky., being arranged in a circle and the words Copper Distilled being inside of said circle arranged in a semi-circle underneath the words Old Crow Distillery. Also the words Whiskey and W. A. Gaines, Distiller, being arranged in horizontal lines underneath the words Copper Distilled.

Q. 40. What were the essential words in that trade mark?

A. The words Old Crow.

Q. 41. Was there ever any registry made of that trade mark in the Patent Office in Washington? If so, by whom, and when were

they filed, and when registered?

A. There was. Application was filed by W. A. Gaines & Co., November 19th, 1870, the same being registered December 13th, 1870. Another application was made January 9th, 1882, and the same was registered April 11th, 1882.

Defendant by counsel objects to the foregoing question and answer because they speak of matters of public record and the record itself is the best evidence.

Q. 42. If you have certified copies from Patent Office of such applications and registries, will you please file the same as exhibits and have the notary mark the same?

A. I have and now file the same as a part of my deposition mark-

ing them respectively G. F. B. No. 1 and G. F. B No. 2.

Q. 43. State as near as you can what was the extent of the production of whiskey by Gaines, Berry & Co. and its successors as above enumerated by you at the three distilleries, the one now known as

the Old Oscar Pepper, the one now known as the Old Taylor and the Old Crow Distillery, particularly the latter, and what

was done with the product?

A. The output of the Pepper Distillery as well as the Taylor was about three to four barrels per day. The product of the present Old Crow Distillery averaged from one thousand to twelve hundred barrels from 1869 to 1879, per annum, and thereafter from three thousand to ten thousand barrels per annum—the latter quantity being made there the last few years. It was sold to the dealers throughout the United States—some trade being developed abroad.

Q. 44. By what trade name and with what trade mark brands on the packages were those whiskeys sold and marketed as you have

stated?

A. As Old Crow whiskey and the packages were branded with the

words Old Crow.

Q. 45. You have stated that Gaines, Berry & Co., leased the Pepper Distillery in 1867, for three years. Did they afterwards make any lease of that distillery for an additional term, if so, was that lease in writing?

A. They did and it was.

Q. 46. Have you the original of that lease? If not state what

became of it, if you know.

A. We have not. It has been mislaid and may be among the papers of the Company, but on making a search for it I was unable to find it.

Q. 47. Was that lease recorded and if so, have you a certified copy of the same, if you have please file it and mark the same exhibit

G. F. B. No. 3?

A. It was. I have a certified copy of it and herewith file it marked Exhibit G. F. B. No. 3.

Q. 48. Were you acquainted with James M. Botts, if so, is he living or dead?

A. I was. I think he is dead.

Q. 49. Are you acquainted with his handwriting? Have you seen him write?

A. I am and have seen him write.

Q. 50. I now show you what purports to be an original deed of conveyance and transfer from James M. Botts and Mildred J. Botts, his wife, to W. A. Gaines, dated June 26th, 1869, to which is appended the certificate of acknowledgment of said Botts and his wife as having been made to said deed on the 26th day of June, 1860, and of the record of said deed in the Franklin County Court Clerk's office on the 28th day of June, 1869, said certificate being signed by A. H. Rennick, C. F. C. C. and also with certificate attached of the Clerk of the Woodford County Court, Sam S. Darneal, that said deed was recorded in his office on November 2nd, 1870. I will ask you to examine said deed and state if you know the signatures thereto, and if so, by whom the signatures thereto were made?

A. I have examined the deed and recognized the signature of James M. Botts—the deed is also signed by Mildred J. Botts, his wife, but as I did not know her I cannot identify her signature.

Q. 51. Please examine the boundary of land described in that deed and state where the same is situated and what it comprises?

- A. The land is situated on the Frankfort & Glenn's Creek turnpike on the waters of Glenn's creek, lying partly in Woodford and Frankiin Counties, Kentucky, and comprises about twenty-four acres of land.
- Q. 52. State what manufacturing establishment and other improvements are now on said land?

A. The Old Crow Distillery plant.

Q. 53. Is that the tract of land upon which Gaines, Berry & Co. erected what is known as the Old Crow Distillery, in 1869?

A. It is.

Q. 54. You have stated that that land lies partly in Franklin County and partly in Woodford County. How much of it is in Franklin and how much in Woodford, and where thereon is situated the distillery plant, and what is on the Franklin part?

A. About one sixth of the land lies in Franklin County, the balance being in Woodford County. The distillery plant is located

in Woodford County. There are two small dwellings connected with the plant on the part in Franklin County.

Q. 55. Were you acquainted with W. A. Gaines, and is he dead

or alive?

A. I was, and he is dead?

Q. 56. Were you acquainted with M. J. Gaines, his wife?

A. I was and am.

Q. 57. Are you acquainted with the handwriting of W. A. Gaines and M. J. Gaines, his wife? Have you seen either or both of them write and sign their names, if so, how often?

A. I am. I have seen them both write frequently and sign their

names.

Q. 58. I now show to you a deed purporting to be signed by W. A. Gaines and M. J. Gaines, and purporting to be between said Gaines and W. A. Gaines & Co., dated in the body there the — day of November, 1870, to which is appended the certificate of James G. Crockett, clerk of the County Court of Franklin County, Kentucky, dated November 2nd, 1870, to the effect that the said deed was on that day acknowledged before him by said W. A. Gaines and M. J. Gaines, his wife, and recorded in his office, and also the certificate of Sam S. Darneal, clerk of the County Court of Woodford County, Ky., of date November 7th, 1870, to the effect that said deed has been recorded in his office and ask you to examine the signatures

803 thereto, purporting to be those of W. Λ. Gaines and M. J. Gaines and M. J. Gaines, his wife. I recognize the signatures

signed and written?

A. I have examined said deed and it is signed by W. A. Gaines and M. J. Gaines, his wife. I recognize the signatures as being theirs.

Q. 59. Please examine the body of said deed and state what prop-

erty is therein referred to?

A. It refers to the property on which the Old Crow Distillery is now located in Woodford County and is the same property embraced in the deed above mentioned from J. M. Botts and wife to W. A. Gaines.

Q. 60. I now show you a deed dated in the body of it the 18th day of November, 1870, between W. A. Gaines, trustee, and the firm of W. A. Gaines & Co., composed of W. A. Gaines, Hiram Berry, George H. Allen, Frank S. Stevens, Marshall J. Allen and Sherman Paris, purporting to be signed by W. A. Gaines, trustee. Are you acquainted with the handwriting of said W. A. Gaines, and have you seen him write and sign his name? If so, please examine the signature to said deed and say if the same is the signature of said W. A. Gaines? The said deed has attached to it the certificate of Sam D. Darneal, clerk of the Woodford County Court, dated November 19th, 1870, of the purport that said deed was produced to him in his office and [acknewledged] by W. A. Gaines, trustee, and that the same was that day lodged for record and recorded in his office?

A. I am acquainted with the handwriting of W. A. Gaines, deceased, and have seen him write frequently and I recognize the sig-

nature attached to this deed as being his own,

Q. 61. I will ask you to examine the body of said deed and state

what property is therein referred to?

A. I found it to be the Old Crow Distillery property and the same as that embraced in the deed from J. M. Botts and wife to W. A. Gaines.

Q. 62. Are you acquainted with the handwriting of George C. Drane and Edmund H. Taylor, Jr., either or both of them? Have you seen them write. Have you seen them sign their names?

A. I am acquainted with the handwriting of both of these gentle-

men. Have seen them write and sign their names.

Q. 63. I now show you a deed, conveyance and transfer from George C. Drane and E. H. Taylor, Jr., administrators of W. A. Gaines, deceased, to W. A. Gaines & Co., composed of Hiram

Berry, George H. Allen, Frank S. Stevens, Marshall J. Allen 804 and Sherman Paris, described as the surviving partners in said firm, dated the 20th day of December, 1872, and purporting to be signed by George C. Drane, administrator of W. A. Gaines, deceased, and Edmund H. Taylor, Jr., administrator of W. A. Gaines, deceased, to which is appended the following certificates of James G. Crockett, clerk of the Franklin County Court, of date the 20th day of December, 1872, to the effect that said deed was that day produced to him in his office and acknowledged by said Drane and said Taylor, and that the same was that day recorded in his office, and the certificate of Sam S. Darneal, clerk of the Woodford County Court, dated December 27th, 1872, of the effect that said deed was that day lodged for record and recorded in his office. Will you please examine the said deed, and particularly the signatures thereto, and state by whom the signatures were made?

A. I have examined this deed and find it signed by George C. Drane and Edmund H. Taylor, Jr., administrators of W. A. Gaines, deceased. The signatures were made by said George C. Drane and

Edmund H. Taylor, Jr., respectively.

Q. 64. I will ask you to examine the description of the second item of property in said deed, and state whether or not the property therein described is the same 24 acres, 2 rods and 4 square poles of land which was by the deed above mentioned from J. M. Botts and wife to W. A. Gaines conveyed, and upon which Gaines, Berry & Co. erected the Old Crow Distillery?

A. I have examined the deed and find the property mentioned in the second item to be the same land conveyed by J. M. Botts and wife to W. A. Gaines, and on which property Gaines, Berry & Co.

erected the Old Crow Distillery.

Q. 65. I now show you what purports to be an original deed from Sherman Paris to Marshall J. Alien, Frank S. Stevens and George H. Allen, dated the 15th day of July, 1882, purporting to be signed by Sherman Paris with the certificate attached thereto as follows: Certificate of Charles Edgar Mills, Commissioner of the State of Kentucky in New York, of date August 1st, 1882, to the purport that the said deed was produced on that day to him by said Sherman Paris, and acknowledged to be his act and deed, and the certificate of John S. Moore, Clerk of the County Court of Woodford County, Kentucky,

of date August 16th, 1882, to the effect that said deed was that day lodged for record and recorded in his office. Were you acquainted with Sherman Paris, of Charleston, Sullivan County, N. H., if so, were you acquainted with his handwriting? Have you seen him write and sign his name, and if so, to what extent?

A. I was very well acquainted with Mr. Paris and also acquainted with his handwriting—saw him write frequently

and sign his name.

Q. 66. Please examine the signature to said deed and state whether or not the same is the signature and writing of said Sherman Paris? A. I have examined the signature to this deed and find it to be

that of Sherman Paris.

Q. 67. Please examine the body of said deed, particularly the description therein given to the tract of land of 24 acres, 2 rods and 24 square poles, and state what land is embraced in said description?

A. It is the land on which the Old Crow Distillery is situated and is the same land conveyed by J. M. Botts and wife to W. A. Gaines.

Q. 68. I now show you a deed or conveyance and transfer between Marshall J. Allen, Frank S. Stevens, Hiram Berry and George H. Allen to the copartnership firm of W. A. Gaines & Co., composed of Marshall J. Allen, Frank S. Stevens, Hiram Berry, George H. Allen and Edson Brad-ey, Jr., dated August 1st, 1882, purporting to be signed by Marshall J. Allen, Frank S. Stevens, Hiram Berry and George H. Allen having thereon the certificates as follows: Certificate of Charles Edgar Mills, commissioner for Kentucky, in New York, dated August 11th, 1882, to the purport that the said — was that day produced to him by Marshall J. Allen and George H. Allen and acknowledged by them to be their act and deed; certificate of Joseph B. Bramam, commissioner of deeds for the State of Kentucky. in the State of Massachusetts, dated the 18th day of August, 1882, of the purport that Frank S. Stevens on that day produced to him said deed and acknowledged the same to be his act and deed; certificate of James Crocket, clerk of the Franklin County Court of Kentucky, dated August 30th, 1882, of the purport that the said deed was that day produced to him in his office and acknowledged by Hiram Berry to be his act and deed; certificate of John S. Moore, clerk of the Woodford County Court, by Sam S. Darneal, deputy clerk, dated September 1st, 1882, of the purport that the said deed was that day lodged for record and recorded in his office. Were you acquainted with Marshall J. Allen, Frank S. Stevens, Hiram Berry and George H. Allen, the parties whose names purport to be signed to said deed? Were you acquainted with the handwriting of each of those gentlemen? Have you seen them write? Have you seen each of them make his signature.

A. I was well acquainted with Marshall J. Allen, Frank S. Stevens, Hiram Berry and George H. Allen. I have seen them write and

I have seen them sign their names.

Q. 69. Please examine the signatures to said deed purporting to be the signatures of those gentlemen and state whether or not those signatures respectively are the genuine signatures of those gentlemen?

A. I have examined the signatures attached to this deed and recognize them to be the signatures of the above named gentlemen.

Q. 70. Examine the boundary of the tract of land described in that deed, stated therein, to contain 24 acres, two rods and 24 square poles and state what land that is?

A. It is the land upon which the Old Crow Distillery, erected by Gaines, Berry & Co., in 1869, is located and is the same land described in the deed of J. M. Botts and wife to W. A. Gaines.

Q. 71. I now show you what purports to be an original deed of conveyance and transfer from Marshall J. Allen, Frank S. Stevens of conveyance and transfer from Marshall J. Allen, Frank S. Stevens, Hiram Berry, George H. Allen and Edson Bradley, Jr., parties composing the copartnership firm of W. A. Gaines & Co., to W. A. Gaines & Co., a corporation, organized under the laws of Kentucky, dated February 17th, 1887, and to which the names of said grantors are appended, the names of George H. Allen purporting to be signed thereto by Marshall J. Allen, attorney in fact and the name of Edson Bradl-y, Jr., purports to be signed by Marshall J. Allen, attorney in fact, and to which is appended the following certificates: Certificate of N. B. Smith, clerk to the County Court of Franklin County, Kentucky, dated February 17th, 1887, of the purport that the said deed was that day to him in his office and acknowledged by Marshall J. Allen, Frank S. Stevens and Hiram Berry and by said Marshall J. Allen, attorney in fact for George H. Allen, and said Marshall J. Allen, attorney in fact for Edson Bradley, Jr., each to be their act and deed and that the same has been duly recorded in his office; and certificate of John S. Moore, clerk of Woodford County, Kentucky, dated February 19th, 1887, to the effect that said deed certified as aforesaid with the foregoing and his certificate was that day duly recorded in his office. Were you acquainted with Marshall J. Allen, Frank S. Stevens and Hiram Berry? Are they living or dead? Were you acquainted with their andwriting? Have you seen each of them write and sign his name and signature?

A. I was acquainted with all of them. They are all dead. I was acquainted with their handwriting and have seen them write and sign their names.

Q. 72. Please examine the signatures of Marshall J. Allen, Frank S. Stevens and Hiram Berry appended to said deed and state whether or not those signatures are genuine and whether or not they were written by those parties respectively?

A. I have examined the signatures, and they are genuine and were signed by each of the above named parties respectively.

Q. 73. Please examine the signatures appended thereto of George H. Allen, by Marshall J. Allen, attorney in fact, and Edson Bradley, Jr., by Marshall J. Allen, attorney in fact. State by whom those signatures were made and written?

A. They were written by Marshall J. Allen.

Q. 74. Please examine the boundary and description to the property described in the tenth item in said deed and state what property that is?

A. It is the property on which the Old Crow Distillery, erected by Gaines, Berry & Co., in 1869, is located and is embraced in the

deed of J. M. Botts and wife to W. A. Gaines & Co.

Q. 75. I now show you original power of attorney from George H. Allen to Marshall J. Allen, of date February 1st, 1887, constituting the said Marshall J. Allen, attorney in fact for said George H. Allen, with the following certificates attached: Certificate of George H. Evans, notary public, Kings County, New York, dated February 1st, 1887, of the purport that George H. Allen appeared before him and executed and acknowledged said power of attorney for the purposes therein mentioned; certificate of N. B. Smith, clerk of the Franklin County Court of Kentucky, dated 17th day of February, 1887, of the purport that the said power of attorney was that day produced to him in his office, certified as above, and that the same and his certificate had been duly recorded in his office; certificate of John S. Moore, clerk of the Woodford County Court of Kentucky, dated February 19th, 1887, to the effect that the said power of attorney and the foregoing certificates were that day produced to him for record and that the same with his certificate was duly recorded. Are you acquainted with the handwriting and signature of George H. Allen, whose name purports to be signed to said power of attorney? Have you seen him write and sign his If so, please examine said signature to said power of attorney and state in whose handwriting the same is?

A. I am acquainted with the handwriting of George H. Allen. I have seen him write, and the signature attached to this power of

attorney is his own.

Q. 67. I now show you what purports to be the original power of attorney from Edson Bradley, Jr., to Marshall J. Allen, dated February 1st, 1887, constituting the latter, attorney in fact for the former, for the purposes therein stated with what purports to be the

signature of Edson Bradley, Jr., thereto and with the fol-808 lowing certificates appended thereto or endorsed thereon: Certificate of George H. Evans, notary public, Kings County, New York, dated February 1st, 1887, to the purport that Edson Bradley, Jr., on that day personally appeared before him and executed and acknowledged said power of attorney; certificate of N. B. Smith, clerk of Franklin County, Kentucky, dated 17th day of February, 1887, of the purport that the said power of attorney was that day produced to him in his office, certified as above, and that the same with the foregoing and his certificate had been duly recorded in his office; and certificate of John S. Moore, clerk of the Woodford County Court, of Kentucky, dated February 19th, 1887, of the purport that the said power of attorney, certified as above stated, and with the foregoing certificates thereon was that day produced to him in his office and that the power of attorney and the foregoing certificates and his certificate were duly recorded in his office. Are you acquainted with the handwriting and signature of Edson Bradley, Jr., whose name purports to be signed to said power of attorney? Have you seen him write and sign his name? If so, please examine said signature to said power of attorney and state

in whose handwriting the same is?

A. I am acquainted with the handwriting of Edson Bradley, Jr., have seen him write frequently, and I recognize the signature attached to this power of attorney as being his own signature.

Not being able to complete the taking of said deposition, by agreement of parties by counsel, I adjourn the further taking of the same until to-morrow, then to be continued at the same place and between the same hours mentioned in the annexed notice.

[SEAL.] T. N. LINDSEY,

Notary Public, Franklin Co., Ky.

My commission expires January 19th, 1902.

Pursuant to adjournment, as above stated, on the 17th day of May, 1901, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon, at the law office of D. W. Lindsey, in the City of Frankfort, Kentucky, I continued the taking of said depositions as follows, to-wit: George F. Berry in the continuation of his deposition, commenced yesterday, on his oath further says:

At this point in the taking of this deposition the following agreement was made and entered into between the parties by their respective counsel.

through their respective counsel engaged in taking these depositions, that instead of filing the originals of the foregoing seven deeds of conveyance and transfer, with certificates attached thereto, and two powers of attorney with certificates attached thereto as exhibits with the deposition of George F. Berry, now being taken, the said witness may produce and hand to the notary to be made, filed and used as such exhibits certified copies of such papers, each to be marked for identification with the initials of the name of said witness and with the proper number of the exhibit, which copies may be used and read with the same force and effect as the originals could be, if they were now filed as exhibits.

D. W. LINDSEY,
Attorney for Plaintiff.
B. G. WILLIAMS,
Attorney for Defendant.

By D. W. Lindsey, Attorney for Plaintiff:

Q. 77. Please file, as exhibits, with this, your deposition, certified copies of the seven deeds of conveyance and transfer and the two powers of attorney which are referred to in the questions and answers that you have made thereto commencing with question No. 50, down to and including question and answer No. 76, and mark each of said copies with your initials and the number of the exhibit commencing with No. 4?

A. I will do so.

Q. 78. What became and is the distinguishing mark and name for the whiskies distilled and sold by the plaintiff W. A. Gaines & Co., and its predecessors at the said Old Crow Distillery in Woodford County in the State of Kentucky?

Excepted to because it has been asked and answered.

A. Old Crow.

Q. 79. What sale has such brand of Old Crow whiskey commanded and does it now command on the market? To what extent, if at all, has such brand of whiskey been made and is now known to dealers in and purchasers of and consumers of whiskey in the United States and elsewhere?

Excepted to because the question has been asked and answered.

A. The Old Crow whiskey has commanded a large sale and does now command a ready sale. It is largely known to the general dealers in the United States and elsewhere as well as to the purchasers of and consumers of whiskey.

Q. 80. To what extent, if at all, has the brand of Old 810 Crow whiskey, as made by the plaintiff, and its predecessors at their Old Crow Distillery in Woodford County, Kentucky, been advertised in trade journals, by cards, lithographs and other literature?

Excepted to because incompetent.

A. It has been largely advertised in nearly every conceivable way—by lithographs, signs, advertisements in newspapers, trade journals, and the distribution of cards by mail, sent to dealers and other persons throughout the country. Many thousands of dol-

lars having been expended for such advertisement.

Q. 81. Where packages or bottles containing whiskey have been [—] are branded or labeled with the words Old Crow, either alone or in combination with other words or symbols, what has been and is understood by the liquor trade and the dealers in and consumers of whiskey throughout the United States to be indicated thereby?

Excepted to because incompetent—the witness cannot speak of the understanding of other people.

A. That the whiskey was manufactured at the Old Crow Dis-

tillery of W. A. Gaines & Co.

Q. 82. Has the defendant, the E. White Grocery, Fruit & Wine Co., or any of its alleged predecessors ever received any authority or permission from the plaintiff or from the plaintiff's predecessors to sell under the title trade mark or designation of Old Crow, any whiskey of any other manufacture or origin than that of the plaintiff or its predecessors?

A. They have not.

Q. 83. Have they ever received any authority or permission to refill with other whiskeys any of the empty bottles originally put out on the market containing genuine Old Crow whiskey?

Excepted to by defendant because there is no charge by the plaintiff that any bottles were ever refilled and it is therefore incompetent.

A. They have not.

Q. 84. Judging from your experience connected with the manufacture and sale of whiskeys, what distinction would or could be drawn as to the make or brand of the whiskey, if in one instance the package or bottle bore a label containing samply the words Old Crow and in the other instance the package or bottle had on it a label consisting of the words Old Crow, in combination with the symbol or picture of a Crow?

Excepted to because incompetent.

811 A. I would consider that both labels referred to the Old Crow whiskey made by W. A. Gaines & Co. at the Old Crow

Distillery.

Q. 85. And if, in addition to the brands, either or both as mentioned in the last question, the label also had on it in substance the following: bottled by us, and the purity, genuineness guaranteed, or words to that effect, and then the name and address of the dealer or bottler? What would be understood by the trade or the dealers and consumers of whiskey or be indicated by such label to them?

Defendant excepts because the question and any answer thereto is incompetent.

A. That the whiskey contained in the bottle had been made at the Old Crow Distillery of W. A. Gaines & Co., in Woodford County,

Ky., and the genuineness of it was guaranteed by the bottler.

Q. 86. Up until about the bringing of this suit had the plaintiff any knowledge or information or had the predecessors of the plaintiff any knowledge or information that either the defendant or any of its alleged predecessors had been or were placing upon any bottle or bottles or other packages containing whiskey not of the origin or manufacture of the plaintiff or its predecessors at the Old Crow Distillery in Woodford County, Ky., any label or labels containing the words Old Crow, either alone or in combination with any other words or symbol or symbols, or that any package or bottle branded or labeled by the defendant or its alleged predecessors with the brand or label Old Crow contained other than genuine whiskey manufactured by the plaintiff or its predecessors at the Old Crow Distillery in Woodford County, Ky.?

A. They had not.

Q. 87. Did the plaintiff or its predecessors have any knowledge or information that the defendant or any of its alleged predecessors or any other bottlers or sellers of whiskey in Kansas City or elsewhere in the United States had been or were using upon bottles or other packages as a designation for bottled whiskey, the words Old Crow, either alone or with a symbol of a crow without regard to the source of manufacture of the whiskey contained in the packages or upon packages containing any other but whiskey made by the plaintiff or its predecessors at its Old Crow Distillery in Woodford County, Kentucky?

A. They did not.

Q. 88, Had the plaintiff or its predecessors any knowledge or information that the Barouch Mercantile Co., B. S. Flershein Mercantile Co., Fred Eyssell, J. W. Ryan, M. Quinn, M. Cohen, Louisville

Supply Co., M. Hoffman, or the Atlantic & Pacific Distributing Co., or any or either of them or any other bottlers, dealers or sellers of whiskey in Kansas City, Mo., or elsewhere, either have been in the past or are now using the words Old Crow, either alone or in combination with a symbol of a crow, or in any other combination upon labels as a designation of bottled whiskey contained in any other packages without regard to the source or manufacture of the whiskey contained in such bottles or packages or upon any bottle or package that did not contain the genuine Old Crow whiskey, manufactured by the plaintiff or its predecessors at the Old Crow Distillery in Woodford County, Kentucky?

A. They had not.

Q. 80. Has the plaintiff or its predecessors ever in any manner acquiesced in the use by any one in any label as a cover for whiskey other than the genuine Old Crow whiskey made by plaintiff or its predecessors at the Old Crow Distillery in Woodford County, Ky., which contained the word- Old Crow alone or in any combination?

A. They have not.

Q. 90. Have any instances come to the knowledge of the plaintiff or its predecessors where any manufacturer or dealer or other person had commenced or were attempting to use labels or brands on packages for whiskey other than the genuine Old Crow whiskey manufactured by them at their distillery in Woodford County, Ky., containing the words Old Crow, either alone or in combination with any symbol or other words, and if so, what action was taken by the

plaintiff or its predecessors in regard thereto?

A. There have been a number of instances where the attention of W. A. Gaines & Co. has been called to parties using the name of Old Crow on packages which whiskey was not made by W. A. Gaines & Co., and in such cases prompt steps have been taken to stop said parties from using the name of Old Crow on such packages. There were two parties in this state, namely, Lapp, Goldsmith & Co., of Louisville, Ky., was W. S. Hume & Co., of Silver Creek, Ky., who had used the words and name of Old Crow on whiskey bottled or distilled by them and legal proceedings were brought against them and they stopped using the name and brand.

Q. 91. Were judgments rendered in those cases that you speak of onjoining those parties from so using the labels containing the words Old Crow upon their other whiskies, if so, can you obtain and file

certified copies of said judgments?

Excepted to because incompetent.

A. There were judgments rendered against said parties and I will try and obtain certified copies of the same and if I can obtain them I will file them with this deposition marking them G. F. B. No. 13 and G. F. B. No. 14.

Q. 92. Has the plaintiff corporation ever had any agencies

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813 in the State of Missouri or places where its goods are stored and from which they sell and distribute them? What has been and is the method of the plaintiff's dealing with persons in the State of Missouri?

A. It has never had any agent or agencies where their goods have been stored and sold and delivered from in the State of Missouri. The method of selling their goods in the State of Missouri has been by their salesmen soliciting orders from dealers there or by correspondence through the mail.

Q. 93. From what point are the goods shipped sold by the plaintiff upon orders by its traveling salesmen or upon orders received through the mail from local dealers in Missouri as stated in your

last answer?

A. From Frankfort, Kentucky.

Q. 94. Are the goods brought from the distillery and shipped from Frankfort or are they stored in Frankfort and afterwards

shipped from that city?

A. They are generally brought from the distillery to the railroad depot in Frankfort—sometimes they are stored in the free warehouse in Frankfort after the tax has been paid and shipped from there to

the depot in Frankfort, Kentucky.

Q. 95. In your answer to the 90th question you state that there were a number of instances where the attention of W. A. Gaines & Co. was called to parties using the name of Old Crow on packages of whiskey not of the make of W. A. Gaines & Co. and in such cases "prompt steps have been taken to stop said parties from using the name of Old Crow on such packages." I now ask you what was the result of the steps taken in those instances? Were the parties stopped from using such name or brand and label or did they continue to use it.

Excepted to because incompetent and because the question has been substantially answered before.

A. Judgment was obtained against them—they stopped using the name of Old Crow and I never heard of them using it afterwards.

Defendant, without waiving his objection to the competency of the deposition of George F. Barry, cross-examines as follows:

X Q. 1. Will you please state your age?

A. I am in my forty-fifth year.

X Q. 2. Then you were only about twelve years of age at the time that Gaines, Berry & Co. operated the Old Pepper Distillery?

A. I was.

X Q. 3. Are not the matters to which you have testified with reference to the organization of the firm of Gaines, Berry & Co.,
 and of the distillery which they leased and operated and of

the brand or trade marks which they assumed and used largely matters of family history and matters about which you know nothing personally?

A. They are not.

X Q. 4. In other words then, they are subjects upon which you were familiar at the time?

A. They were.

X Q. 5. Were you living in the neighborhood of the Old Oscar Pepper Distillery when you were twelve years of age?

A. I was living within eight or nine miles of it—my residence

being Frankfort, Kentucky.

X Q. 6. At that time, where was the shipping point of the product by Gaines, Berry & Co. of the Old Oscar Pepper Distillery?

A. I think it was Frankfort, Kentucky, principally.

X Q. 7. You, at that time, were a mere lad attending school and had no connection personally with the business?

A. I was a lad and had no connection with the business.

X Q. 8. Did you at that time know upon what terms or how or why they held and operated either the Old Taylor or the Old Oscar Pepper Distillery?

A. Yes, sir.

X Q. 9. You state in answer to question 6 that in the spring of 1867 they began operating the Old Oscar Pepper Distillery, operated the same for about three years, do you speak of that matter by reason of your knowledge at the time of the terms of the lease, if such there was, or are you at speaking from information obtained since that time.

A. I knew from personal observation that they operated those distilleries during that period but not from any knowledge of any lease

at that time.

X Q. 10. And as to personal knowledge of those things to which you have testified, your answer would be practically the same, with reference to your knowledge of the time and period during which you say they operated the Old Taylor?

Excepted to by counsel for plaintiff, the question being indefinite and misleading.

A. I knew from personal knowledge that they operated the Old

Taylor house.

X Q. 11. I will ask you, if at that period of your life when you were twelve years of age you knew, or now claim that you knew, anything of the nature of trade marks, or what trade marks, if any, were used by persons engaged in the manufacture of whiskey?

A. I knew then that the trade mark of which the essential words

— Old Crow was branded on the barrels made at those distilleries by

Gaines, Berry & Co.

X Q. 13. Did not Old Oscar Pepper use identically the 815 same words Old Crow on whiskey manufactured by him at the Old Oscar Pepper Distillery, which Labrot now owns?

A. I do not know, as I never knew Mr. Pepper, and was never at that distillery until it was operated by Gaines, Berry & Co.

X Q. 14. Have you investigated the matter as to whether he did so use that trade mark and are you willing to say that he did not?

A. I never had occasion to investigate it and therefore could not say.

X Q. 15. Was not your distillery, precedent to the year 1882, called merely the Crow and not Old Crow?

A. I presume you mean the distilleries operated by Gaines, Berry & Co. and their successors. If you mean these, I will state the present distillery operated by W. A. Gaines & Co., in Woodford County, is known as the Old Crow Distillery. It may be sometimes called for the sake of brevity Crow.

X Q. 16. Was it not, precedent to 1882, so known and denominated by the members and officers of that partnership and their successors the present corporation—that is as the Crow and not Old

Crow?

A. It was not. But for the sake of brevity Crow was frequently

used in the place of Old Crow.

X Q. 17. Is that the explanation which you give of the fact that in all the deeds made or executed to or by this firm which are filed as exhibits in this case precedent to 1882, that the description of the distillery is the Crow instead of Old Crow?

A. It is.

X Q. 18. You speak of two distilleries having been operated by Gaines, Berry & Co. and their successors precedent to the erection of the present Old Crow and you say that the Oscar Pepper Distillery and the Old Taylor Distillery were operated at the same time by said firm, were they operated by different distillers?

A. I think they were.

X Q. 19. Will you please state the names of those distillers?

A. W. F. Mitchell was one—I do not remember the name of the

distil'er at the Old Taylor house.

X Q. 20. Did you have more than those two distillers precedent to the time of the erection of the present Old Crow? When I say you, I mean Gaines, Berry & Co. or their successors?

A. I only remember Mr. Mitchell as being a distiller employed by Gaines, Berry & Co. at the Pepper house. At the distillery which was built by Gaines, Berry & Co. in 1869, and operated by their succes-

sors. W. A. Gaines & Co., afterwards W. F. Mitchell was em-816 ployed there as a distiller, and when he left that distillery the present distiller, Van Johnson was employed as such and has

continued as distiller up to the present time.

Q. 21. Do you claim or rather does the present corporation, W. A. Gaines & Co., claim that no manufacturer of whiskey or handler of whiskey adopted or used the words Old Crow as a brand or trade mark on its goods before W. A. Gaines & Co. or their predecessors did so?

Excepted to by plaintiff as incompetent.

A. They do.

X Q. 22. Did W. A. Gaines & Co. or their predecessors, so far as you are advised ever have any understanding with Labrot & Graham or Labrot to whom the original Old Crow distillery now belongs by which he or they conceded to your firm the right to the exclusive use of the brand Old Crow?

A. They did not.

X Q. 23. All you mean to say then, with reference to them, is that

they made no complaint not that — conceded to you the right to its exclusive use?

A. I mean to say that they not only made no complaint but as just and honest men they conceded the right of W. A. Gaines & Co. to that brand of Old Crow, as W. A. Gaines & Co. and their predecessors originated and made the Old Crow brand valuable.

X Q. 24. I understand you to say that you were not prepared to say that Old Oscar Pepper had not himself used the brand Old Crow before your firm or its predecessors, if that be true, how can you now

say that W. A. Gaines & Co. originated it?

A. I stated before that I did not know Mr. Pepper and was never at his distillery or the Pepper Distillery until Gaines, Berry & Co. operated it. W. A. Gaines & Co. did not originate the brand but their predecessors, Gaines, Berry & Co. did.

X Q. 25. Then as to Labrot & Graham, you simply construed their silence into a concession of your right and not that your firm or com-

pany had any discussion with them in regard to it?

A. When Labrot & Graham first started in business Mr. Graham asked me if W. A. Gaines & Co. would have any objection to their using the words Old Crow underneath their brand Old Oscar Pepper Distillery. I told him they certainly would and he stated that if there was any objection they would not use it and as far as I know they never did and the question never came up afterwards.

X Q. 26. And his suggestion arose, did it not, from the fact that he at the time owned what was originally known as the Old
 Crow Distillery, it being the Old Oscar Pepper Distillery?

A. I am inclined to think that the value of the Old Crow as a trade mark had more to do with it than the fact that Gaines, Berry & Co. had previously made the Old Crow brand at that distillery.

X Q. 27. Please tell me specifically upon what W. A. Gaines & Co.

bases its claim to the exclusive use of the name of Old Crow?

A. Upon the fact that its predecessors, Gaines, Berry & Co., originated and devised the brand when the operated what was known as the Pepper house and the Taylor house, branding the barrels at

those houses Old Crow whiskey.

X Q. 28. Did they not begin its use when they were using the Old Oscar Pepper Distillery and was not that brought about because their predecessors, Old Oscar Pepper, had himself used it and when they left that house took the trade mark or brand with them?

A. I have no personal knowledge on this point,

X Q. 29. Do you use a symbol of a crow on labels or packages of

whiskey manufactured by your firm?

A. We do not now, but we have from time to time used a variety of labels, show cards and advertising matter, the essential words being in each instance Old Crow used in all of them.

X Q. 30. Was the symbol of a crow at any time used by your firm

as a trade mark?

A. No, it was used only in connection with the word Old Crow.

X Q. 31. At any time was any of your liquor branded Crow instead of Old Crow.

A. It was not.

X Q. 32. I understand you to say that each barrel and bottle of your whiskey is distinctly marked with the name of your firm or corporation and its location?

A. It is.

X Q. 33. You sell a great deal of your whiskey in barrels?

A. We do.

X Q. 34. How do you control or have you any control of the manner in which that liquor is bottled or branded after it leaves your possession?

A. We would, of course, have no control over the whiskey after it left our possession and was shipped to the owner who could do with

it as he saw fit.

X Q. 35. And you do not attempt to keep trace or knowledge of the manner in which it is bottled or branded after it leaves your place?

A. We do not.

818 X Q. 36. Have you ever had any understanding or agreement with E. H. Taylor, Jr., by which he conceded to the present firm of W. A. Gaines & Co. the exclusive use of the brand and

trade mark Old Crow?

A. It is my understanding that when Mr. Taylor withdrew from the partnership firm of W. A. Gaines & Co. in 1870, that he sold all of his interest which consisted of the distillers, trade marks and all other property that the firm might have been possessed of to his other partners.

X Q. 37. As I understand your former responses, you base your claim to the brand or trade mark Old Crow upon the fact that Gaines, Berry & Co., and their successors originated it as a brand or trade

mark, is that true?

A. It is.

X Q. 38. And you do not base it upon any other fact?

A. We do not.

X Q. 39. Do you employ the same formulas at the Old Crow and the Hermitage, the two distilleries operated by W. A. Gaines & Co.?

A. Practically so, except that one the Old Crow is mashed by hand in small tubs — at the Hermitage by machinery in large tubs.

X Q. 40. In other words the process or formula is the same at both distilleries except that one the mash is by hand and the other by machinery?

A. With that exception they are practically the same.

X Q. 41. You do not base your claim to the brand Old Crow in any degree to the formula by which the whiskey is manufactured?

A. We do not, except that the process used first by Gaines, Berry & Co. at the Pepper Distillery and the Taylor, and in whose employ they had one by the name of William F. Mitchell, who is said to have learned the art of distilling from James Crow, who formerly made whiskey for Oscar Pepper and other parties in Woodford County, and Mitchell used, or claimed to use, the process as was used by Crow when he made whiskey for Gaines, Berry & Co. And the present distiller employed by W. A. Gaines & Co., and who succeeded Mitchell, learned the business from Mitchell and is using practically the same formula at the present time.

X Q. 42. Crow was never employed nor did he at any time make whiskey for Gaines, Berry & Co., or their successors at any time?

A. He was not, as he had been dead many years before they went into the business. I never knew him personally, but learned that he had died through other parties.

X Q. 43. He did make whiskey at the Old Pepper Distillery, at the Johnson Distillery and other distilleries in Wood-

ford County for other people?

A. I do not know it personally, but I have heard it so stated by others.

X Q. 44. Was it not from his name and his formula that the brand

Old Crow grew?

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A. I was told by my father that they adopted the name of Old Crow as their trade-mark on account of the reputation that James Crow had as a distiller of whiskey?

X Q. 45. He never having been in the employ of Gaines, Berry & Co., nor their successors, how did they obtain from him his formula and the right to the use of his name as a trade-mark brand?

A. He being dead many years before they engaged in business, they could not have obtained any right from him. William F. Mitchell claimed, so my father told me, to have Crow's formula.

X Q. 46. But, as to whether W. A. Gaines & Co. in reality have any title to James Crow's formula or to the use of his name as a trade-mark either from him or his heirs, you do not know?

A. The predecessors of W. A. Gaines & Co., having originated the brand Old Crow themselves they would need have no occasion to have inquired of Mr. Crow or any one else whether the right to use that brand was theirs or not. Mr. Crow left no heirs or there were none living at the time Gaines, Berry & Co. commenced business. As Mr. Crow was reported to have died in 1856 and he had, I understood, a wife and daughter who died several years after. He himself, I understood, never owned a distillery, but simply operated those of others as a distiller.

X Q. 47. Did you or not adopt and use the trade-mark Old Crow on the strength of the claim made by W. F. Mitchell that he knew

Crow's formula?

A. As I had no personal interest in the business, not being old

enough, I could not say.

X Q. 48. Had not the Crow whiskey, or the whiskey ordinarily called Crow whiskey, obtained great notoriety precedent to the formation of the partnership of Gaines, Berry & Co.?

A. I could not say as I was too young to know.

X Q. 49. Has not W. A. Gaines & Co. an agent resident in Kansas City, Mo.?

A. It has not.

X Q. 50. Where does Blood live, the man who swore to the plaintiff's petition?

A. He is a salesman of W. A. Gaines & Co, with headquarters in Chicago. I believe his residence is now there.

X Q. 51. Have you no salesman in Missouri with his headquarters there?

A. We have not.

X Q. 52. How long since you used the symbol of a crow as a part of your trade-mark?

A. We have never used such symbol as a part of our trade-mark. X Q. 53. How long since you have used the symbol of a crow,

either on packages of whiskey or bottled goods?

A. We have never used the symbol of a crow on either the barrels or bottled goods. Whenever such symbol was used it was done merely as an advertisement.

X Q. 54. How long has it been since such symbol was used in the

manner you indicate?

A. I could not state definitely as the advertising matter was gotten up by the New York partners who attended to the distribution of such advertising matter. I have seen many of the show cards and other advertising matter, some of which had the symbol of a crow, others had not, I could not say when such symbol was discontinued.

X Q. 55. But you admit that it has been discontinued by your

firm?

A. It may be. My understanding is that it has been, but it is quite possible that on some of the advertising cards the symbol may still be used. It is a matter that I have not attended to myself as an officer of the company, and therefore cannot be positive about it.

X Q 56. You say without reference to who was the bottler that if you found a bottle of whiskey with the words Old Crow on it, and the words quality guaranteed with the name of the bottler, you would suppose that it was Old Crow whiskey manufactured by W. A. Gaines & Co. with the bottler guaranteeing the genuineness of it. Was that your statement?

A. It was.

X Q. 57. You know nothing personally as to whether or not it is common in Kansas City, and elsewhere in the United States for bottlers to use the words Old Crow upon the labels as a common designation of bottled whiskey without regard to its source or not, do you?

A. I do not.

#### Re-examined.

## By D. W. Lindsey, Attorney for Plaintiff:

Q. 1. In your answers on cross-examination you have stated in substance that at the time Gaines, Berry & Co. in 1867 commenced distilling at the Old Oscar Pepper Distillery and subsequently while

they were operating that distillery and the distillery known as

821 the Old Taylor Distillery, you were living in Frankfort, Kentucky, some nine miles distant from the distilleries and that you were not then connected personally with the business; I will ask you to what extent during those times, if at all, you visited those dis-

tilleries?

A. I went there frequently with my father, who, as I have previously stated, was a partner—going both to the Pepper Distillery as well as to the Taylor house. I could not state how many times I went as it has been a long time ago but it was quite frequently.

Q. 2. If you know, state about when Graham or Labrot & Graham acquired and commenced operating the Old Oscar Pepper Distillery?

A. It was in the year 1878.

Q. 3. If that distillery was operated between the time Gaines, Berry & Co. ceased to operate the same and the time it was acquired by Graham or Labrot & Graham, state by whom it was operated?

A. It was operated by E. H. Taylor, Jr., and James E. Pepper,

between the years 1873 or 1874 and 1877, under the name of James

E. Pepper & Co.

Q. 4. What name did they give to the distillery and what was the

brand they used for their whiskey?

A. They gave it the name of Old Oscar Pepper Distillery and to

the whiskey they gave the name of Old Oscar Pepper.

Q. 5. Who was the E. H. Taylor, Jr., you mention as operating that distillery with Pepper from 1873 to 1877, was he the same E. H. Taylor, Jr., who you have mentioned as having been a member of the firm of Gaines, Berry & Co. and W. A. Gaines & Co., and who sold out to his partners in the latter firm his interest therein, or was he a different person?

A. He was the same person.

Q. 6. Has the said Taylor at any time or James E. Pepper at any time in any manner questioned the right of Gaines, Berry & Co. or their successors to have and use the trade name and trade-mark Old Crow, either as a designation for their distillery or as a name or brand for their whiskey?

The defendant by counsel objects and excepts to this question and all the questions and answers on re-examination, because counsel for plaintiff is re-asking matter which was all gone over on direct examination.

A. They have not.

Q. 7. You have stated in your cross-examination that you were not acquainted with James Crow but that from common information you learn that he died about the year 1855 or 1856; will you please state in what neighborhood he was living at the time of his death, according to the accepted report?

822 Excepted to because incompetent.

A. I have been informed by parties who professed to know that he died while at work in one of the distilleries near the Old Taylor house. It was either the Old Taylor or a small distillery near Mill-

ville, I forget its name.

Q. 8. Has any representative or heir of James Crow, any one else ever in any manner questioned the right of Gaines, Berry & Co., and their successors to use as a name for their distillery the words Old Crow or to use those words as a trade-mark or brand for their whiskey?

A. They have not. Q. 9. You have stated on cross-examination that William F. Mitchell was employed by Gaines, Berry & Co., as their distiller when they commenced distilling at the Oscar Pepper Distillery and that he remained in their employ for some time thereafter—please state for what length of time Mitchell was the distiller for Gaines, Berry & Co., and their successors and at what distilleries he worked for them?

A. He worked for Gaines, Berry — Co. at the Pepper house and at the Taylor house supervising the latter house and having a dub distiller under him there. He then worked at the Old Crow that Gaines, Berry & Co. erected in 1869 and remained there for two or three years when he left their employ.

Q. 10. Have you ever heard the statement or claim which you say was made by Mitchell that he learned the business of distilling from James Crow and had acquired from him Crow's formula for making

whiskey ever questioned by any one?

Excepted to because incompetent.

A. I have not.

Q. 11. Under what formula or process has the whiskey produced by Gaines, Berry & Co. and their successors at their Old Crow Distillery been produced? Was it by the formula used by Mitchell as claimed by him to have been derived from James Crow or has the process or formula been changed in any manner since they first commenced with Mitchell?

A. The process is practically the same except as improvements have suggested themselves from time to time and which have been

adopted.

GEORGE F. BERRY.

Witness fee, two days' attendance, \$2.

Subscribed and sworn to before me, on the day, at the place and within the hours first aforesaid.

SEAL.

T. N. LINDSEY, Notary Public, Franklin Co., Ky.

My commission expires January 19th, 1902.

Not being able to complete the taking of said depositions by agreement of parties by counsel, I adjourn the further taking of the same until to-morrow, then to be continued at the same place and between the same hours mentioned in the annexed notice.

[SEAL.] T. N. LINDSEY, Notary Public, Franklin Co., Ky.

My commission expires January 19th, 1902.

Exhibit 1. To deposition of G. F. Berry is certificate of the [Commission-] of Patents, Washington, D. C., of the filing by W. A. Gaines & Company on December 13th, 1870, of trade mark for whiskey as follows:

See Record, page -.

Exhibit 2. To deposition of G. F. Berry is certificate of the Commissioner of Patents, Washington, D. C., of filing by W. A. Gaines & Company, on January 9th, 1882 of a trade mark for whiskey as follows:

See Record, page —.

Exhibit 3. To deposition of G. F. Berry is certified copy of lease of distillery and fixtures, together with mill, distillery, house and two stone ware houses, situated on that part of the farm of the late Oscar Pepper that fell to O'Bannor Pepper, infant son of Oscar Pepper, and Nannie E. Pepper, dated January 1, 1870, for two years, and signed Gains, Berry & Company, Nannie Pepper, guardian for O'Bannor Pepper, said lease was on November 1, 1870, transferred by Gaines, Berry & Company to W. A. Gaines in trust for W. A. Gaines & Company.

Exhibit 4. To deposition of G. F. Berry is copy of deed from Jas. M. Botts and wife to W. A. Gaines of land on which the present "Old Crow" Distillery is situate partly in Woodford and partly in

Franklin Counties, Kentucky, dated June 26th, 1969.

Exhibit No. 5. To deposition of G. F. Berry is certified copy of declaration of trust from W. A. Gaines and wife to W. A. Gaines & Company, of the tract of land purchased from Dr. Botts and wife, by W. A. Gaines on the 26th day of June, 1869; this instrument is dated June 26th, 1869.

Exhibit 6. To deposition of G. F. Berry is a copy of deed from W. A. Gaines, transferred to W. A. Gaines & Company (a partnership), the property purchased of Dr. Botts and wife on which is situated the "Crow Distillery," signed W. A. Gaines, November 18th, 1870.

Exhibit No. 7. To deposition of G. F. Berry is a certified sequence of deed from George C. Drain & Edmund H. Taylor, administrator of W. A. Gaines to W. A. Gaines & Company, of the interest of W. A. Gaines in said firm, signed December 20th,

Exhibit No. 8. To deposition of G. F. Berry is a certified copy of a deed from Sherman Paris to Marshall J. Allen, Frank L. Stevens and George H. Allen, Conveying his interest in the tract of land purchased of Dr. Botts and wife to W. A. Gaines in 1869, on which is the distillery known as the "Old Crow Distillery," and other houses and fixtures and all his interests in the firm of W. A. Gaines & Company, including trade marks. Signed August 1st, 1882 by Sherman Paris.

Exhibit No. 9. To deposition of G. F. Berry is certified copy deed from Marshall J. Allen, Frank S. Stevens, Hiram Berry and Geo. H. Allen to W. A. Gaines & Company, sells and conveys all their right, title and interest in the land purchased of Dr. Botts and wife, and the distillery proper built thereon. Dated August 1st, 1882, and signed by Marshall J. Allen, Frank S. Stevens, Hiram Berry

and Geo. H. Allen.

Exhibit No. 10. To deposition to Geo. F. Berry is a copy deed from W. A. Gaines & Company (a partnership composed of Marshall J. Allen, Frank S. Stevens, Hiram Berry, Geo. H. Allen and Edson Bradley, Jr.) to W. A. Gaines & Company, a corporation, conveying the land purchased of Dr. Botts and wife by W. A. Gaines in 1869, and upon which the present "Old Crow" Distillery is situated. Dated August 17th, 1887, signed Marshall J. Allen, Frank S. Stevens, Hiram Berry, Geo. H. Allen.

Exhibit No. 11. G. F. Berry, deposition is copy of Power of Attorney from Geo. H. Allen to Marshal J. Allen to sign and acknowledge articles of incorporation of W. A. Gaines & Company and to sign deeds for transfer of his interest in partnership of W. A. Gaines & Company to corporation W. A. Gaines & Company.

Exhibit No. 12. Deposition of G. F. Berry is copy of Power of Attorney for Edson Bradley, Jr., to Marshal J. Allen for the same purpose as described in Exhibit 11, signed February 1st, 1887, and

duly signed, recorded and acknowledged.

Exhibit No. 13, Deposition of G. F. Berry is certified copy of judgment of the Madison County Circuit Court of Kentucky, wherein W. A. Gaines & Company are plaintiffs and W. S. Hume & Company are

defendants, directs the injunction granted by the judgment of Madison Common Pleas Court be made and that plaintiff recover of defendant 1 cent damages and costs, March 26th,

At this point a recess was taken until 2 o'clock p. m.

#### Afternoon Session.

Plaintiff's counsel also read in evidence the depositions of W. E. Bradley and James R. Graham, taken at the same time and place,

which are in words and figures as follows, to-wit:

Pursuant to adjournment, as above stated, on the 18th day of May, 1901, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon, at the law office of D. W. Lindsey, in the City of Frankfort, Kentucky, I continued the taking of said depositions as follows, to-wit:

W. E. Bradley, of lawful age, being produced, sworn and examined, on the part of the plaintiff, deposeth and saith:

Counsel for defendant desiring to ask the witness on his voir e dire propounds the following questions:

Q. 1. Are you a stockholder in the W. A. Gaines & Co. Distillery, corporation?

A. There is no such corporation in existence. I am a stock-holder in W. A. Gaines & Co., a corporation.

Q. 2. Are you an officer in that corporation, if so, state what office you hold in the same?

A. I am its treasurer.

The defendant now objects and excepts to the taking and use on this trial of the deposition of W. E. Bradley because said corporation, of which he is treasurer, has already taken the testimony of other witnesses not stockholders of nor officers of said company heretofore.

It is the opinion of the officer taking the deposition that the witness is competent and so rules and thereupon the witness is examined

as follows:

By D. W. Lindsey, attorney for plaintiff:

Q. 1. State your age, residence and occupation?

A. Age sixty years, name W. E. Bradley, residence Frankfort,

Kentucky, occupation treasurer of W. A. Gaines & Co.

Q. 2. Did you know a firm under the name and style of W. A. Gaines & Co., if so, state the character of the business or what business that firm was engaged in when you first became acquainted with the existence of said firm and what members then composed it?

A. I did know a firm of that style, composed of Marshall J. Allen, Sherman Paris, Frank S. Stevens, George H. Allen 826 and Hiram Berry. They were in the business of manufactur-

ing Old Crow and Hermitage whiskevs?

Q. 3. Is that firm now in existence?

A. It is not. It went out of business in 1887 and was succeeded by the corporation of the same name, which has since been carrying on the same business.

Q. 4. What change, if any, took place in the membership of that firm during the time that you knew it and state when you first be-

came acquainted with or knew of that firm?

- A. I first became acquainted with it in 1873. I do not know of any changes, if any, which took place up to March, 1879, when I became personally associated with it as its business manager. The first change of which I had personal knowledge, took place in 1882, when Sherman Paris left the firm and Edson Bradley became a member of the firm. There were no subsequent changes that I know of.
- Q. 5. You have stated that the firm of W. A. Gaines & Co., when you first became acquainted with it, was engaged in the business of manufacturing of Old Crow and Hermitage whiskeys, will you please state the location of the distilleries, where they were conducting those manufacturies?

A. The Old Crow Distillery, where the Old Crow whiskey was and is being made, is located in Woodford County on Glenn's creek near the dividing line of Franklin and Woodford Counties.

Hermitage Distillery is located in South Frankfort, Kv.

Q. 6. Has the distillery which you have spoken of in the last answer as located in the edge of Woodford County on Glenn's creek, been operated continuously from the time you first mention to the If so, state by whom or what firm and corporation it has present?

been so operated?

A. It has been operated continuously as this word it understood among distillers. As distilleries making Kentucky whiskey generally suspend operations during the summer and early fall months and this has been the case with the Old Crow Distillery. In 1888 nearly all the distilleries in Kentucky ceased operations entirely on account of over production and this was the case with the Old Crow Distillery. It was so operated by W. A. Gaines & Co., a firm, until 1887, and has since that time been operated by W. A. Gaines & Co., incorporated.

Q. 7. Had the firm of W. A. Gaines & Co., when you first became acquainted with it, any distinctive name for the distillery that you have spoken of situated on Glenn's creek in Woodford County, Kentucky, near the Franklin County line? Was that distillery known to the manufacturers of whiskey, the whiskey trade generally, 827 and the dealers and consumers of whiskey by any distinctive name? If so, state what the distinctive name was which that firm had for the distillery and the distinctive name by which it was known by manufacturers of whiskey, the whiskey trade in general, the dealers in and consumers of whiskey in the United States?

A. The distinctive name used by W. A. Gaines & Co. was Old Crow for both the distillery and its product. The former being known as Old Crow Distillery and the whiskeys as Old Crow whiskey and it was so known by distillers generally and by the dealers in and

consumers of whiskey, in the United States.

Q. 8. Had that firm, at the time you first knew it, any distinctive trade name and trade mark or brand for designating the product of that distillery?

A. It had.

Q. 9. Please describe, as accurately as you can in words the trade name and brand that they had for the product of that distillery?

A. The brand was a circular one, placed on what is known as the commercial head of the barrel. The upper part of the brand as the barrel was located with the bung hole up, contains the words Old Crow Distillery in a semi-circle and under this the words Copper Distilled Whiskey, across the diameter the words W. A. Gaines, Distiller, and the lower half of the circle the words Woodford County, Ky.

Q. 10. Was said trade mark brand ever registered in the United States Patent Office, if so, and you can do so, will you make cer-

tified copies of the same part of your deposition?

A. Said trade mark was so registered. Certified copies of said registeries have been filed with the deposition in this case of George F. Berry, marked "Exhibit G. F. B. No. 1 and G. F. B. No. 2," and I now refer to the same and make them a part of this deposition.

Q. 11. Please state what were the essential words in said brand and trade mark, and how the same were applied to packages other than barrels containing the product of that distillery?

Excepted to be defendant so far as the witness is asked what were the essential words.

A. The essential words were the two words Old Crow and when the trade mark was placed on bottles, a fac-simile of the brand was printed on the labels which were affixed to the bottle in the ordinary way by some adhensive substance.

Q. 12. Was the entire brand as you have described it, as placed on the head of a barrel, always used upon packages and bot-

tles?

828 A. That I cannot say, as the labels were gotten up by the members or the firm and officers of the corporation who resided in New York and samples of the same as a general thing were not submitted to the representatives in Frankfort.

Q. 13. What distinctive name for the product of that distillery, if any, and what brand or mark, as a designation for that product,

was used by that firm and has been used by its successors, the corporation of the same style since you first knew the firm?

A. The words Old Crow.

Q. 14. Under what trade name and under what trade label or brand or mark have the manufacturers of whiskey, the whiskey trade generally, the dealers in and consumers of whiskey known and recognized the product of that distillery since you first became acquainted with the firm of W. A. Gaines & Co.

A. Old Crow.

Q. 15. Have you any knowledge as to the brands, labels, trade names or marks used to designate the product of that distillery, or by which the product was known to the public and the trade generally anterior to 1873, when you say you first became acquainted with it?

A. I have not.

Q. 16. Please state whether the name Old Crow Distillery has been exclusively applied to the distillery of the plaintiff situated as you have stated in the edge of Woodford County, Kentucky, on Glenn's creek and owned by the plaintiff and its predecessors? Has any other distillery within your knowledge or information ever been called by that name?

A. It has been so exclusively applied so long as I have known anything about the matter and the name has never been applied

to any other distillery to my knowledge?

Q. 17. Has any other person, firm or corporation other than the plaintiff and its pre-cessors, ever used the title or trade mark Crow or Old Crow as a brand title or trade mark for whiskey?

Excepted to because the question has been asked and answered.

A. I have never heard of any one who had the right to use this trade mark except W. A. Gaines & Co., the firm and corporation.

Q. 18. Have you ever heard of a firm called Gaines, Berry & Co.? And, if so, what relation, if any, had they to the firm of W. A. Gaines & Co.?

A. Yes, I have heard of such a firm and should have made an exception — the last answer in as much as Gaines, Berry & Co. were the predecessors of the firm of W. A. Gaines & Co. and transferred to W. A. Gaines & Co. all its rights in this brand.

Q. 19. To what extent has the name of Old Crow, as a designation of the distillery owned by the plaintiff and its predecessors of which you have made mention, and the same words as a designation and brand of the product of that distillery been made to and disseminated to the trade and for what length of time? And what has been the extent of the production and sale of whiskey

at and from that distillery by the plaintiff and its predecessors?

A. It has been very largely advertised, both by printed advertisements in the whiskey trade papers, which have a large circulation among the dealers in whiskey, and it has also been largely advertised in nowspapers. Besides this, W. A. Gaines & Co. has issued what are known as show cards and which contain the designating words of Old Crow and these have been issued free of charge

to wholesale and retail dealers who make a custom of hanging them in conspicuous places where they can be seen by consumers and the public generally and many thousand dollars are expended every year in advertising the whiskey in this way. Besides this, salesmen are constantly employed to visit the dealers and advocate the purchase of the whiskey. Besides this, brokers who dispose of whiskey and who are located in the principal cities of the country, publish a monthly price list giving prices of the different brands of whiskey. Whenever Old Crow whiskey is quoted in these price lists it means W. A. Gaines & Co., Old Crow whiskey—no other is ever spoken of

Q. 20. Is the fact that the plaintiff, W. A. Gaines & Co., and its predecessors, had adopted and continually used the words Old Crow upon barrels, bottles and packages as indicated the product of the said Old Crow Distillery, been known to manufacturers of whiskey

and to dealers and other persons familiar with the trade?

A. It has.

Q. 21. What does the appearance of the words Old Crow upon bottles or packages of whiskey indicate? And what do the manufacturers and dealers in the trade and the public generally recognize the name to indicate?

Excepted to because incompetent.

A. Such a label indicates that the bottle contains Old Crow whiskey and that such whiskey is manufactured by W. A. Gaines & Co. at its Old Crow Distillery; it being generally known that this is a distinguishing trade mark used by W. A. Gaines & Co.

830 Q. 22. Is such trade mark used by W. A. Gaines & Co. exclusively or is it used by any one else?

Excepted to by defendant.

A. It is used by W. A. Gaines & Co. exclusively.

Q. 23. You have stated that you first became acquainted with the firm of W. A. Gaines & Co. in 1873, have you at any time or times, been connected with or employed by that firm or its successors, the corporation, W. A. Gaines & Co., if so, state the character and extent of such employment or connection?

A. I became connected with the firm in March, 1879, as its business manager. I was associated with it continuously in this capacity until the firm went out of existence in 1887. When the corporation was formed, it immediately succeeded the firm, I was appointed

its treasurer and have been its treasurer ever since.

Q. 24. I find that you have not answered a question that was propounded in a previous question, by which you were asked what has been the extent of the production and sale of whiskey at and from the plaintiff's Old Crow Distillery by the plaintiff and its predecessors?

A. I cannot give the exact product in barrels or gallon- without consulting the record of the office but in general terms the product has been large in comparison with other high price whiskeys and amounts to several thousand barrels yearly. The entire product, since I have been associated with the firm and corporation, has probably been from one to two hundred thousand barrels, all of which has been sold with the exception of what is left on hand to meet the ordinary demands of trade which probably does not exceed ten thousand barrels and this is being disposed of daily according to the requirements of customers.

Q. 25. Over what area of country or to what places have the sales

and shipments of said product been made?

A. Sales have been made all over the country from Boston to San Francisco, and from northern Michigan to Texas and intermediate points.

Q. 26. Under what brand, name and mark have said seals and

purchases and shipments been made?

Excepted to because it has been asked and answered.

A. Under the regular Old Crow brand of W. A. Gaines & Co.

Q. 27. What acquaintance and familiarity has your connection as general manager of the firm of W. A. Gaines & Co., and the treasurer of its successor, the corporation, W. A. Gaines & Co., given you with the manufacturers and dealers in whiskey through-

out the United States and particularly those in the State of

Kentucky.

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A. I have visited a great many distilleries in the state and am personally acquainted with the parties who control them and have also been in the places of business of a good many of the wholesale dealers and have met and talked with nearly all the customers of W. A. Gaines & Co. who visit their office as they frequently do. I also conducted for many years the business correspondence of W. A. Gaines & Co., and although I do not now give this my personal attention I see a great deal of the correspondence which is a matter of record. I am also associated with the Kentucky Distilleries & Warehouse Co., which owns and operates between forty and fifty distilleries and in such position I see carbon copies of all letters which go from its office every day and also see very many of the letters which it receives.

Q. 28. From such acquaintance and familiarity with the dealers and manufacturers and trade generally in whiskies, are you able to state that you know the estimation in which the product of the plaintiff's Old Crow whiskey is manufactured at its distillery in Woodford County, Ky., is and has been held by manufacturers, dealers and the public generally?

Excepted to by defendant because incompetent.

A. I am able to state that the product of the Old Crow Distillery is held in very high estimation by the trade and manufacturers and public generally and has been sold at a higher price than any other whiskey made in the United States, and this, not in exceptional cases but uniformly. I do know such estimation.

Q. 29. Are — yourself personally a chemist and acquainted with

the science of distillation of whiskey, if so to what extent?

A. I do not pro'ess to be a chemist but I am acquainted with the practical operation of the manufacture and distillation of whiskey and with the chemical transformation which takes place during the process. When I came to Kentucky in 1889, I had some theoretical knowledge on the subject and for twenty-two years I have been in charge of the practical operations of the two distilleries owned by W. A. Gaines & Co., and for fourteen years, from 1885 to 1899, I was in charge of the practical operation of the two distilleries belonging to the Allen-Bradley Co. Besides this, I have visited and inspected a large number of other distilleries in Kentucky and Illinois.

Q. 30. From such knowledge, are you able to state that you are capable of judging of the quality of the whiskey, that is, and has been produced at the Old Crow Distillery by the plaintiff and its predecessors—if so, state what the quality of

that whiskey is and has been?

A. I do so state and also say that the quality is the very highest. Q. 31. If you saw a package or bottle of whiskey bearing a label

Q. 31. If you saw a package or bottle of whiskey bearing a label consisting of the words "Old Crow Whiskey" with the picture of a crow above the words "Old Crow," and below the words "Old Crow Whiskey" the words "This whiskey is bottled by us and we are responsible for its purity and fine quality. E. Whyte & Co." Without examining the contents of such a package or bottle of what distillation of manufacture would you believe the contents of such a bottle or package to be?

Excepted to because incompetent.

A. I should suppose the contents were manufactured by W. A. Gaines & Co. and that E. Whyte & Co. had bought W. A. Gaines & Co.'s Old Crow whiskey to put in the bottles and that they were guaranteeing the whiskey was a part of the original package which they had bought and that the same was pure when placed in the bottle by them.

Q. 32. What would be indicated by the brand on a bottle or package containing the words Old Crow with either the symbol of the crow or the other words indicated as a part of the label omitted?

Excepted to because incompetent.

A. It would indicate that the bottle contained whiskey of the manufacture of W. A. Gaines & Co. at its Old Crow Distillery.

Q. 33. Have you ever known or heard of any objection or adverse claim having been made or asserted by any person, firm or corporation to the use by the plaintiff or its predecessors of the name Old Crow Distillery as a designation or distinctive name for its said distillery or to the use by the plaintiff or any of its predecessors of the title Crow or Old Crow as a brand or designation for whiskey?

Objected to so far as this question embraces a request for hearsay evidence.

A. I have not.

Q. 34. Within your knowledge or information has any person, firm or corporation other than the plaintiff and its predecessors ever

sed or operated any distillery known as the Crow or Old Crow istillery'

Excepted to so far as the question requests anything more than

ne witness'es personal knowledge...

A. No.

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Q. 35. Has the defendant, E. Whyte Grocery, Fruit & line Co., or any of its alleged predecessors, ever had or reeived any authority or permission to brand or sell whiskey under e title brand, trade mark or designation of Old Crow, any whiskey any other manufacture or origin than that of the plaintiff or its redecessors, from the plaintiff, or its predecessors?

A. It has not.

Q. 36. Has the defendant company, or any of its alleged predessors, ever had or received any authority or permission from the aintiff or any of its predecessors to refill with other whiskies any the empty bottles originally put out on the market containing nuine Old Crow whiskey?

Objected to because incompetent.

A. My personal knowledge in reference to this matter only goes ck to March, 1879, and I wish to make this same modification in y last answer. I know, however, it has been the invariable policy W. A. Gaines & Co. to refuse such permission and no permission s been given since I have been connected with the firm and cor-

ration.

Q. 37. Until about the bringing of this suit had the plaintiff or the edecessors of the plaintiff any knowledge or information that either e defendant or any of the alleged predecessors of defendant had en or were placing upon any bottles or other packages containing niskey not of the origin or manufacture of the plaintiff or its edecessors at their Old Crow Distillery in Woodford County, Ky., y label or labels containing the words Old Crow, either alone or in mbination with any other words or symbol or symbols; or that y package or bottle branded or labeled by the defendant or its eged predecessors with the brand or label Old Crow contained ner than genuine whiskey manufactured by the plaintiff or its edecessors at their said Old Crow Distillery?

A. No.

Q. 38. Had the plaintiff or its predecessors any knowledge or inmation that Charles G. Perrin, The Barouch Mercantile Co.: B. Flershin Mercantile Co.; Fred Eyessell; J. W. Ryan; M. Quinn; Cohen; Louisville Supply Co., M. Hoffman or the Atlantic & eific Distributing Co., or any of them or any others in Kansas y or elsewhere have either in the past or are now using the words I Crow either alone or in combination with a symbol of a crow, or any other combination upon labels or brands as a designation of tled whiskey or whiskey contained in any other packages without ard to the source or manufacture of the whiskey contained in h bottles or packages or upon any bottle or package that did not contain the genuine Old Crow whiskey manufactured by the 1 plaintiff or its predecessors at their said Old Crow Distillery in Woodford County, Kentucky?

A. Not to my knowledge.

Q. 39. Has the plaintiff or any of its predecessors in any manner ever acquiesced in the use by any one as a label on any cover for whiskey other than the genuine Old Crow whiskey made by the plaintiff or its predecessors at said Old Crow distillery which contained the words Old Crow alone or in combination?

A. No.

Q. 40. What has been the course of action of the plaintiff and its predecessors in any case where they have had knowledge or reliable information which induced them to believe the that any one, either manufacturer, dealer or other person, had or were about to, or were attempting to, use any label or brand on packages for whiskey other than the genuine Old Crow whiskey, containing the words Old Crow, either alone or in connection with any symbol or other words?

A. The policy has been to notify such parties that W. A. Gaines & Co. had the exclusive right to use said trade mark and to warn them against the continuance of its use and so long as I have been connected with W. A. Gaines & Co. this policy has been consistently followed. A large majority of parties so notified have discontinued their use of the trade mark and a few suits have been commenced?

Q.41. Have they ever acquiesced or permitted any party or parties to continue to use such brand and in any case where they have had actual knowledge that the parties were infringing their

brand have they failed to take steps to stop the same?

Excepted to because the question has already been asked and answered.

A. They have never acquiesced in the use of their brand where parties have used them improperly and so far as I know have never

failed to take steps to prevent such use.

Q. 42. Has the plaintiff corporation ever had, or has it now, any agencies in the State of Missouri or any place or places where its goods are stored or from which they are sold and distributed?

A. No.

Q. 43. What has been and is the plaintiff's method in dealing

with persons in the State of Missouri?

A. It receives orders directly from customers and ships goods from its warehouses in Kentucky. It also has salesmen who travel in Missouri, advocating the purchase of its goods and in case any dealer gives an order for its goods through one of its salesmen it is always understood that such an order is subject to the approval by W. A. Gaines & Co. to fill or not as they see fit.

Q. 44. When the orders are received through the traveling 835 salesmen, from what point or place are the goods shipped to

fill such orders?

Q. From its warehouses located in Kentucky or in the case of whiskey which has been exported and brought back to this country from New York.

. Cross-examined.

By B. G. Williams, attorney for defendant:

X Q. 1. Did not Old Oscar Pepper use the words Old Crow as a

listinguishing mark or brand of his whiskey manufactured at the Old Oscar Pepper Distillery, which Labrot now owns?

A. I think he died a number of years before I came to Kentucky

and I never heard of any such use by him.

X Q. 2. Then you simply do not know whether he did or not?

A. That is correct.

X Q. 3. If W. A. Gaines & Co. ever used the picture of a crow in connection with the words Old Crow as a brand or trade mark for heir whiskey, how long since they discontinued that use?

A. I do not think they ever used a picture of a crow in any com-

bination whatever.

X Q. 4. On all packages, bottles or barrels of whiskey which is genuine and furnished by W. A. Gaines & Co., they always put the name of the manufacturer in a plain and conspicuous position, do hey not?

A. Yes.

X Q. 5. The name of W. A. Gaines & Co. as the manufacturer of Old Crow whiskey is as well known to the trade and to the public in general as the distinctive trade mark or brand Old Crow, is it not?

A. I think so.

X Q. 6. Then without the name of W. A. Gaines & Co., one would not be deceived by the name Old Crow, if it had not also W. A.

Gaines & Co. in connection therewith?

A. I don't see that that follows. W. A. Gaines & Co.'s name apbears on all packages made by it whether at its Hermitage Distillery or at its Old Crow Distillery and is well known to the trade in connection with both distilleries. The word Old Crow is a distinguishing trade mark of the whiskey made by it at its Old Crow Distillery and distinguishes it from the product of the Hermitage Distillery ilso.

Re-examined.

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By D. W. Lindsey, attorney for plaintiff:

Q. 1. In your third answer on cross-examination you state in substance that you do not think that W. A. Gaines & Co. ever used a picture of a crow in any combination whatever, do you mean by that or are you prepared to say that the symbol of a row was not used upon any of their signs, show cards or literature or abels though not used as a part or in direct combination with the brand or trade-mark?

A. No, I refer more especially to the brand as put on the trademark end of the barrel. I think, in fact I know that H. B. Kirk & Co., the largest customer of Old Crow whiskey of W. A. Gaines & Co., has used and I think is now using a label containing a picture of a crow. My impression is that these labels were furnished or at least prepared by W. A. Gaines & Co.

W. E. BRADLEY.

Witness fee, 1 day's attendance, \$1.

Subscribed and sworn to before me, on the day, at the place and within the hours first aforesaid.

[SEAL.]

T. N. LINDSEY, Notary Public, Franklin Co., Ky.

My commission expires January 19th, 1902.

Not being able to complete the taking of said depositions, by agreement of parties by counsel, I adjourn the further taking of the same until Monday, May 20th, 1901, then to be continued at the same place and between the same hours mentioned in the annexed notice.

[SEAL.] T. N. LINDSEY, Notary Public, Franklin Co., Ky.

My commission expires January 19th, 1902.

Pursuant to adjournment, as above stated, on the 20th day of May, 1901, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon, at the law office of D. W. Lindsey, in the City of Frankfort, Kentucky, I continued the taking of said depositions as follows, to-wit:

James R. Graham, of lawful age, being produced, sworn and examined, on the part of the plaintiff, deposeth and saith:

#### Announcement.

## By Defendant's Counsel:

The Hon. B. G. Williams, who has heretofore represented the defendant in the taking of these depositions, appeared and stated to the officer taking these depositions after the swearing of the above named

witness, James R. Graham, that his employment as counsel for the defendant for the purpose of taking these depositions had ceased and that he appeared for the purpose of announcing his withdrawal. Thereupon the taking of the depositions was continued as follows:

# By D. W. Lindsey, attorney for plaintiff:

Q. 1. Please state your age, residence and present occupation? A. I will be fifty-nine years old next November. My occupation is that of a farmer and I reside in Frankfort, Kentucky.

Q. 2. How long have you resided in Frankfort, Kentucky, and in what business or businesses have you engaged since January 1st, 1867?

A. I came to Frankfort in May, 1860, and was a telegraph operator until 1865, when I became city marshal and was city marshal and tax collector for about ten years, during which time I was also running a transfer business. In 1878 I became the owner of the Old Oscar Pepper Distillery by purchase from E. H. Taylor, Jr., or rather through his composition in bankruptcy. I purchased this property in May of that year, and in August of that year I formed a partner-

ship with Mr. Leopold Labrot, but our partnership dated back to the time of my purchase. We ran that distillery under the partnership of Labrot & Graham up to November, 1899, when I sold out to Mr. Labrot, who is now running it.

Q. 3. Where is that distillery situated?

A. It is situated a few hundred yards from Glenn's creek on a branch leading into that creek. It is about three miles and a half up the creek from the Old Taylor Distillery and about five miles above the Old Crow Distillery in Woodford County, Kentucky.

Q. 4. Who ran the distillery which you purchased from Taylor or through his composition as you have stated prior to the time you be-

came the owner of it?

A. E. H. Taylor, Jr., and prior to Taylor I have always heard Gaines, Berry & Co. ran it but as to that I have no personal knowl-

dge.

Q. 5. If you know, state by what distinctive name that distillery was known and called by E. H. Taylor, Jr., and the whiskey trade and public generally, while said Taylor was running it?

A. Old Oscar Pepper Distillery.

Q. 6. And how was his whiskey produced by him at that distil-

lery?

A. I think his whiskey was branded in the same name, though I now have no definite recollection of having seen the brand myself.

Q. 7. By what name was that distillery known and by what trade-mark and name was the whiskey called and branded from the time you became the owner of the property down to the present time?

A. Old Oscar Pepper Distillery and the whiskey was branded Old

Oscar Pepper whiskey.

Q. 8. At the time you purchased that property state where the firm of W. A. Gaines & Co., if you knew of such a firm, was engaged in business, and if that firm had a distillery on Glenn's creek in Woodford County, state where the same was situated, by what name it was called and for what length of time within your knowledge that dis-

tillery had been operated by them?

A. I knew the firm of W. A. Gaines & Co., and they were operating the Old Crow Distillery at that time which is situated in the edge of Woodford County and Franklin County on Glenn's creek and about five miles below the Old Oscar Pepper Distillery and is the same distillery now being operated by the corporation, W. A. Gaines & Co. W. A. Gaines & Co. operated this distillery some time previous to my purchase of the Old Oscar Pepper Distillery and said distillery was operated by Gaines, Berry & Co. before it was operated by W. A. Gaines & Co. Gaines, Berry & Co. were succeeded in the operation of this distillery by the firm of W. A. Gaines & Co. which in turn was succeeded by a corporation of the same name, that is, I have understood that the firm was turned into a corporation.

Q. 9. During the time the distillery was operated by Gaines, Berry & Co. and W. A. Gaines & Co. and the corporation W. A. Gaines & Co., as you have stated was the said distillery called by them and

known to the trade and public generally, by any definite and distinctive name, if so, please state what that name was?

A. It was during all of said time it was operated by Gaines, Berry & Co. and then W. A. Gaines & Co. the firm and corporation called by the parties operating it and known to the whiskey trade and the public generally as the Old Crow Distillery.

Q. 10. During the time, from 1869 down to the present and particularly from May, 1878, down to the present, what acquaintance have you had with the manufacturers and distillers of whiskey in the State of Kentucky and what acquaintance have you had with the dealers and others in the whiskey trade?

A. As commission agent for the railroad I received and shipped a good deal of their goods of different distillers embracing distilleries in this and Woodford and Anderson Counties and in that way became acquainted with their brands, and from 1878 down to

the time I sold my interest in the Old Pepper Distillery, I met and became acquainted with a great many distillers and dealers in whiskey.

Q. 11. During that time that the distillery which you have stated was named the Old Crow Distillery stituated in the edge of Woodford County on Glenn's creek was and has been operated by Gaines, Berry & Co., W. A. Gaines & Co. and W. A. Gaines & Co., incorporated, what has been the trade name and brand by which the product of that distillery has been known, branded, marketed and sold?

A. Old Crow.

Q. 12. To what extent has the whiskey trade and the dealers in and consumers of whiskey known the fact that that distillery was called Old Crow Distillery and the whiskey produced there Old Crow and branded and sold as such and particularly through this section of the country?

A. There was no other name for it—the distillery was never called nor its product ever known or called or branded by any other name. The fact that the distillery was so named and its product so called and branded and sold was well known to the trade and to the public generally.

Q. 13. Has any other firm, person or corporation other than the plaintiff and its predecessors ever used or operated any distillery known as the Crow or Old Crow Distillery?

A. No, sir; not within my knowledge.

Q. 14. Have you ever heard of any objection or adverse claim having been made by any person, firm or corporation to the use by the plaintiff or its predecessors to that title for its distillery or the title or brand Old Crow as a designation for its whiskey?

A. I have not.

Q. 15. If you saw a package or bottle containing whiskey which was branded or labeled with the title Old Crow, without examining the contents of that bottle or package, who would you believe were the makers of that whiskey and at what place would you believe it had been made?

A. W. A. Gaines & Co. at its Old Crow Distillery in Woodford

County, Ky.

Q. 16. Suppose the label upon such a bottle consisted of the following, the words "Old Crow Whiskey" with the picture of a crow above the words Old Crow and below the words Old Crow these words, "This whiskey is bottled by us and we are responsible for its purity and fine quality, E. Whyte & Co.," what would you believe the contents of such a package to be.

A. Such a brand would induce the belief that the whiskey was genuine Old Crow whiskey, which had been obtained by E. Whyte & Co., either from the manufacturer or in the market by the barrel

and by E. Whyte & Co. bottled.

Q. 18. Would, or would not such a brand placed on a bottle or other package containing whiskey other than that made by the plaintiff or its predecessors be a deception to and mislead the trade and the public generally?

A. That would be my construction and I believe it would.

Q. 18. Prior to the time Gaines, Berry & Co., in 1867, commenced branding the whiskey made by them at the Old Oscar Pepper Distillery, if you know, state whether Kentucky whiskeys and especially those made in this and the surrounding counties were branded with any trade mark or brand?

A. While I was connected with the railroad and in the transfer business hauling freight to and from both the railroad and the river, I handled great quantities of whiskey and I have no recollection of any of it being branded until after Gaines, Berry & Co. commanded

the manufacturing of whiskey.

Q. 19. Please state whether you or the firm of Labrot & Graham, as the owners and operators of the Old Oscar Pepper Distillery or in any other capacity ever claimed the right to the trade name or trade mark or brand of Old Crow as a designation for your whiskey or ever questioned the right of W. A. Gaines & Co. and its predecessors to the use of that brand?

A. We did not. We never claimed right in ourselves or doubted

that they had the right to that brand.

J. R. GRAHAM.

Witness fee \$1.

Subscribed and sworn to before me, on the day, at the place, and within the hours first aforesaid.

SEAL.

T. N. LINDSEY, Notary Public, Franklin Co., Ky.

My commission expires January 19th, 1902.

Plaintiff's counsel read in evidence the deposition of Charles C. Leonard, taken at Chicago, December 26, 1901, which is in words and figures as follows, to-wit:

Direct examination.

By Frederick Arnd, Esq.:

Q. Please state your name?

A. Charles C. Leonard.

Q. Where do you live, Mr. Leonard?

A. 618 46th Place.

Q. In what city? A. Chicago, Illinois.

Q. How long have you lived in the City of Chicago?

A. Seventeen years.

Q. What is your business?

A. Bottlers' supplies.

Q. What is the name of the concern with which you are connected?

A. U. S. Bottlers' Supply Co.

Q. Where is the business located? A. 212 Randolph street, Chicago.

Q. State whether or not your company is a corporation?

A. Yes, sir. 841

Q. Are you one of the officers of the corporation?

A. Yes, sir.

Q. What office or offices do you hold in that corporation?

A. Secretary and treasurer.

Q. In this, your deposition, when I speak of "your company" I wish you to understand that I refer to the U. S. Bottler's Supply Company, for the sake of convenience. In what business is your company engaged?

A. Bottlers' supplies of all kinds—particularly for the wholesale

wine and liquor trade.

Q. When you say bottlers' supplies, what does that include?

A. Bottles, caps, corks, labels, bottlers' machinery, etc. Q. You say that your company manufactures labels? A. Yes, sir.

Q. What kind of labels?

A. All kinds of stock wine and liquor labels.

Q. How extensive is your business, Mr. Leonard, in the manufacture of labels? I do not wish to inquire into any secrets of your business?

A. We do not keep it separate—pretty hard work to tell.

Q. But what proportion of your business would you say is that of the manufacture of labels?

A. Possibly the tenth.

Q. As compared with other manufacture-s of labels in the City of Chicago, how does your company stand?

A. We are one of the largest in Chicago in strictly wine and

liquor labels.

Q. How long has your company been engaged in the manufacture of wine and liquor labels?

A. Well, we have been manufacturing about two years. Before

that we had them made by another party.

Q. How long has your company been engaged in the sale of wine and liquor labels?

A. About ten years.

Q. Referring now to liquor labels, please state generally what is included in that term, as you use it.

A. Whiskey, brandy, rum, gin and like products.

Q. How many different kinds of whiskey labels is your company engaged in the manufacture of?

A. I expect we make probably—strictly whiskey labels, possibly

three hundred different styles.

Q. Is your company engaged in the manufacture of a whiskey label known as the "Old Crow" brand?

A. Yes, sir.

Q. How many different varieties of "Old Crow" labels does your company manufacture?

A. Probably twenty or twenty-five.

Q. Does your company make it a practice to manufacture any kind of a label that a person will order of it?

1. No, sir.

Q. Are there any restrictions observed by your company in that respect?

A. Yes, sir.

Q. Please state what those restrictions are?

A. It is not our policy to make any label of a private brand so the label is everywhere near like the distillery bottling or the original label, except upon an order given us or authorized by the concern that makes the genuine article.

Q. Is that policy of your company generally observed?

A. Yes, sir.

Q. With reference to the manufacture of "Old Crow" labels, state whether or not your company has observed the policy of which you speak?

A. We have.

Q. Are you acquainted with the brand "Old Crow," the whiskey which is manufactured or distilled by W. A. Gaines & Company of Woodford County, Kentucky?

A. I have seen it on their bottles of whiskey.

Q. What is your understanding as to who distills the genuine "Old Crow" brand of whiskey?

A. My understanding is W. A. Gaines & Company of Woodford County, Kentucky.

Q. When you sell an "Old Crow" label, for what purpose do you understand such label to be used?

A. We suppose it is to be used on bottles containing "Old Crow" whiskey.

Q. And distilled by whom?

A. By W. A. Gaines & Company.

Q. And how long has that been your understanding?

A. Ever since I have known the brand.

- Q. And that covers a period of how many years?
- A. Since we have been in the business—ten years.
  Q. Is the brand "Old Crow" a well known brand of whiskey in the trade?

A. Yes, sir.

Q. Have you with you any samples of "Old Crow" labels?

A. I have.

Q. Will you produce one?

A. Yes.

Q. Please hand it to me.

(Witness hands label to Mr. Arnd.)

Mr. Arnd: Will the notary please mark this label "Leonard's Ex hibit 1."

Q. I now show you label marked "Leonard's Exhibit 1" and as you from what source you obtained that label?

A. Hasterlik Brothers.

Q. Who are Hasterlik Brothers?

A. They formerly were in bottlers' supply business and 843 our company bought them out.

Q. So the label marked "Leonard's Exhibit 1" is a label which you purchased from Hasterlik Brothers?

A. Yes, sir.

Q. How long ago?

A. About ten years ago.

Q. State whether or not you have this label in stock?

A. Yes, sir.

Q. And have had it in stock how long?

A. Ten years.

Q. Have you any other label of the "Old Crow" brand?

A. Yes.

Q. Will you please hand me one?

(Witness hands label to Mr. Arnd.)

Mr. Arnd: Will the notary please mark this label "Leonard" Exhibit 2.'

Q. I now show you, Mr. Leonard, label marked "Leonard's Ex hibit 2," and ask you by whom that label was manufactured?

A. By us.

Q. By your company?

A. Yes, sir.

Q. How long has your company been manufacturing this label

A. About a year.

Q. State whether or not this label is a stock label?

Q. By that you mean one that you carry in stock?

Q. Have you any other labels of the "Old Crow" brand?

A. Yes, sir.

Q. Will you produce one?

(Witness hands label to Mr. Arnd.)

Mr. Arnd: Will the notary please mark this label "Leonard" Exhibit 3."

Q. I now show you label marked "Leonard's Exhibit 3," and ask you if you carry that label in stock?

A. Yes, sir.

Q. How long have you carried it in stock?

A. About ten years.

Q. Have you any other samples of labels?

A. Yes, sir.

Q. Will you please produce same?

(Witness hands label to Mr. Arnd.)

Mr. Arnd: Will the notary please mark this label "Leonard's Exhibit 4."

Q. Mr. Leonard, I now call your attention to the label marked "Leonard's Exhibit 4," and ask you from what source you obtained that label?

A. From our stock of labels.

- 844 Q. Is this a label which you carry generally in stock? A. Yes, sir.
  - Q. And how long have you carried this label in stock?

A. Five or six years.

Q. Have you any other samples of "Old Crow" labels?

A. Yes, sir.

Q. Will you please produce one?

(Witness hands label to Mr. Arnd.)

Mr. Arnd: Will the notary please mark this label "Leonard's Exhibit 5."

Q. I now show you, Mr. Leonard, the label marked "Leonard's Exhibit 5," and ask you from what source you obtained that label?

A. From our stock.

Q. That is from the stock of your company?

A. Yes, sir.

Q. Do you carry that label now in stock?

A. Yes, sir.

Q. And how long have you carried it in stock?

A. About eight years.

Q. Have you any other label of the "Old Crow" brand? A. Yes, sir.

Q. Will you please produce same?

(Witness hands label to Mr. Arnd.)

Mr. Arnd: Will the notary please mark this label "Leonard's Exhibit 6."

Q. I now call your attention to the label marked "Leonard's Exhibit 6," and ask you from what source you obtained same?

A. From our company's stock.

Q. From your company's stock of labels?A. Yes, sir.Q. State whether or not this label is kept in stock by you?

A. Yes, sir.

Q. How long has it been kept in stock by you?

A. About nine years.

Mr. Arnd: I now offer, as evidence, labels marked "Leonard's Exhibit 1," "Leonard's Exhibit 2," "Leonard's Exhibit 3," "Leonard's Exhibit 4," "Leonard's Exhibit 5," "Leonard's Exhibit 6," respectively, and ask that they be attached to the deposition of Mt. Leonard.

Which said exhibits so marked, are received as evidence and are

as follows:

"Leonard's Exhibit 1." Jennie White, Notary Public, "Old Crow, Hand Made, Sour Mash Whiskey."

"Leonard's Exhibit 2." Jennie White, Notary Public. "Old Crow, Hand Made, Sour Mash Whiskey."

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"Leonard's Exhibit 3." Jennie White, Notary Public. "Fine Old. Old Crow."

"Leonard's Exhibit 4."

Jennie White, Notary Public. "Old Crow, Hand Made Sour Mash Whiskey. 9 Years Old. Caution:-This brand of whiskey is guaranteed to the Consumer as a pure, hand made, Sour Mash Whiskey for family and Medical use, Distilled from selected Grain and only the flinty or hominy part of grain is used, thus freeing it of fusel before it is distilled. Old Style."

"Leonard's Exhibit 5."

Jennie White, Notary Public.
"Old Crow, Old Sour Mash Whiskey. Distilled from Selected Grain and is Absolutely Pure."

> "Leonard's Exhibit 6." Jennie White, Notary Public. "Old Crow, Hand Made, Sour Mash Whiskey."

Q. Mr. Leonard, have you any other samples of "Old Crow" labels?

A. Yes, sir.

Q. Will you please hand me all the rest that you have with you? (Witness hands Mr. Arnd thirteen labels.)

Q. These are all the rest of the "Old Crow labels which you have brought with you?

A. Yes, sir.

Mr. Arnd: Will the notary please mark these labels "Leonard's Exhibit 7," "Leonard's Exhibit 8," "Leonard's Exhibit 9," "Leonard's Exhibit 13," "Leonard's Exhibit 14," "Leonard's Exhibit 13," "Leonard's Exhibit 14," "Leonard's Exhibit 1 hibit 15," "Leonard's Exhibit 16," "Leonard's Exhibit 17," "Leonard's Exhibit 18," and "Leonard's Exhibit 19," respectively.

Q. From what source did you obtain the labels marked "Leonard's Exhibit 7," "Leonard's Exhibit 8," "Leonard's Exhibit 9," "Leonard's Exhibit 10," "Leonard's Exhibit 11," "Leonard's Exhibit 12," "Leonard's Exhibit 13," "Leonard's Exhibit 14," "Leonard's Exhibit 15," "Leonard's Exhibit 16," "Leonard's Exhibit 17," "Leonard's Exhibit 18," and "Leonard's Exhibit 19," respectively?

A. From our regular stock of labels.

Q. For what purpose do you carry these labels in stock?

A. For the purpose of selling them.

Q. How long have you carried in stock these labels marked "Leonard's Exhibit 7," "Leonard's Exhibit 8," "Leonard's Exhibit 11," "Leonard's Exhibit 11,"

"Leonard's Exhibit 12," "Leonard's Exhibit 13," "Leonard's Exhibit 14," "Leonard's Exhibit 15," "Leonard's Exhibit 16," "Leonard's Exhibit 17," "Leonard's Exhibit 18," "Leonard's Exhibit 19," respectively?

A. We have carried these labels in stock from ten years to one year—some of them ten years and others a less time. If you will call my attention to each particular label I will state the exact time.

Mr. Arnd: I do not think it necessary to go into that matter more

particularly.

Mr. Arnd: I now offer as evidence the labels marked "Leonard's Exhibit 7," "Leonard's Exhibit 8," "Leonard's Exhibit 9," "Leonard's Exhibit 10," "Leonard's Exhibit 11," "Leonard's Exhibit 12," "Leonard's Exhibit 13," "Leonard's Exhibit 14," "Leonard's Exhibit 15," "Leonard's Exhibit 16," "Leonard's Exhibit 17," "Leonard's Exhibit 18," and "Leonard's Exhibit 19," respectively. Which said exhibits so marked, are received as evidence and are as follows:

"Leonard's Exhibit 7."

Jennie White, Notary Public.

"Old Crow, Hand Made, Sour Mash. W. A. Gaines & Co., Distillers.

Superior Quality." 1880.

"Leonard's Exhibit 8."

Jennie White, Notary Public.

"Old Crow, Hand Made, Sour Mash Whiskey, 1881. W. A. Gaines & Co., Distillers."

"Leonard's Exhibit 9."

Jennie White, Notary Public.
"Genuine Old, Old Crow, Hand Made, Sour Mash Whiskey."

"Leonard's Exhibit 10."
Jennie White, Notary Public.

"Pure Old Crow, Old Fashion, Hand Made, Sour Mash Bourbon. This whiskey is distilled from small grain only, and slow process fermentation, obviating all impurities by haste, preventing a superabundance of fusel oil, and generating a pure wholesome product, agreeable to the taste and healthful to the system. In order to guard the public against the numerous and injurious imitations of this celebrated brand of whiskey, we caution all persons, before purchas-

ing to see that the trade mark and cap of the bottle are intact and unbroken."

"Leonard's Exhibit 11."

Jennie White, Notary Public. "Old Crow, Hand Made, Sour Mash Whiskey. Old Crow Distillery, Copper Distilled Whiskey, W. A. Gaines & Co., Distillers, Woodford Co., Ky."

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"Leonard's Exhibit 12." Jennie White, Notary Public. "Old Crow, Hand Made, Sour Mash Whiskey."

> "Leonard's Exhibit 13." Jennie White, Notary Public.

"Pure Old Crow, Old Rye Whiskey. Distilled from Selected Grain and is Absolutely Pure."

> "Leonard's Exhibit 14." Jennie White, Notary Public. "Kentucky. Old Crow, Hand Made, Sour Mash."

> > "Leonard's Exhibit 15."

Jennie White, Notary Public. "Old Crow, Hand Made, Sour Mash Whiskey. Superior 1890 Quality."

> "Leonard's Exhibit 16." Jennie White, Notary Public, "Old Crow, Hand Made, Sour Mash Whiskey."

"Leonard's Exhibit 17." Jennie White, Notary Public.

"Old Crow, Hand Made, Sour Mash Whiskey, 1892. W. A. Gaines & Co., Frankfort, Ky."

"Leonard's Exhibit 18." Jennie White, Notary Public. "1885. Old Crow, Hand Made, Sour Mash Whiskey."

"Leonard's Exhibit 19."

Jennie White, Notary Public.
"Old Crow, Hand Made, Sour Mash Whiskey. This celebrated Whiskey is made exclusively by the old fashioned process, employed only in the distillation of the finest Whiskies from carefully selected grain grown in the immediate vicinity of the distillery. It is absolutely free from all matter prejudicial to health and especially recommended for Medicinal Use as a pure and healthful stimulant. In order to guard the public against the numerous and injurious imitations of this celebrated Brand of Sour Mash Whiskey, we caution all persons to satisfy themselves before purchasing, that the labels bear our Trade-Mark."

Q. With reference to the policy, heretofore testified to by you, pursued by your company in restricting the sale of "Old Crow" labels to persons whom you believe and understand will use them upon bottles containing the genuine "Old Crow" brand of whiskey, please state whether you ever deviate or have deviated from that policy?

A. No, sir. Of course, there are undoubtedly cases where deception has been practiced upon us, that is, a person will satisfy us that he is entitled to use an "Old Crow" label, when as a matter of fact he is not entitled to do so, and obtain from us "Old Crow" labels and put them upon bottles containing an inferior grade of whiskey. That is a thing we cannot help.

Q. Mr. Leonard, please state what other concerns or business houses in the United States are engaged in the manufacture of

whiskey and wine labels?

A. There are a great many. I do not suppose there is any city of any size in the United States that does not manufacture whiskey and wine labels.

Q. Are you acquainted with one R. T. Bell?

A. Yes, sir.

Q. By whom is he now employed?

A. By the U. S. Bottlers' Supply Company.

Q. That is the same concern that you heretofore testified that you are the secretary and treasurer of?

A. Yes, sir.

Q. Where is he now located?

A. Kansas City Missouri.

Q. How long has he been working for your company?

A. About six years.

CHAS. C. LEONARD.

Mr. Pence: Are those the labels you introduced when Mr. Blood was on the stand?

Mr. Ladd: I don't think I did, I don't remember; I think you asked him about them.

Mr. Pence: They have already been introduced in evidence. Mr. Ladd: They are offered in evidence attached to this depo-

sition. There are nineteen exhibits here, it seems.

Mr. Ladd: I wish to offer in evidence all exhibits referred to—I won't take the time now to take them out—they are mostly transfers from one party to another, from one firm to another, and from one corporation to another.

Mr. Pence: The only one I care to have read and have the Court's attention called to specially, is the lease from the heirs of Oscar Pepper to Gaines, Berry & Company, of the original Old Crow Distillery, in which the distillery is termed "Old Crow Distillery."

Mr. Ladd: This is dated January 1, 1870, lease from Mrs. Linnie

E. Pepper to Gaines, Berry & Company at the City of Frankfort, Kentucky.

Mr. Pence: The one I refer to is the first lease that was made.

Mr. Ladd: That ain't here; it never was here. Mr. Pence: The lease of 1867.

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Mr. Ladd: You are mistaken in supposing that was the

original lease, or a copy of it, because that never was here.

Mr. Ladd: I don't know whether I made a formal offer of all of these brands and labels and papers that we have had here, and talked about, and testified about. I would like to have them all considered in. Now if the Court please, I would like to make a statement, if it is proper to do so, and I will be sworn in regard to the matter.

S. B. Ladd, called as a witness on the part of plaintiff, being duly sworn, testified as follows:

#### Direct examination:

Mr. Pence has called my attention to the fact that the original petition in this case, and the amended petition, differ in some of their averments of fact, and that is true, some of their recitals-

Mr. Pence: Mr. Ladd, I wish you would have Mr. Small ask you

the question.

Mr. Ladd: No, I prefer to go on myself; though you can crossexamine me to the full extent.

Mr. Pence: I want to object to whatever I consider is-

Mr. Ladd: Suppose you let me go on, and then move to strike it out. We will get through it a great deal quicker, if you will just as soon.

Mr. Pence: Go ahead.

Mr. Ladd (continuing): When Mr. Blood came to see me in June, I think it was 1900, he said that he wanted a suit brought, but he was not certain that the whiskey in those bottles which he had bought was not "Old Crow" whiskey, because he had not sampled it; so it was decided to send one to New York and if it turned out that it was not, a suit was to be brought, and he went away. But all that Blood knew about the matter is what transpired here locally; he did not undertake to give me any information about the facts in regard to the trade mark. Later on I received a letter from the attorneys, New York attorneys, I have forgotten their names—it is Wise & Lichtenstein—I think so-Mr. Pence has a copy, a printed copy of the petition, which is signed by them; that was sent to me by them as a sort of a guide, and that is all the information I had about the origin of "Old Crow" trade mark, what I saw in that printed petition, and I followed it practically in getting up my petition.

Q. Is that all?

850 A. No, that is not all. After the issues were made up and testimony was taken in Kentucky by General Lindsey, after the depositions came up, most of them had come up which have been read here, the Kentucky depositions, I looked them over. and General Lindsey wrote to me he had been familiar with the matter, and I was instructed to turn the matter of taking depositions over to him, and he said that I was mistaken in any petition.

Mr. Pence: I object to that, don't think that is proper. Witness: Well, all right. When I came to look over the depositions I saw that some of the recitals in the first part of my petition were not in point of fact accurate or true, and particularly as to the fact that we claimed we were the successors of James Crow, and when I found from the testimony of these witnesses who did know the facts, just what the situation was, I filed this amended Now that is just the way that happened. After I had written my amended petition. I sent it up to Mr. Blood at Chicago; he was in Chicago, and told him he - got to swear to it and send it back here, before I made the application for a temporary injunction, and he made the affidavit in Chicago, and sent it back to me. That is the way-that accounts for the difference between the original and the amended petition in this case.

Mr. Pence: No effort to blame you, Mr. Ladd.

Mr. Ladd: No, no, I ain't trying to exonerate myself, I do not need any explanation.

Mr. Pence: I object to Mr. Ladd's testimony as irrelevant to any possible issue in this case. I move to strike it out on that ground.

Mr. Ladd: Well, it simply explains the difference between the original and the amended petition, and I thought it was right that the Court should know how it occurred.

Mr. Small: Yes, sir, that is all.

The Court: The motion will be overruled. You called attention to the fact of the difference in the two petitions.

Mr. Pence: Yes.

To which ruling of the Court defendant then and there duly excepted.

#### Cross-examination.

## By Mr. Pence:

Q. Just one question, Mr. Ladd. Mr. Blood swore to the original petition, did he not?

A. Yes, as I said, I sent it—he was in Chicago—and I 851 sent it up there and I prepared and had a jurat there for him, and he went before some Notary Public and swore to it; the original petition shows that.

Q. And he also swore to the amended petition?

A. I don't think the amended petition is sworn to at all.

Q. Isn't it sworn to?

A. I won't be sure, but I think not. Q. Well, you are not certain?

A. I think not.

Q. You got your information when you drew the original petition from Wise & Lichtenstein, the New York attorneys?

A. I got it from the printed petition which they sent me. Q. Which Wise & Lichtenstein drew?

A. You had it in your hand this morning, and you cross-examined Mr. Blood about it.

Q. This is a petition on a suit that was brought in the City of New York and they are exactly alike?

A. Yes, sir.

Plaintiff here rested.

## Defense.

Defendant to sustain the issues on its part offered and introduced evidence as follows, to-wit

Charles G. Perrin, called as a witness on the part of defendant, being duly sworn, testified as follows:

Direct examination.

#### By Mr. Pence:

- Q. State your name to the Court, Mr. Perrin?
- A. C. G. Perrin.
- Q. Where do you reside?
- A. In this city.
- Q. How long have you lived in Kansas City?
- A. About 33 years.
- Q. In what business have you been engaged?
- A. In the wholesale whiskey business principally.
- Q. For what length of time?
- A. For that length of time?
- Q. About 33 years?
- A. About 33 years, yes, sir.
- Q. Are you familiar with a stock label called the "Old Crow" label?
  - A. Well, I have seen a great many stock labels called "Old Crow" labels.
- 852 Q. You may state to what extent that stock "Old Crow" label has been used in the trade by bottlers and sellers of whiskey, within your knowledge?
- A. Well, most ever since I have been in business the name of "Old Crow" has been in general use.
  - Q. Has been in general use?
  - A. Yes, sir.
  - Q. Did you for a long period of years bottle whiskey yourself?
  - A. Yes, sir.
- Q. I will ask you whether for a long period of years you bottled whiskey under this stock label of "Old Crow," I mean whiskey not manufactured by W. A. Gaines & Company of Frankfort, Kentucky.

Plaintiff objected because if one man has seen fit to perpetrate a fraud, it is not relevant and does not tend to constitute any defense for another man.

Mr. Pence: I object to the use of that term. There is no question of fraud in this case.

The Court: I think it is competent.

Q. Go ahead, Mr. Perrin?

A. I have to ask you to repeat the question.

Q. I will ask you whether or not, Mr. Perrin, if for a long period of years, while you were bottling whiskey, whether you used this stock label of "Old Crow" in bottling whiskey other than the whiskey manufactured by W. A. Gaines & Company?

Plaintiff's counsel objected to the question as incompetent, irrelevant and insmaterial. While one person may have done that for a long or short period is no defense, does not tend to make out a defense.

The Court: Go on.

Witness: I could not say whether we ever bottled "Old Crow" under the stock label any particular number of times. I think, perhaps, we may have used that label on a few occasions at the special request of parties who desired the goods put up under the brand of "Old Crow." I never make a practice of using the "Old Crow" label, although we have used it. I have used it.

Q. Just describe to the court what those old stock labels were like,

those "Old Crow" stock labels were like?

A. You will have to have a memory longer than mine to go into a general description of stock labels. The word- "Old Crow" was about the principal thing, "Old Crow" bourbon was the words usually implied.

Q. To what extent were those labels used by bottlers and sellers of

whiskey?

853 A. I think they have been in very general and in very common use for a great many years

common use for a great many years.

Q. For what kind and grades and manufactures of whiskey?

A. It would be impossible for me to say, but I suppose they are used on all grades of whiskey.

Mr. Ladd: I object to Mr. Perrin testifying to the use of "Old Crow" labels for any whiskey except "Old Crow" whiskey, except as he had occasion to notice it. It seems to me that objection ought to be good.

The Court: Yes, you must identify the whiskey, show the kind of whiskey. There might have been used to his knowledge for "Old

Crow" whiskey.

Q. Just describe to the court what the use was, among these bottlers, of this "Old Crow" label?

By Mr. Ladd: Did you see them bottle the whiskey?

A. Of course not.

Q. Did you sample the whiskey and know what it was?

A. No. sir.

Mr. Pence: Now, my question, Mr. Perrin, is this: I will ask you to state whether or not these "Old Crow" labels, these stock "Old Crow" labels, were in general use by bottlers and sellers of whiskey

upon cheaper grades of whiskey than the whiskey manufactured by W. A. Gaines & Co., at their distillery in Woodford County, Ky.?

Plaintiff objects because witness has already said that he did not examine the whiskey contained in these bottles and can not know.

The Court overruled the objection.

Witness: Well, I think I will have to have that question repeated to me.

(Question read by the stenographer.)

A. Of course, I could not state as to the quality of whiskey that was used, but I will say that the labels have been in very general use, and from the character of goods that some people have handled I should infer that they were used on ordinary inferior grade whiskeys.

Mr. Ladd: I move to strike out what he infers.

The Court: Motion will be sustained.

To which ruling of the court defendant then and there duly excepted.

Q. Are you familiar with, are you acquainted with the 854 price of this "Old Crow" whiskey as manufactured by Gaines & Company?

A. Yes, sir.

Q. Is it a high or low priced whiskey?

A. It is an exceedingly high priced whiskey. Q. It is an exceedingly high priced whiskey?

A. Yes, sir.

Q. You may state at what prices the whiskey was sold, this whiskey that you have been referring to, which bore these "Old Crow" stock labels, at what prices that whiskey was sold?

A. The prices that we sold that whiskey at the time?

Q. Yes, sir.

A. Oh, it is impossible for me to state. I have not the slightest idea. I just mention in a general sense that I have used that label on the character of goods that we employed at the time; I could not state.

Q. You don't understand my question exactly, Mr. Perrin. am asking you now, whether this whiskey which was bottled under the title "Old Crow," bearing these "Old Crow" stock labels, was sold at such prices as precluded the fact that it was Gaines & Company's whiskey, manufactured in Woodford County, Kentucky?

A. Well, I am unable to answer as to the price, but I can say this that the whiskey was put up under the common stock label of "Old Crow" and was not sold as product of W. A. Gaines' Distillery.

Q. Now, was that commonly done by bottlers and dealers?

A. Well, I can not answer for others. Q. You can only answer for yourself?
A. Yes, sir.

Q. And you state that your company did bottle cheaper whiskey than the Gaines & Company's whiskey under the labels of "Old Crow?"

A. That is right.

Q. During what time during what period of years was that done, Mr. Perrin?

A. Well, I don't know, it is pretty hard to state; I should say, I might say between 1870 and 1890.

Q. Between 1870 and 1890?

A. I should imagine about that time.

Q. Did you ever receive any notice from W. A. Gaines & Co., any warning not to bottle whiskey in that manner?

A. No, sir; I don't think I ever did.

Q. You say that this whiskey that was bottled and sold under the "Old Crow" stock labels was a cheaper whiskey than that manufactured by W. A. Coines & Co. 2

factured by W. A. Gaines & Co.?

A. I didn't state that, sir; I said that we used the "Old Crow" stock label on several occasions to my certain knowledge on the contents of a package. I can not state I know positively that it was not "Old Crow" whiskey.

Q. Well, have you noticed on sale in these various retail establishments where they sell bottled whiskey, have you noticed bottles of whiskey marked with the "Old Crow" stock labels?

A. Oh, yes, sir.

Q. For sale?

A. Yes, sir.
Q. And at what price is that whiskey usually sold?

A. It would be impossible for me to tell, sir; I don't know what whiskey would sell for.

Q. Has it been sold to your knowledge?

A. I don't know; I am not in that line of business and I couldn't tell you; I am not selling at retail.

Q. Are those labels commonly used upon bottles in these retail

establishments?

A. Well, I couldn't say how commonly, but I know the label is

often used; I saw the label about the shelves, and so forth.

Q. How did you come to use this "Old Crow" label, Mr. Perrin, upon whiskey that was not manufactured by W. A. Gaines & Company?

A. In all probability we had an order for a cheap grade of whiskey to be put up under the label of "Old Crow" and in filling that

order we used it.

Q. Did you consider the words "Old Crow" as the exclusive property of anybody at that time?

Plaintiff's counsel objected as incompetent.

The Court: I don't think that is proper, what we considered.

To which ruling of the court defendant then and there duly excepted.

Q. Now, you gave your deposition sometime ago, Mr. Perrin, in this case?

A. Yes, sir.

Q. This question was asked you, "Do you say you have used them yourself?" and you answered "Yes, sir."

Mr. Ladd: I object to counsel reading to the witness from a deposition which he himself took. That is not the proper method of examining the witness on direct examination.

Mr. Pence: Simply for the purpose of refreshing the recollection

of the witness, that is all.

The Court: He has not shown any reason yet for having his recollection refreshed.

To which ruing of the court defendant then and there duly excepted.

Q. Then I will ask you this question, you say that you have used them yourself?

Mr. Ladd: Don't lead him that way, please,

Witness: Well, I explained to you when we would use them, how we would use them, and in what way we would use them. Is there anything additional to that that you want me to explain? I don't understand just what you are trying to get at.

Q. How do you consider this "Old Crow" label; how did you consider it: did you consider it a label that you had a right to use upon

all kinds of whiskey?

A. Why, most assuredly.

Piaintiff objected to the question and answer as incompetent. The Court: Objection sustained. That is the question that is to be tried here.

To which ruling of the court defendant then and there duly ex-

cepted.

Mr. Pence: I am trying to get at the general use of this label on all grades and manufactures of whiskey. Mr. Perrin knows that, and I may be in fault myself in not being able to bring it out clearly. What I want to know is, how Mr. Perrin came to use these stock labels upon various grades in the manufacture of whiskey—different kinds of whiskey.

The Court: He told you that on several occasions he had orders for cheaper grades of whiskey to be bottled under the label of "Old Crow" and he bottled it under that label. Now, if there is anything additional that you want him to explain, of course, you may do so.

Witness: I don't know anything further to explain. I know this, it never was a practice of ours to use stock labels of any kind or character, except on orders—on special orders. We had our own labels and cared for our business by the use of those labels, but occasionally we got orders for goods requiring stock labels of various brands which we did not hesitate to use.

Q. You never used at any time on these labels the name of W. A. Gaines & Company?

A. No, sir; I never did, oh, no.

Q. The "Old Crow" that you bottled was the "Old Crow" that was bottled generally by dealers in whiskey and bottlers in whiskey?

A. They were just simple stock labels, that is all.

The Court: Was it "Old Crow" that you bottled under those labels, Mr. Perrin?

A. I don't think it was: I don't remember ever bottling 857 any "Old Crow" whiskey at all in my life.

Mr. Pence: You mean the whiskey of W. A. Gaines & Company? A. Of W. A. Gaines & Company, yes, sir, genuine "Old Crow" whiskey, W. A. Gaines & Company's "Old Crow."

O. Mr. Perrin, if you would see a bottle on sale in a retail establishment, a bottle of whiskey for sale, with that kind of a label on it: "Old Crow Whiskey," with a picture of a crow up here (indicating label on bottle), and below it says, "This whiskey is bottled by us and we are responsible for its purity and fine quality, E. Whyte & Co.," would you consider that that whiskey was whiskey manufactured by W. A. Gaines & Co., at their distillery in Woodford County, Kentucky?

A. Well, I tell you in view of the fact that W. A. Gaines & Co., are large bottlers, and that the genuine "Old Crow" whiskey is quite extensively bottled, I would consider that no reputable house would put their name on a bottle of whiskey that was not genuine.

Q. But you just now said that you, yourself, have put on the word-

"Old Crow"?

A. I never said I put Perrin & Co., or W. A. Gaines. I used the

simple "Old Crow" bourbon, the simple stock label.

Q. Suppose you saw this whiskey with no other designation on there than it was bottled by E. Whyte & Co., without the name W. A. Gaines & Company, would you consider it whiskey distilled by W. A. Gaines & Company?

A. Well, I answered that question, I think, that no reputable

house-

Q. (Interrupting.) I don't ask you about the reputable house

part?

[Q.] I say ordinarily I would consider a whiskey that had the name of the bottier on, professing to be a whiskey of any standard brand, I would consider that his name on that bottle was a guaranty of the quality and brand; that would be my inference.

Q. Don't you know, Mr. Perrin, that you have already said that the words "Old Crow" frequently appear upon whiskey that is not

manufactured by W. A. Gaines & Co.?

A. Oh, yes; I do.

Q. Now, what is there on that to indicate that that whiskey was

manufactured by W. A. Gaines & Company?

A. Why, there is nothing in the world to indicate that that whiskey was manufactured by W. A. Gaines & Company except that my inference would be that it was not made by W. A. Gaines.

858 Q. There is nothing on there to indicate that it was not made by W. A. Gaines you say, except it is bottled by E. Whyte & Co.?

A. Yes, sir; that is all.

Q. Now suppose you went in to inquire the price of this whiskey, and you were told it was 65 cents a quart, would you then say that it was whiskey of W. A. Gaines & Co., bottled by W. A. Gaines & Company?

A. Then I would think they were selling it pretty cheap; that would be the inference.

Q. Well, would you consider it the whiskey of W. A. Gaines & Co.?

A. Well, I hardly think I would at that price.

Q. On your cross-examination, Mr. Perrin, I will ask you if you were asked by Mr. Ladd this question—I think I am entitled to ask this question under the circumstances?

The Court: I don't know till he asks it.

Q. I put the question, "Do you mean to say that you used an "Old Crow" label on whiskey that did not come from the Old Crow Distillery?

Plaintiff's counsel objects to this method of cross-examining this witness.

The Court: I don't believe that is proper, Mr. Pence. He is your own witness; no deposition shown on his part not to answer questions.

Mr. Pence: I don't seem to be able to bring out the facts that he testified to before, and I think I have a right to bring it out.

Witness: Why don't you read the deposition?

Mr. Pence: I would very much like to do it, Mr. Perrin.

Witness: If my deposition differs from what I testify to here, then I made an awful mistake in giving the first deposition, for I certainly told nothing but the truth in both instances.

Mr. Pence: I ask permission to read this question and answer of

the witness.

The Court: I will permit you to refresh his memory by asking leading questions.

Q. Then I will ask you, Mr. Perrin, if, on the taking of your deposition when you were asked——

Mr. Ladd: That is not what the Judge said.

Mr. Pence: I am not beginning to ask him leading questions, which the Court says I can do.

Q. I will ask you now if on the taking of your deposition you were asked by Mr. Ladd, "Do you mean to say that you would use the 'Old Crow' label on whiskey that did not come from the "Old Crow Distillery"? Now, I will ask you if you did not answer that question as follows: "Yes, sir; for we consider the "Old Crow" label as common property. I would not think of using the 'Old Crow' label with W. A. Gaines & Company's name on it, only on their whiskey, for as I remember it, they had a special label, and we never attempted to use it on anything but their own goods."

A. Well, sir, do you want any better answer than that?

Mr. Ladd: I object to that, because he is laying the foundation for contradicting his own witness—a different statements made here-tofore.

The Court: Yes, that was not what I suggested to you; I supposed that you wanted to bring out from Mr. Perrin something along some line that he had not communicated in response to you yet, and I told

you you might ask him a leading question to refresh his memory on that particular point; but it is not proper for you to take his deposition, which was taken, and examine him from it, or cross-examine him here, as long as he is here and shows no disposition whatever not to answer questions.

Mr. Pence: I don't know; I have been able to bring out these facts

before, but I don't seem to be able to do so at present.

Q. I will ask you whether or not, Mr. Perrin, you did not consider this stock label, this "Old Crow" label without the name of W. A. Gaines & Co., on it, as common property?

A. Yes, sir; I have so testified that the ordinary "Old Crow" label

has been considered just common property.

Mr. Pence: Well, now, that's all.

Cross-examination.

## By Mr. Ladd:

Q. Mr. Perrin, as I understood you, you said on your direct examination, in answer to a question of Mr. Pence, that you may have put inferior whiskey under "Old Crow" labels in bottles on a few occasions at the special request of some customers. Am I right about that?

A. That is right.

Q. You gave your deposition in this case at Mr. Pence's office at one time. You remember that circumstance, do you not?

A. Yes, sir.

Q. Do you remember that I asked you this question, and you answered it in this way. I will read the question and then 860 the answer. "Q. Did Gaines & Company or the proprietors of that distillery know that you were using 'Old Crow' labels on any whiskey other than that which came from their distillery?" And your answer was, "No, sir; I don't think they ever did." Was that right?

A. It is very likely to be right; that would be my answer now if you should ask me; that would be my answer now if you should ask

me the same question.

Q. "Q. So far as you know, they were entirely ignorant of it. ignorant of the fact that you used a label that said 'Old Crow' on it. on bottles that did not contain whiskey that came from that distillery in Woodford County, Kentucky?" Your answer was, I will ask you, was it not, A. So far as I know they were."

A. I think that is right.

#### Redirect examination.

## By Mr. Pence:

Q. Mr. Perrin, did you know E. C. Homan?

A. Yes, sir. Q. Who was he?

A. He was a traveling representative of Paris, Allen & Co.

Q. The proprietors of this Gaines & Company?

A. Well, I think they are distributors or part owners perhaps a member of the firm of W. A. Gaines & Company.

Q. What was his territory? A. It included this city.

Q. It included Kansas City?

A. Yes, sir.

Q. For what length of time did he come here to Kansas City to your knowledge?

A. Well, in the neighborhood of 25 years. Q. In the neighborhood of 25 years?

A. Yes, sir.

Q. Is that up to the time of his death?

A. Yes, sir.

Q. And when did his death occur, if you know?

A. It is in the early spring or winter, last winter or the early

spring of this year.

Q. During all that time did he come here to Kansas City and visit the trade here and make sales of this Gaines & Company's "Old Crow" whiskey?

A. He was a frequent visitor to Kansas City; I could not say as to

his sales.

Q. Well, he was a salesman for that Company?

A. He was a salesman, yes, that is a fact.

Recross-examination.

By Mr. Ladd:

Q. Do you know where Mr. Homan lived? You say he came here for the plaintiff- to make sales for them?

A. No, sir; I think he lived in Cincinnati, but I think his headquarters were in New York.

Q. How old a man would Mr. Homan be now if he lived; can you make an estimate?

A. Well, I should say between about 54 or 55; 53 or 55.

The Court: Mr. Perrin, is there such a thing known to the whole-sale liquor trade as "Old Crow" whiskey?

A. Yes, sir. Q. What is it?

A. It is the product of W. A. Gaines & Company's Distillery.

Q. Is there any other whiskey known as "Old Crow" whiskey except that?

A. None that I ever remember of.

Q. How long have you known of that "Old Crow" whiskey being

the product of Gaines & Company's Distillery?

A. Well, it is pretty hard for me to state, Your Honor; I don't remember when the "Old Crow" Distillery, the W. A. Gaines firm was started, but I have known of the whiskey for upwards of twenty wears.

R. H. Drennan, called as a witness on the part of defendant, being duly sworn, testified as follows:

Direct examination.

## By Mr. Pence:

Q. State your name to the Court, Mr. Drennan?

A. R. H. Drennan.

Q. You live in Kansas City, Missouri?

A. Yes, sir.

Q. How long have you lived here?

A. 32 years, since 1869.

Q. What has been your business?

A. I was in the wholesale whiskey business from 1869 to 1884. Since that time I have been in the real estate and insurance business.

Q. Where were you born, Mr. Drennan?

A. Scott County, Kentucky.

Q. In what year?

A. 1840. Q. 1840? A. Yes, sir.

Q. Did you ever know James Crow?

A. Yes, James Crow, I saw him when I was a boy: I knew him when I was a boy; it was the first distillery I was ever in in my life in Woodford County; I was born and raised about ten or twelve miles, I guess, I believe at that time it was about the only distillery in the county.

Q. Where did you see him?
A. I saw him at the distillery.

Q. Now, where was that distillery?

A. It was at Glenn's Creek, in Woodford County. Q. About how far from Frankfort, Kentucky?

A. Oh, it isn't over six or eight miles, I think, sir.

Q. Was that the same distillery that afterwards came into the possession of Oscar Pepper?

A. I think so, yes, sir.

Q. Oscar Pepper, after the death of Crow, known as the old Oscar

Pepper Distillery?

- A. Well, I don't remember whether Pepper succeeded Crow in the distillery or not; I don't think he did; I think probably some one else bought it afterwards; I am not certain about that; however, Pepper ultimately became the owner, I think, of the distillery, but I don't think that he——
- Q. Who was the owner of this distillery, who ran the distillery when you first knew of it, your earliest recollection of it?

A. Crow.

Q. James Crow?

A. Yes, sir.

Q. Have you seen him there yourself?

A. Well, I think I did.

Q. How, under what circumstances?

A. I remember going there once, one of by neighbors had some hogs there at slop; I was quite a lad, though, then a boy about ten or

twelve years old, I suppose, and I went there to help to take the hogs away; I think that is the only time I ever saw Crow.

Q. When did you leave the State of Kentucky?

A. In March, 1869.

Q. In 1869? A. Yes, sir.

Q. How was that distillery known, what was the name of that distillery?

A. Why, it was, I think it went by the name of the Crow Distillery.

Q. The Crow Distillery? A. Yes, sir.

Q. Did you ever hear of the "Old Crow" brand of whiskey?

A. Oh, yes, I have heard of that all my life. Q. How did that whiskey get its name?

A. Well, that I couldn't tell you, sir, I suppose from the factsthe man who manufactured it, Crow himself,

Q. You may state whether that was a well known brand of whis-

key in Kentucky prior to the year 1867?

A. Well, I can't state that it had such a very great reputation prior Now, when that distillery was-when Crow commenced making whiskey there, they did not make whiskey then like they do now, or like they did in 1867; they didn't make over half a barrel of whiskey a day. Now, you know, they make 10, 15 or 20 barrels a day; and I can't say that it had any great reputation, because it became a common brand of whiskey. 863

Q. Was it a common brand of whiskey before you left the

State of Kentucky?

A. Well, I tell you, I can not answer that question correctly from the fact that I never was in the whiskey business until I came to this town, and never paid very much attention to it, to the manufacture of whiskey or the brands. It was not a very--not a popular brand during my administration of my whiskey career. I was in the wholesale business here from 1869 to-I went out of it in 1884, I believe, and I don't think I ever used any of that whiskey direct from the distillery. I know I never did under the brand of "Crow." I have used a good deal of whiskey branded "Crow" whiskey, but it was the cheapest whiskey that I handled.

Q. Now, you may state what the custom was among bottlers and sellers of whiskey in branding cheaper brands of whiskey than that

manufactured by Gaines & Co., "Old Crow?"

Plaintiff objects to the question as immaterial, incompetent. The Court: Answer the question.

A. Well, there was very little whiskey bottled, up to that time, perhaps, of my going out of business in 1884, and I don't think I ever saw a bottle of whiskey branded "Crow." Now-well, I will not go ahead—I answered your question.

Q. Well, you say you bottled yourself, a great deal of whiskey? A. No, sir; no, I never did; I never put up a bottle of whiskey in by life. I just said, you know, that there was very little whiskey ottled up to the time that I went out of the wholesale business.

Q. Well, you say you sold a lot of whiskey under the name of Old Crow;" how was it marked?

A. Why, it was just—that was—I got that—that was rectified hiskey, the cheapest quality of whiskey that I kept in the store; it as branded with a burnt brand "Old Crow" whiskey, that cost us 1.15 to \$1.25 a gallon.

Q. Well, how would you sell it, would you sell it by the barrel or

ig or by the barrel?

A. No, by the barrel; I was in the wholesale business.

Q. Would you sell it by the barrel?

A. Yes, sir.

Q. Don't you know of any of that whiskey having been bottled by ne parties that you sold it to?

A. No, sir.

Q. You don't know about that?

A. No.

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Q. You don't know whether they bottled it or not?

A. No, I don't think so. Q. How would it be sold?

A. Well, I don't knew about that. I sold it by the barrel; I don't know how the parties sold it that bought it from me.

Q. Don't you know how whiskey was sold at retail during the time that you were in the whiskey business?

A. Why, it was sold fifteen cents a drink, apparently, over the bar. Mr. Ladd: And two for a quarter?

A. Two for a quarter.

Mr. Pence: Wasn't ever sold by the gallon or jug?

A. Well, now I expect they did; I don't know about that, howver, sir.

Q. You don't know about that?

A. No, sir.

Q. What was the reputation of old James Crow as a distiller of hiskey?

A. Why, he had the reputation of being a very fine distiller, sir,

efore his death.

Q. What was the excellence of that whiskey attributed to, Mr. brennan, that was made by that "Old Crow" Distillery where Old

row worked?

A. Well, sir, during Crow's life time they used to make up the pash just like the people do now to make a pone of light bread, othing made but sour mash whiskey, and instead of having 40, 50 r 60 tubs, and having hops, why they had one large vat, a large tub, nd don't need a long process, and it was pure whiskey.

Q. Yes.

A. There was no drawing to it; that was the excellency of it; it nade it excellent, I suppose.

Q. Was the excellency also partly attributed to the spring water,

xcellent spring water that it was made from? A. Oh, yes, they have a very fine spring there at this distillery. Q. Have you ever seen that spring?

A. Yes, sir, but it has been a good long time ago; I could not describe it today.

Q. Then owing to the excellence of the manufacture and care, and to this spring water, the whiskey you say had a fine reputation?

A. Yes, sir.

Q. How was it known; how was it designated in the trade?

A. Well, I can not answer that question. That was previous to my going into the business; but I don't think, I don't think the Crow whiskey had any significance until in the last few years, that is the magnitude; of course, during his life time he didn't make very much whiskey, and what he made was very fine, and he was known there in the county, and in the state as being a very fine distiller.

Q. And how was the whiskey known that he made and manu-

factured there?

A. I don't remember just what name it went by at all, sir.
Q. Did you ever hear of "Old Crow" whiskey before you left Kentucky?

A. Well, I don't know that I ever did. It was, as I said a while ago, that I never paid very much attention to the whiskey traffic

until I came here.

Q. How far did you live from this "Old Crow" Distillery?A. About 8 or 10 miles, I think 10 or 12 miles, perhaps.

Q. And do you know anything about when Gaines & Company built their distillery, or was that after you left the State of Kentucky?

A. Well, it is, but I used to do a good deal of business with Gaines & Company. I knew Will Gaines as well as I knew anybody, him and High Berry both, his partner, it was W. A. Gaines & Company and Berry. I bought a great many goods from them, but not under the brand of Crow at all, the Hermitage was the principal whiskey that I handled from there.

Q. The Hermitage?

A. Yes, sir.

Q. Did you have anything to do with whiskey at all while you were in the State of Kentucky as a dealer?

A. No, sir.

Q. Had no connection with the business at all?

A. No, sir.

Cross-examination.

# By Mr. Ladd:

Q. Mr. Drennan, how many times did you ever see Crow?

A. I don't know that I ever saw him but once in my life, Mr. Ladd.

Q. How old were you?

I was about ten years, I guess.

Q. You saw him then at the distillery?

A. Yes, sir.

Q. Was that the only time you was ever at the distillery?

A. Yes, sir; I think it was.

Q. And you lived how far from there?

A. Oh, eight or ten miles, I think it was, sir.

Q. You were born in 1840?

A. Yes, sir. Q. You came out here in 1869?

A. Yes, sir.

Q. And you were about ten years when you saw Crow and that was the only time you were ever at the distillery?

A. Yes, sir.

Q. So that was about 1850?

A. I guess it was; that of course, I am not positive about that.

Q. Of course, you could not remember?

A. Yes.

Q. Now don't you know that Crow was working at that time for

Oscar Pepper?

A. No, sir, the Oscar Pepper was not known in the whiskey at all; hadn't anything more to do with that distillery than you have to-day?

Q. In 1850?

866 A. No, siree, no indeed. I think the first distillery the first connection that Oscar Pepper ever had, was the old Macklin house right above Frankfort, that he turned into a distillery; that is my recollection; I knew Oscar Pepper as well as I know you; knew him all my life and did know him always.

Q. Do you know a man by the name of William F. Mitchell, a

distiller?

A. No, sir, I think not.

Q. Do you know a couple of old distillers by the name of Edwards that are still living, 80 years old?

A. No, sir; I don't remember them.

Q. Do you know Mr. W. H. Averill, the druggist at Frankfort?

A. Mighty well, yes, sir, I knew him.

Q. How far was Frankfort from this distillery?

A. About eight miles I think; I think that is about the distance, yes, I knew Charlie Averill better than I know him.

Q. Did you know J. R. Shaw?

A. Of Cynthiana, he is in Harrison County.

Q. Well, he is a man now or last year he was 70 years old, Joshua R. Shaw?

A. I don't remember.

Q. Live right near the Pepper Distillery?

A. Well, I don't thing I knew him; I knew a family of Shaws that lived there that used to be in the whiskey business in Harrison County near Cynthiana.

Q. Do you know John C. Mastin, a merchant who lives in Frank-

fort, Kentucky?

A. Mastin?

Q. Yes, he lives in Frankfort, Kentucky?

A. Well, I don't know whether I can just call him to mind now, Mr. Ladd. I used to know every merchant in Frankfort.

Q. Do you know his father, John W. Mastin?

A. Well, knew a family of Mastins lived up there at the stamping 68 - 311

ground about nine miles from Frankfort, but I don't know whether it is the same man or not; I used to know though, every merchant in Frankfort, I carried the mail from George to Frankfort from 1856 to 1859, and I was in Frankfort every days, except Sunday during the whole time.

Q. You never had anything to do with the whiskey trade until

after you came out here in 1869?

A. No, sir. When I say I never had anything to do with it, I had a wholesale grocery in Covington, and I had about a hundred barrels of whiskey on hand; that is the way I came to get into the whiskey business. When I sold out my grocery, the man would not buy the whiskey in straight, and that is the way I came to this town;

I shipped the whiskey here.

Q. That is before you came?
A. That is before I came here; yes, sir; that is about the 867 only acquaintance I ever had with whiskey.

W. W. WHYTE, called as a witness on the part of defendant, being duly sworn, testified as follows:

Direct examination.

## By Mr. Pence:

Q. State your name, Mr. Whyte?

A. W. W. Whyte.

Q. Are you a son of Ebenezer Whyte?

A. Yes, sir. Q. Senior?

A. Yes.

Q. When did he die?

A. April the year past.

Q. When did he begin business in Kansas City, Missouri, Mr. Whyte, do you know?

A. 1877.

Q. In 1877, what kind of a business did he begin at that time?

A. Grocery business and liquors, meats, etc.

Q. What was the character of the business that he did in the liquer line, just describe a little, what kind of a business?

A. Why, we carried liquors.

Q. Did you bottle any? A. We carried liquors and we used it in bottling, sold by the jug.

Q. Selling by the bottle and by the jug? .

A. Yes, sir.
Q. Was he engaged in that business when he first began here?

A. Yes. sir.

Q. Now has that business been carried on continuously ever since by E. Whyte & Company and E. Whyte Grocery Fruit & Wine Company?

A. Yes, sir, with the exception of about 18 months. Q. Now I show you a label here, Mr. Whyte. I Look at that label. You may state whether that label, or one similar to it, a similar label was used by the firm of E. Whyte & Company in 1877?

A. That label or one very similar to it was; this is a more recent,

the same label on the bottles.

Q. That or one very similar to it?A. Yes, sir.

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Q. How were those labels used during the time that they were used by E. Whyte & Company; tell the Court how they were used?

A. On bottle whiskies.

Q. You may state whether the use of that label has been continuous by E. Whyte & Company and the E. Whyte Grocery, Fruit & Wine Company up to what period, from 1877 to what period?

A. Why, to the time we was enjoined from using them.

Q. And that was about two years ago? A. I should judge about two years ago.

Q. If you know, how did you come to adopt that label?

A. Why, father had been using that label in business in Indiana, something similar to it.

Q. When did you begin to work in the store?

A. I guess the first time I came here almost, in a small way.

Q. You began first as a-

A. As a cash boy.

Q. About how old were you at the time, do you remember?

A. About 13 years old. Q. About 13 years old?

A. Used to come down and help him out after school hours, after supper hours.

Q. You may state whether or not-do you know what is known

as the stock label?

A. I know from general hearsay and general seeing they are stock labels?

Q. You may state whether that label was at the time in use by other dealers in bottle goods and retailers of whiskey, a similar label, an "Old Crow" stock label, whether "Old Crow" stock labels were in use at that time by other dealers?

A. I expect they was, yes, sir.

Q. Well, what do you know about that since you have been old enough?

A. From what I have been told they have been doing it.

Mr. Ladd: I move to strike that out.

Q. Not what you have been told; that would not be proper.

The Court: It will be sustained.

Q. What you have been told is not proper. You may state what you know about the use of these stock labels by other dealers at the time that it was adopted by your house when you was in business here?

Plaintiff objects because witness stated he simply knows what he has been told by other people.

The Court: You asked him to state what he knew about it.

A. I have been told by other bottlers.

The Court: Your own knowledge.

Witness: The bottlers they told me that they used stock labels.

The Court: What other people told you is not competent. What you know of your own knowledge and see is competent.

869 Q. Have you seen the stock labels yourself?

A. I have been seeing the stock labels in good many cases, and people told — they used them on "Old Crow" whiskey.

Plaintiff moves to strike out the answer.

Motion by the Court sustained.

Q. You say you have seen these stock labels in use by other dealers in bottle goods?

A. Yes, sir.

Q. Upon bottle whiskey?

A. Yes, sir.

Q. Now has there been that use of these stock labels ever since your house began business here?

A. Yes, sir.

Q. Do you know that of your own knowledge?

A. Yes, sir.

Q. Now the firm of E. Whyte & Company, when was that succeeded by the corporation?

A. I think it was 1895.

Q. In 1895?

A. Yes, sir.

Q. Well, then what took place then with the firm of E. Whyte & Company?

A. Why, the E. White Grocery, Fruit & Wine Company succeeded to the assets, general good will and what property there may have been, etc.

Q. You may state whether or not all assets and property and labels, trade marks and good will of E. Whyte & Company was assigned over to the corporation?

A. Yes, sir, they were.

Q. Was there any property belonging to E. Whyte & Company that was not turned over to the corporation?

A. No. sir.

Q. Your father was president of the corporation?

A. Yes, sir.

Q. And the leading member of the firm of E. Whyte & Company?

A. Yes, sir. Q. Now Mr. Whyte, you may state to the Court where you purchased the whiskey that you put up under the labels that I have just shown you; where was that whiskey purchased?

A. Chicago, Ills.

Q. Chicago, Illinois?

A. Yes, sir.

Q. And how long have you been buying whiskey of that same house?

A. Well, from my knowledge we have been buying it possibly

twenty years.

Q. What is the name of that whiskey?

A. Cabinet, Old Cabinet. Mr. Ladd: Old Cabinet?

A. Yes, sir.

Mr. Pence (resuming): You may state to the Court whether at any time you have ever bottled any of the whiskey manufactured or distilled by W. A. Gaines & Company of Frankfort, Kentucky?

A. No, sir.

- Q. Never have? A. Not knowingly.
- Q. I forget to ask you whether your connection with the store has been continuous ever since you went into the store as a boy; have you been connected with the store all the time?

A. Steadily, say from 1880 I have been.

Q. 1880 and familiar with all the operations of the store and the business there?

A. Yes, sir.

Q. I will ask you whether you ever sold a bottle of whiskey bearing this label, representing it to be the whiskey distilled by W. A. Gaines & Company?

A. No, sir.

Q. I will ask you whether at any time you ever filled a bottle bearing the label of W. A. Gaines & Company with any other whiskey than the whiskey of W. A. Gaines & Company?

A. No, sir; I never did.

Q. I will ask you whether at any time the store has ever sold a bottle of whiskey with a label on it containing the name of W. A. Gaines & Company?

A. No, sir.

Q. Or reciting that it was distilled by W. A. Gaines & Company at their "Old Crow" Distillery in Frankfort, Kentucky?

A. No, sir.

Q. Then, if I understand you, the use of this label by the firm of E. Whyte & Company, and the corporation, E. Whyte Grocery, Fruit & Wine Company has been continuous since the year 1877?

A. Yes, sir.

- Q. Have you ever in all that time ever had any intimation, or received any notice of any kind or character, from W. A. Gaines & Company forbidding you from using the label that you have in use?
  - A. Not until the letter from Mr. Ladd was received.

Q. And that was what year? A. Two years ago, I believe.

Q. Two years ago?

A. I believe it was. Q. In June of 1900? A. Possibly it was, yes, I haven't seen the letter since.

Q. I will ask you whether or not E. Whyte & Company and the corporation, E. Whyte Grocery, Fruit & Wine Company have always claimed the right to use this label?

Plaintiff objects.

The Court: Answer the question.

A. We have, yes, sir.

- Q. Now, Mr. Whyte, after you were served with the notice by this plaintiff here, the letter that is spoken of here, I will ask you whether or not you made any inquiry among the dealers in whiskey in Kansas City, Missouri, to see whether other persons were using the stock labels, the "Old Crow" stock labels upon whiskey not manufactured by W. A. Gaines & Company?
- A. Yes, sir.
  Q. Now just go ahead and tell the Court in your own way what you did?

Mr. Ladd: I object to his stating anything that he learned by inquiry among dealers; that is certainly incompent.

The Court: You can tell what you did yourself, what you saw, but not what anybody told you.

A. Mr. Poston and myself.

Q. Mr. Walter Poston?

A. Mr. Walter Poston and myself started out and made a good many visits and we bought a great deal of "Old Crow." Wherever we went we told them we would like a bottle of "Old Crow" that was not made by W. A. Gaines & Company.

Plaintiff objects to any conversation between this witness and the parties that he went to, and plaintiff moves to strike out what witness testified he said to these people.

The Court: I think so far he is all right. He said he went and asked for a bottle of "Old Crow" not made by W. A. Gaines & Company.

Witness: In numerous places they said they had it and we got it.

Mr. Ladd: I object and move to strike that out.

The Court: Motion will be sustained. What they said is not competent. What you did is competent. What they said is not competent: that is hearsay and for that reason not competent.

Q. Omit what they said, but you may state what you did now?

A. Well, we bought whiskey that was not "Old Crow."

Q. Now have you that whiskey?

A. I think we have.

Q. That you purchased?

A. We have several bottles.

Q. Did you label each bottle that you purchased?

A. Yes, sir.

Q. Where is that whiskey?

872 A. I expect it is in the keeping of the sheriff.

Q. About how many places did you visit in Kansas City,

Missouri, for the purchase of this "Old Crow" whiskey not made by W. A. Gaines & Company?

A. Well, they are so numerous I can't hardly recall them.

Q. Well, name as many as you can, and we will have the bottles here directly that you purchased.

A. Well, there is Hugo Eysell. There is a party by the name of Ryan, the Curve saloon, the place across from the Curve saloon.

Q. Buy some from Matt Quinn. Look at that bottle that I show you and see if that is one of the bottles that you purchased?

A. That is one of them.

Q. Now tell the Court where you purchased that; did you make a memorandum at the time?

A. That I wouldn't say; there is no memorandum on it. There

was probably one put on at the time but I see it is off.

Q. You purchased that bottle at one of the business houses in Kansas City, Missouri?

A. Yes, sir.

Q. What did you pay for it, do you remember?

A. I would not attempt to say. There is no price marked on it. I know it was not "Old Crow" price; it was less than a dollar.
Q. It was less than a dollar?
A. Yes, sir.

Q. Did you pay as much as a dollar; is the price marked on there; is the price marked on that?

A. Yes, sir.
Q. You say that you did not pay as much as a dollar for that quart bottle of whiskey?

A. No. sir.

Q. And when you purchased it you asked for "Old Crow" whiskey that was not manufactured by W. A. Gaines & Company? A. That was not manufactured by W. A. Gaines & Company.

Q. Now look at that bottle that I show you; examine that label? A. Yes, sir.

Q. State to the Court where you purchased that?

A. That was at the northwest corner of Independence and Grand avenue.

Q. And what did you pay for that bottle?

A. One dollar.

Q. Did you make the same injury when you went into that place of business?

A. Every bottle we bought, we made inquiry that we wanted whiskey that was not W. A. Gaines' whiskey.

Q. Examine that bottle and state where you purchased it? A. That is bought from Fred Eysell, on Union avenue.

Q. What did you pay for that bottle of whiskey? A. We paid a dollar and a quarter for it. Q. Dollar and a quarter?

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A. Yes, sir; asked him for some whiskey that was not W. A. Gaines'. He said they just got a car lead of it in, and that is some of it.

Q. Who did you buy that of—Fred Eysell?

A. Fred Eysell.

Q. Examine that bottle and state where you purchased that?

A. This was bought at the northwest corner of Independence and Grand avenue, the northeast corner of Independence and Grand avenue.

Q. What did you pay for that bottle?

A. We paid 65 cents for it.

Q. Examine that bottle, Mr. Whyte, and tell the Court where you bought that?

A. I can hardly make out this writing now. It was bought two years ago and it has been blurred.

Q. Well, did you buy it in a business house at Kansas City, Missouri?

A. Yes, sir.

Q. Upon inquiry for "Old Crow" whiskey not manufactured by W. A. Gaines & Company?

A. Yes, sir.

Q. And you paid 75 cents for it?

A. 75 cents for it.

Q. Examine that bottle; state where that was bought?

A. This was bought from a party by the name of Ryan, who keeps a liquor house on Union avenue; it is marked 1040 Union avenue.

Q. What did you pay for that bottle, Mr. Whyte? A. I really couldn't say; it is not marked on here.

Q. Well, was it a dollar or less?

A. It is my recollection it was a dollar and a quarter.

Mr. Ladd: Is that the Ryan whiskey that you are talking about now?

A. Yes, sir.

Mr. Pence (resuming): Mr. Whyte, did you purchase that bottle, and if so where?

A. Why, this was bought at the Milwaukee saloon.

Q. Milwaukee saloon?

A. Yes, sir.

Q. What did you pay for that bottle, do you remember?

A. Dollar and a half. Q. How is that labeled?

A. "Morrin-Powers oldest Old Crow whiskey in the world."

Q. Now I will ask you—here are some empty bottles; are these bottles that were purchased by you, or how did they come to be here?

A. Why, they were bottles that I purchased for the labels.

Q. Purchased here in Kansas City?

A. Yes, sir.

Q. All containing whiskey at the time that you purchased them? A. No, sir.

874 Q. Not all? A. No. not all.

Q. And I will ask you, Mr. Whyte, whether all these bottles that you have testified to contain labels on them known as the "Old Crow" stock labels?

A. Yes, sir.

Q. I will ask you whether any of the labels contain the name of W. A. Gaines & Company?

A. Not one of them.

Q. I believe you stated when these purchases were made, or have you stated?

A. I don't know that I have. It was after the suit was brought any way.

Q. Now was it in the year 1900—two years ago?

- A. In 1901; the dates are generally on. This was purchased March 7, 1901.

Q. 1901? A. Yes, sir.

Mr. Ladd: That one you have just spoken of is the Morrin-Powers

& Company?

A. Yes, one was, yes, sir; this was purchased in February 27, 1901. They were purchased principally in the year 1901, the fore part.

Q. I will ask you whether you ever at any time sold any bottled whiskey with the fraudulent intent to mislead and deceive the purchasing public and buyers and consumers of whiskey as to the whiskey that you sold?

Plaintiff's counsel objected to the question because what defendant did speaks for itself.

The Court: Let him answer.

Q. It is one of the allegations of this petition?

A. No, sir.

Q. Done with fraudulent intent. I will ask you whether you at any time have ever represented the whiskey that you sold to be the genuine "Old Crow" whiskey distilled by the plaintiff or its predecessors, at the "Old Crow" Distillery in Woodford County, Kentucky?

A. No, sir.

Q. What do you sell your "Old Crow" whiskey for at retail, how much a bottle?

A. 75 cents.

Q. 75 cents a quart?
A. Yes, sir.

Q. Is that the uniform price?

A. Yes, sir.

Q. Mr. Whyte, did you hear the evidence of Mr. Blood, the witness for the plaintiff here?

A. Yes, sir.

Q. You heard his evidence? A. Yes, sir.

Q. I will ask you if at any time you ever—E. Whyte & Company, or E. Whyte Grocery, Fruit & Wine Company, ever had a barrel of "Elk Run" Whiskey in its house?

A. No, sir, not branded "Elk Run" whiskey.

Q. What is that? 875

A. Not stenciled "Elk Run" whiskey, no. sir.

- Q. Did you ever have a barrel of whiskey that was marked "Elk Run"?
  - A. No. sir.
  - Q. Did you ever sell that whiskey to your knowledge?
  - A. No, sir.
- Q. You heard Mr. Blood testify that on the occasion that he visited the store, that in passing out he saw a large number of bottles on the shelves, on the north side of the store, as he passed out, marked "Old Crow"?
  - A. Yes, sir, I heard him say so.
- Q. I will ask you if you ever had any bottles arranged upon your shelves on Walnut street?
- A. We have lots of bottles and lots of liquor on the shelves but no "Old Crow" on the shelf.
- Q. Where do you keep your bottles of "Old Crow"? A. The "Old Crow" is kept on the head of each barrel; each barrel set up on end, and the liquor from the barrel is put in the bottles and set on top of the edge of the barrel, and where these barrels are located, they are located north and west of the desk.
  - Q. Now where is your desk in that store?
  - A. The rear of the store.
  - Q. In the rear of the store?
  - A. At the south side.
  - Q. Your store fronts west on Walnut street?
  - A. Yes, sir.
  - Q. And this desk is in the rear?

  - A. Yes, sir. Q. You have no office there at all, have you?
  - A. No. sir.
  - Q. Just simply a desk where you transact business?
- Q. And this barrel that you call your "Old Crow" whiskey is near that desk?
  - A. Yes, sir.
- Q. And the bottles are kept stacked upon or standing upon the heads of the barrels?
  - A. Yes, sir.
- Q. How many barrels of whiskey have you in your store marked "Old Crow"?
  - A. One only.
  - Q. One only? A. Yes, sir; we had only one.
  - Q. Only had one?
  - A. Yes, sir.
  - Q. Did you ever mark your barrel with the age of the whiskey? A. Not the "Old Crow."

  - Q. Never had it so marked or labeled?
  - A. No. sir.

### Cross-examination.

By Mr. Ladd:

Q. Mr. Whyte, you say that you have been using this label like the one on this bottle that has been opened, ever since 1877, or ever since 1880, when you went into the store?

A. One like that or something similar to it, ves, sir.

876 Q. The labels that you have used, which you speak of, have the words "Old Crow" on the them, do they?

A. Yes. sir.

Q. And you say that in these bottles which are covered with that kind of labels, there was a whiskey called "Old Cabinet" whiskey?

A. "Old Cabinet" whiskey that we bought.

Q. Which you have been buying in Chicago for twenty years?

A. Just about, yes, sir.

Q. You knew it was "Old Cabinet" whiskey, and you bought it for "Old Cabinet" whiskey and paid for it as "Old Cabinet" whiskey, did you not?

A. We ordered "Old Cabinet" and that is what went into the

bottles.

Q. You ordered it and put it into bottles, and then put labels on its which said that was "Old Crow" whiskey?

A. Yes, sir.

Q. And have been doing it for twenty years, have you?

A. Yes, sir.

Q. Do you know whether "Old Crow" whiskey is a very expensive whiskey?

A. I know Gaines' "Old Crow" whiskey is an expensive whiskey. Q. Yes. Do you know of any distiller who manufactures whiskey called "Old Crow" whiskey except W. A. Gaines & Company in Woodford County, Kentucky?

A. Not that puts Gaines' name on it, no, sir.

Q. Did you ever hear of a distillery known as the "Old Crow" Distillery except the one owned by Gaines & Company in Woodford County, Kentucky?

A. Not that I am aware of.

Q. This whiskey manufactured at that distillery that you speak of is a high priced whiskey?

A. That is my understanding of it.

Q. It is the highest priced whiskey in the market?

A. That I couldn't say.

Q. It is a high priced whiskey?

A. Yes, sir. Q. You selected it because it was a very high priced whiskey to put in these bottles to be represented as "Old Crow"?

A. I beg your pardon; we did nothing of the kind; no, sir.

Q. Now what is your age? A. Born in 1866—thirty-five.

Q. Are you an officer of this company?

A. Yes, sir.

Q. What is your position?

A. Vice-President.

Q. How long have you been an officer—ever since the company was organized?

A. The corporation.

Q. Corporation I meant to say; that was about 1895?

A. Yes, sir.

877 Q. Have you examined any of the whiskey in these bottles that you produce here?

A. No. sir.

Mr. Ladd: If you- Honor please, I would like to move now to strike out all of the testimony on the direct examination in regard to the purchase by this witness of this whiskey, because it is an indirect way of proving by hearsay, that some one else sold under "Old Crow" labels, whiskey which was not genuine "Old Crow" whiskey. That is all it amounts to. There is no proof that anybody has ever sold whiskey which was not "Old Crow" whiskey as "Old Crow" whiskey, except this witness says, I went and asked for that kind of whiskey, and this is what I got. I move to strike out for that reason. Let them bring the man who sold this whiskey. I also move specially to strike out that part of his testimony which refers to purchases which he said he made at two corners of Independence and Grand Avenue, and at the Milwaukee saloon, because there is no averment in the answer, of the use of these labels by those parties. There are some parties mentioned here.

Mr. Pence: The answer alleges use by a large number of parties and others in Kansas City and elsewhere, whose names are at present

unknown to defendant.

The Court: The motion will be sustained as to the bottle at the northeast and northwest corner of Independence and Grand, and Milwaukee saloon.

Mr. Pence: What they said about it was not considered and I am

perfectly willing that the court should strike it out.

Mr. Ladd: Now I move to strike out that testimony on another ground, and I have already mentioned it, and I only do it now so that Your Honor may [now] that I still insist upon it. I move to strike it out upon the ground that it does not tend to constitute a defense to this action, to say that others have done the same or similar acts.

The Court: That is true, Mr. Ladd, but I don't know but what it may be followed up. I don't know. It is competent as far as it

goes. The motion will be overruled.

Mr. Pence: If Your Honor please, here is something that we have overlooked. One of these cases which Your Honor has stricken out is specified here in the amended answer. M. Cohen, that is the party. Mr. Ladd: He has not mentioned any M. Cohen within my hear-

ing.

Mr. Pence: Do you know where M. Cohen is located—isn't it the corner of Independence avenue?

A. Yes, sir.

The Court: Northeast or northwest.

Q. Which corner is that, do you know?

A. I think it is on the northwest; it is two years or more, a little over a vear since we were there.

The Court: As to anything that is pleaded, of course it will not be stricken out.

Mr. Ladd (resuming): Mr. Whyte, did you put all of your "Old Cabinet" whiskey which you bought under "Old Crow" labels?

A. Yes. sir. Q. All of it?

A. Yes, sir.

Q. You have been putting it up there for twenty years?

A. Yes, sir.

Q. How much do you buy every year?

A. Why, really, I could not state till I look over the books for that particular brand.

Q. Well, can you approximate it?

A. Oh, I should judge possibly six barrels a year of that one thing.

Q. Six barrels a year, and you have been getting that up for twenty years, have you?

A. Yes, sir.

Q. And sold it off as "Old Crow" whiskey?

A. Yes, under our name.

Q. Just like this, under a label similar to this one the bottle that has been opened and tasted here?

A. Under that label, yes, sir.

Mr. Ladd: Are you going to put this label in evidence?

Mr. Pence: Yes, I will.

Mr. Ladd: Suppose you put it in.

Mr. Pence: I will just offer it in evidence. The label referred to is marked "Exhibit Whyte."

"Exhibit Whyte." Old Crow Whiskey, Hand Made Sour Mash. This whiskey is bottled by us and we are responsible for its purity and fine quality. E. Whyte & Co."

Q. Now this label that Mr. Pence showed you on your direct examination is the same precisely as the label on the bottle that has been opened here in Court, is it not?.

A. I have not compared the two, but I so understood.

Q. Will you please do so? A. The same.

Q. Is the label which Mr. Pence showed you the same label which you had used on this "Old Cabinet" whiskey ever since your corporation was formed?

A. That or something similar.

Q. Well, have you specimens of other labels that you used?

A. No, sir.

Q. Have you some at the store?

A. No, sir, I tried to get them; I could not find them.

Q. Sir?

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A. I tried to find them but I could not.

' Q. Have they been used up?

A. They have been used up or thrown away.

Q. Was there any material difference in the balance of them? A. I don't know, they are marked "Old Crow," bottled by E. Whyte & Company, with the picture of a crow.

Q. With the picture of a crow?

A. Yes, sir.

Q. Did they have the words "this whiskey is bottled by us and we are responsible for its purity and fine quality, signed, E. Whyte & Company"?

A. I don't think that was on the other label, it has been on this

one.

Q. It is not a new thing for your company to be brought into court here for infringing liquor labels, is it, Mr. Whyte?

Defendant objects as incompetent, irrelevant and immaterial. The Court: I don't think that is competent.

Mr. Pence: You may answer that. I withdrawn the objection. Witness: Yes, sir.

Q. It is a new thing?

A. Yes, sir. Q. This is not the first time you have been brought into court charged with selling a counterfeit liquor, is it?

A. We were charged with selling a Hennessey brandy that was not

a Hennessey brandy.

Q. Yes, that was in the United States Circuit Court?
A. That was not proved in that case.

Q. That was the United States Circuit Court, was it not?

A. Yes, sir, and they went in court and it was not proved. Q. Just want a moment. That was in the United States Circuit Court at Kansas City, was it not?

 A. Yes, sir.
 Q. A bill was filed by the proprietors of Hennessey's Three Star or Cognac brandy, whatever they call it, against your company, charging you with selling a counterfeit brandy which was not Hennessey brandy or manufactured by Hennessey, under a label purporting to be Hennessey brandy; that is true, is it not, so far?

A. Yes, so far.

Q. And that case was tried, was it, and you were appropriately enjoined from doing it any more by Judge Philips? 880

A. No, sir; not Judge Philips.

Q. What judge was it?

A. Judge Hook.

Q. When was that? A. The injunction was simply to restrain us from selling any imitation brandy under that name.

Q. When was that?

A. Possibly it is about a year ago.

Q. How?

A. About a year ago.

Q. Who was your attorney? A. Judge Fields, in that case.

Q. Who was the attorney on the other side?

A. Hopkins, I think took care of it.

Q. Just look at that and see if that proceeding was not brought in the fall of 1897; look at the bottom of it?

A. Well, it may have been but it was tried, the decision was ren-

dered probably this spring a year ago.

Q. And testimony was taken, and the case argued, before Judge Hook, and a decree entered enjoining you perpetually, according to the prayer of the bill, wasn't it?

A. No, sir; the prayer of the bill was, they brought suit against us

for \$2,000 damages.

Q. Yes, sir, and the Court refused to offer an accounting but did enjoin you from doing it any more?

A. The Court enjoined us from selling an imitation Hennessey brandy.

Q. How long had you been doing that kind of work with Hen-

nessey brandy?

A. I don't know, and I don't know yet that we have been doing that with Hennessey brandy. We never done it willingly or knowingly. As you are aware, there were a good many suits brought the same way; the goods were brought from the wholesale houses.

Q. Mr. Whyte, do you know who printed that label that Mr.

Pence showed you?

A. I think it came from St. Louis, sir. Q. You don't know who printed it?

A. I am under the impression that label was printed by L. Hoffman of St. Louis.

Q. It was printed to order, I suppose, because it has your name on it, or your father's name?

A. Undoubtedly. The stock labels were made up from the books

and our name was added to the bottom.

Q. What did you pay for that "Old Cabinet" whiskey, per bar-

A. Between \$1.40 and \$1.50 a gallon.

Redirect examination.

By Mr. Pence:

Q. Mr. Whyte, isn't it true that at the time that you were sued by this Hennessey Company-

881 Plaintiff objects to the form of the question.

Q. I will ask you whether or not, Mr. Whyte, at the time that you were sued by this Hennessey Company, nearly every whiskey house in Kansas City was either sued or gone after by this company?

A. Most every whiskey house and the wholesale druggists.

Q. Now how did it come about that you happened to sell this Hennessey brandy that was not the genuine Hennessey brandy?

A, Simply because it was ordered, Hennessey brandy was ordered,

and we received those goods in that shape, and we put them on the shelf, and marked them, and the deception was of such a fine character that it took an expert to decipher it. It was not bottled by us or bought by us.

Q. You ordered the Hennessev brandy from the wholesale house,

and you supposed you were getting Hennessev brandy?

A. Yes, sir.

Q. You sold it as Hennessey brandy?

A. Absolutely.

Q. Was that the case with all the parties that were sued by Hennessey & Company at that same time?

A. That is my understanding that it is.

Q. As far as you know?

A. Yes, sir.

Q. Glasner & Barzen were sued at the same time, were they not?

A. Yes, sir.
Q. You did not label this Hennessey brandy that you bought?

A. No. sir.

Q. You sold it just precisely as it came to you from the wholesale house?

A. Yes, sir.

Q. Now, Mr. Whyte, examine this. I will ask you if you advertised the "Old Crow" whiskey that you were selling at any time?

A. Yes, sir.

Q. And how frequently and often?

A. Why, I judge every other day; sometimes every day.

Q. What is that paper that I hand you there?

A. Why this is a copy of the "Kansas City Sunday Journal," dated September 5, 1880.

Q. Did you yourself take that extract from the "Kansas City Journal" of September, 1880?

A. Yes, sir.

Q. I will ask you whether under the title "Wines and Liquors" there you advertised the "Old Crow" whiskey that you were selling at that time?

A. Yes, sir.

Q. Just read that, what it says there?

A. "Old Crow" hand made sour mash?

Q. What is the price?

A. I think it reads \$3.50.

Q. Per gallon? A. Yes, sir.

882 Recross-examination.

# By Mr. Ladd:

Q. That was in 1880?

A. That was in 1880.

Q. And that was this same whiskey that you are bottling?

A. Yes, sir.

Q. And have been bottling continuously?

A. Yes, sir.

Q. Under this stock labels? A. Under that same label.

Mr. Ladd: I offer that in evidence.

Mr. Pence: I object to it; I don't see how that is competent.

The Court: Let it go in.

"Kansas City Journal, September 5th, 1880. Kansas City Grocery & Fruit House, Wines and Liquors, Old Crow, Extra Sour Mash, per gal., \$3.50."

Mr. Ladd: Did you say that Glasner & Barzen were sued for selling imitation Hennessey?

A. That is my understanding, yes, sir. Q. Well, who says so?

A. The newspaper reports say so.

Q. Did you see it?

A. The newspaper reports say so, sir.

Q. Then you don't know anything about it, do you?

A. Just what the newspaper said.

Mr. Ladd: I move to strike out all his reference to Glasner & Barzen.

The Court: I believe Mr. Pence said Glasner & Barzen, I think Mr. Pence asked him the question if Glasner & Barzen were not sued. Witness: May I make a statement in regard to that Hennessey?

The Court: If your attorney asked you the question, any explanation you want to make.

Mr. Pence: Wait till we get through if you want to make any further statement.

Mr. Ladd (resuming): Mr. Whyte, do you remember ordering a case of Hennessey brandy by your house—Hennessey imported brandy, of Morrin-Powers & Company, before these Hennessey suits were brought against you, and your sending it back because

883 the price was too high, and saying to Mr. Morrin that you did not want any imported brandy?

A. No, sir; absolutely, no, sir.

Defendant objects as wholly incompetent, irrelevant and imma-

The Court: The objection will be sustained.

Q. Did your house do that?

A. No. sir.

Defendant's counsel objected.

Objection sustained.

2nd redirect examination.

By Mr. Pence:

Q. Mr. Whyte, you wanted to make some further statement with reference to this; you can do so with reference to the Hennessey matter?

[Q.] Well, then the Hennessey matter was up, Evans, Smith & Company were also sued about it, and I went down and saw Mr. Evans about it, because as I say, the deception was such a fine deception that we had no way of telling ourselves, and I asked him and he said-

Mr. Ladd: I object. Never mind what Mr. Evans said now.

The Court: That would not be competent.

Mr. Pence: What Mr. Evans said is not competent. Now, Mr. Whyte, I will ask you if the labels that you used on your liquor, these stock labels, always contained the name of "Old Crow"?

A. Yes, sir. Q. And "Old Crow" whiskey?

A. Yes, sir.

Q. And never at any time contained the name of Gaines & Company or the name of the "Old Crow" Distillery?

. A. No, sir.

Q. In Woodford County, Kentucky, I will ask you if at any time any labels that you ever used, or your house ever used upon bottled whiskey ever imitated, even remotely imitated any labels that you have seen introduced in evidence here to-day, as being the labels of W. A. Gaines & Company?

A. No, sir.

J. C. Cravens, called [-] a witness on the part of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Pence:

Q. You live in Kansas City, Mr. Cravens?

A. Yes, sir.

Q. How long have you lived here?A. Nearly 25 years. 884

Q. What business are you engaged in?

A. Real estate.

Q. Were you acquainted with E. Whyte & Company? A. Yes, sir.

Q. Did you work for E. Whyte Company in 1877?

A. Yes, sir.

Q. When did E. Whyte & Company begin business here?

A. In August, 1877.

Q. Did you begin to work for them at the time they began?

A. Yes, sir. Q. Were you with them when they began.

A. Yes, sir.

Q. Did E. Whyte & Company bottle and sell liquor at retailwhiskey, did they deal in whiskey?

A. Yes, sir.

Q. Look at that label, Mr. Cravens, and tell the Court whether that is the kind of a label that was used by E. Whyte & Company on their bottled whiskey in 1877, beginning with 1877?

A. Well, my recollection is they did not commence bottling when they first opened; we sold an "Old Crow" whiskey by the gallon, half gallon and quart.

Q. How was that whiskey labeled or marked?
A. "Old Crow Sour Mash."
Q. "Old Crow Sour Mash"? Do you remember what it was sold for, how much a gallon?

A. \$3.50 a gallon. Q. \$3.50 a gallon?

A. Yes, sir.

Q. When they began bottling was that the kind of a label that was used on the bottles?

A. Yes, that is, as near as I can recollect it is the same kind of a

label.

Q. What were the distinguishing features, what words? A. "Old Crow."

Q. Did the labels ever at any time contain the name of W. A. Gaines & Company of Frankfort, Kentucky?

A. No, sir.

Q. How long were you with them, Mr. Cravens?

A. About seven years. Q. About seven years?

A. Yes, sir.

Q. Was the use of these words "Old Crow" as a label for their whiskey, was that continuous during the time that you remained with them?

A. No, sir.

Cross-examination.

By Mr. Ladd:

Q. Do you know what the tax on whiskey was in 1880?

A. No, sir. Q. 1877?

A. No, sir.

885 Q. Do you know whether \$3.50 was a fair price for "Old Crow" whiskey at that time?

A. I do not.

Q. You don't know anything about it, do you? You don't know what "Old Crow" whiskey was worth in 1877 or 1880 either, do you, you can't tell now?

A. No, sir.

Q. Genuine "Old Crow" whiskey, you say you don't know what it was worth then in the market?

A. No, sir.

HENRY LANG, called as a witness on the part of defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Pence:

Q. State your name to the Court, Mr. Lang?

A. Henry Lang.

Q. Where do you live?

A. 2311 Independence avenue.

Q. What business are you engaged in now?

A. Grocery.

Q. Grocery? A. Yes.

Q. How long have you lived in Kansas City?

A. Since 1877. Q. Since 1877?

A. Yes, sir.

Q. Were you acquainted with E. Whyte & Company?
A. Yes, sir.
Q. What business were they in in 1877?

A. Groceries.

Q. And when did they begin business?

A. I worked for them in 1877. I don't know exactly what month it was in the fall.

Q. You worked for them?

A. Yes, sir.

Q. What were your duties?

A. Keep up the stock.

Q. Did they deal in whiskies?

A. Yes, sir.

Q. Did they bottle and sell whiskey and sell it in jugs?

A. Sell it in jugs, not by the bottle, but sell it in jugs and gallons? Q. What name or trade mark did they use at that time to designate their whiskey?

A. Had one mark on a car- board six inches square up on the top of the barrel, marked with a brush "Old Crow" whiskey.

Q. "Old Crow" whiskey? A. Yes, sir.

Q. And did they use that name in the sale of their liquor?

A. Oh ves. sir. Q. Absolutely?

A. Yes.

Q. How long did you continue with them?

A. About four years.

Q. About four years?

A. Yes, sir.

Q. You may state whether or not the use of these words was continuous by E. Whyte & Company during the time that you were there?

A. Yes, sir.

Q. Used to designate that whiskey?

A. Yes, sir.

Q. Do you know what kind of whiskey it was?

886 A. Bourbon.

Q. Bourbon?

A. Yes, sir.

Q. Do you know what it sold for, how much a gallon?

A. \$3.50.

Q. \$3.50 a gallon?

A. Yes, sir.

- Q. When they began to bottle whiskey, I will ask you, Mr. Lang, if they used a label something like that, similar to that?
  - A. They did not bottle any whiskey while I was there. Q. There wasn't any bottled while you were there? A. No, sir.

Q. How was it sold mostly?

- A. Mostly by the quart, gallon and half gallon, no label put on.
  - Q. You left them at what time?

A. I think it was about 1881.

Q. About 1881?

A. Yes, sir.

Q. Do you remember when Will Whyte came into the store?

A. Oh, yes.

Q. Was that while you were still there?

A. Yes, he was there.

Cross-examination.

By Mr. Ladd:

Q. You left in 1881? A. Yes, sir.

Q. All the time you were there they did not do any bottling at all?

A. No, sir.

Q. Sold it by the gallon or half gallon?

A. Yes, sir.
Q. You say they sold it at \$3.50 a gallon?

A. Yes, sir.

EBENEZER WHYTE, called as a witness on the part of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Pence:

Q. Mr. Whyte, you are a son of Ebenezer Whyte, senior? A. Yes, sir.

Q. How long have you been connected with the firm of E. Whyte

& Company and with the present corporation?

- A. Well, father opened up in August, 1877, and we moved here in 1879, and I have been around more or less around the store since 1879.
  - Q. Since 1879?

A. Since 1879.

Q. What is your age now?A. 33—thirty-two—33 next birthday.

Q. Do you remember the occasion when Mr. Blood came to your store in June 29, 1900?

A. Well, about that time, yes, sir.

Q. Tell the Court what transpired there at that time?

A. Well, Mr. Blood came in there and asked for Mr. Whyte. Mr. Whyte was not there but I happened to be there, and he went out; then he came in the following day, a day or two afterwards, about noon time, and Mr. Whyte was there, and he presented Mr. Whyte a card, and I was about 10 or 12 feet from the desk as he passed me, but I knew who he was from the description I had of him, and I was down near the desk all the time. I just stepped back; my place was around near the desk, at all times or practically all the time. I just stepped back, I went back; he turned to his left, but I walked right down the aisle and went to the right of the desk; when I turned I faced the store.

Q. Did you hear the conversation between Mr. Blood and your

father?

A. I did.

Q. I will ask you, Mr. Whyte, to state whether or not you had any barrels labeled "Elk Run" whiskey in your store on June 29, 1900?

A. I never saw a barrel marked "Elk Run," never smelled it or

never heard of it.

Q. You never had such barrels in your store?

A. No, sir.

Q. I will ask you whether Mr. Blood at that time referred to the "Elk Run" whiskey and asked your father whether it was fair to bottle "Elk Run" whiskey under the label "Old Crow?"

A. He did not.

Q. You may state to the Court, Mr. Whyte, whether you had any bottles with labels of "Old Crow" on them arranged along the shelves, the walls of your store room?

A. We have not and never had.

Q. Where do you keep your bottles?

A. Keep it on the barrel right near the desk, right on the side, about a foot from the desk, on the right hand side of the desk as you pass towards the front of the store on the top of the head. The barrels are upright, put there for convenience sake, and they are put on top of the barrel.

Q. I will ask you, whether you had any barrels in there labeled

"Old Crow" and marked with the age of the whiskey?

A. No, sir.

Cross-examination waived.

At this point the further hearing of this cause by consent of the Court and agreement of counsel was adjourned until July 17, 1902.

And afterwards, to-wit, on July 17, 1902, the further hearing of this cause was resumed as follows, to-wit:

John Garrigues, called as a witness on the part of the defendant, being duly sworn, testified as follows:

#### 888 Direct examination.

## By Mr. C. R. Pence:

Q. State your name to the Court, Mr. Garrigues?

A. John Garrigues.

Q. Where do you live, Mr. Garrigues? A. In Jackson County, Missouri. Q. How long have you lived here?

A. 10 years.

Q. What business are you engaged in?
 Λ. Wholesale liquor business.

Q. With what concern are you associated?

A. Secretary and treasurer of the Kansas City Supply Company, incorporated.

Q. How long have you been engaged in the liquor business?
A. Ever since coming to the city, ten years.

- Q. With what firms have you been connected prior to your connection with Kansas City Supply Company?
  - A. I was employed by Glassner & Barzen of this city formerly. Q. How long were you connected with Glassner & Barzen?

A. Seven years.

Q. They are wholesale liquor house of this city, Kansas City, Mo.?

A. Yes, sir. Q. A prominent concern?

- A. I cannot afford to advertise them; they are a liquor house of this city.
- Q. Mr. Garrigues, are you familiar with what are known as the "Old Crow" stock labels?

A. Yes, sir.

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Q. Please describe them to the Court and where they are obtained;

A. Well, I will have to make my answer to that rather against you, Mr. Pence.

Q. Just state in a brief way?

A. All liquor houses use a class of labels called stock labels. There are certain brands of whiskey better known than others, and there are bottlers' supply houses a dozen or more in this country; we buy those labels in the quantity that we need and use them in course of our business in bottling liquor.

Q. Where do bottlers and dealers obtain those stock labels?

A. We buy ours in Chicago mostly. You can buy them in any of the large cities of the country nearly.

Q. Are there concerns who make a business of printing them?

A. They are called stock labels; that is the reason these bottlers' supply houses print them in enormous quantities and keep them in Ordinary labels we order specifically: these though we can get at any time.

Q. Are they sold just as ordinary merchandise carried by these

houses, any other merchandise? A. How do you mean?

Q. Well, sold to whoever applies for them?

A. Anybody that has the cash or credit can get all he wants of

them, if that is what you mean.

Q. Mr. Garrigues, you may state if you know to what extent of your own knowledge, to what extent these "Old Crow" stock labels have been used upon various brands and manufactures of whiskey other than whiskey manufactured by A. Gaines & Company of Frankfort, Kentucky.

Plaintiff's counsel objected to the question unless it is confined to

the use of them by the persons mentioned in the answer.

Mr. Pence: The petition alleges that they are used by other persons at present unknown to the plaintiff. There is further allegation that the use of them is general and common in the whiskey trade as labels upon other whiskey than that of the plaintiff. I am not asking for any specific use, but I am asking him what he knows of their use in general.

The Court: Well, let him answer.

A. I would answer that by saying that so far as my knowledge goes, stock labels, "Old Crow" and other brands also, are used indiscriminately, according to orders received from customers by all wholesale liquor houses.

Q. What kinds of whiskey?

A. It does not make any difference, if a man sends an order and says "send me five cases of 'Old Crow' at \$8 a case," we ship to him; if he says five cases at \$6 a case, we ship it to him; he gets goods according to the price he pays; that is the custom of the trade as far as I know.

Q. Then they are used, commonly used by bottlers and dealers

upon other whiskey than Gaines & Company's whiskey?

A. Well, that would be the deduction I would draw from the price at which the goods were sold by any and every house. I don't know of a whiskey house that you could not get any standard brand from at any price you chose to order that any whiskey at all could be furnished at.

Q. Under these stock labels?

A. Under these stock labels, yes, sir.

Q. Did you ever see any of these stock labels that imitated or were intended to imitate or counterfeit the label of W. A. Gaines & Company?

A. Well, I don't know as I understand exactly what you mean,

Mr. Pence?

Q. Well, what do these stock labels, how do they read?

A. Oh, some of them read "Old Crow Sour Mash," some simply "Old Crow," some "Old Crow Whiskey," some "Old Crow Bourbon," and some "Celebrated Old Crow Sour Mash," and so on.

Q. Do they pretend to state the manufacture or origin of the whiskey?

A. Not on ordinary stock label, no, sir.

Q. Now for what length of time has that been the custom of the trade, Mr. Garrigues?

A. So far as my own knowledge goes ever since I have been in the business.

Q. Ever since you have been in the business?

A. Yes, sir, and from what I have been told, for an indefinite time.

Q. Were you ever acquainted with one E. C. Homan?

A. You mean Paris, Allen & Company's man?

Q. Yes?

A. Yes, sir, I knew him.

Q. And who do you say E. C. Homan was?

A. E. C. Homan was the representative of Paris, Allen & Company, of New York City, who were the controllers of the "Old Crow" brand distillery of W. A. Gaines & Company as well as various other goods.

Q. Was this part of Mr. Homan's territory, if you know?

A. Yes, sir.

Q. For what length of time did Mr. Homan come to Kansas City

and serve the trade?

A. Well, Mr. Homan came to Kansas City regularly about twice a year ever since I have been in the business until the time of his death, and he told me that he had been traveling for 25 years for the one firm; that is, he told me that at the time, it must have been. Oh, that was five or six years ago any way.

Q. When did he died, do you know?

A. A year or two ago, a year or such a matter, not very long.

Q. Were you pretty well acquainted with him?

A. Why, in a business way I knew Mr. Homan very well, yes, he was quite a good friend of mine, always chatted with me when he was in the city.

Q. Did you ever have a conversation with E. C. Homan with reference to the use of these "Old Crow" stock labels upon other

whiskey than Gaines & Company's?

A. Yes, I talked with him about that.

Q. Well, now, just tell the Court where it was and under what

circumstances and what was said?

Mr. Ladd: We object to any conservation with Mr. Homan, who it appears is dead, and who was the agent of this plaintiff, upon any point in this case. I object to the question as incompetent.

The Court: Let him answer the question.

A. When I was with Glassner & Barzen we used to have a customer on Union avenue who ran a saloon there, and was also doing a little jug business, that is a little shipping business out of town, and he was a very good friend of mine; I used to sell him lots of low proof domestics, and one day when I was over there he showed me one of his price lists where he advertised "Old Crow" whiskey bottled in cases of full quarts, that is 12 quarts to the case, for some such price as \$4.50 or \$5.00, I am not quite sure which, it was not over \$5.00, and rather think is was \$4.50. I asked him what he put in. He says "I put some of your 70 proof in that."

The Court: Mr. Garrigues, that is not the question that was asked

you at all.

A. This is merely preliminary. Now Homan comes to Kansas City about that time, and I told him of this very instance, and said "You fellows ought to stop that, Mr. Homan; it hurts "Old Crow." He says, "I don't see that it does," he says, "if they sell good whiskey, 'Old Crow' is good whiskey, and it don't hurt the reputation; if a man sells bad whiskey and labels it 'Old Crow' anybody that has got any liquor sense knows it is not 'Old Crow' because 'Old Crow' is good whiskey;" he says, "all this stuff advertises 'Old Crow." It didn't look good to me but it looked good to him, I guess, and I let it go at that. It was a matter of common jest in the trade, the putting of stock labels on whiskies, on anything.

Q. Mr. Garrigues, are you pretty familiar with the customs and

habits of the trade and the purchasers of bottle whiskey?

A. Fairly so, yes, sir, it is part of our business.

Q. I will ask you whether or not a purchaser who desired Gaines & Company's genuine "Old Crow" whiskey would be deceived in purchasing other whiskey than Gaines & Company's that was simply labeled "Old Crow" without any designation on the label as to the source of manufacture of the whiskey or as to who distilled it?

A. Why I think it would be impossible for a man to be deceived

for several reasons.

Q. Give the reasons to the Court?

A. In the first place not even an expert can tell "Old Crow" from any other whiskey, that is a cinch, he can't tell "Old Crow" six years from "Old Crow" fifteen. I asked Mr. Homan that very question once, in a saloon in Atchison, Kansas. In the second place, as I stated awhile ago in answer to some question, it is the price that governs the quality of whiskey. Now, if a man buys a quart of whiskey

for 50 or 75 cents and it is labeled "Öld Crow," or "Sherwood Rye," or "McBrayer" or any other brand, a man is no more fooled than if he goes up here and buys a diamond for

more fooled than if he goes up here and buys a diamond for ten dollars for five carats; if he has got any sense he knows that no-body can sell him diamonds at that price; so "Old Crow" is universally known to be perhaps the finest whiskey made in the State of Kentucky, I don't say it is the finest, because I do not drink, but it has that reputation; well, we pay wholesale for it, when we buy it all the way in 100 case lots, a price say \$10 a case, that is nearly 90 cents a quart; we sell it at \$12 a case, occasionally cut it, cut the price; so if any body, wise or unwise, bought it for a lower price than what good whiskey would cost, he might know from that alone that he was not getting W. A. Gaines & Company's "Old Crow" whiskey.

Q. Take an ordinary purchaser now, who, was looking for Gaines & Company's "Old Crow" whiskey, would be buy a quart of whiskey, paying 65 or 70 cents for it, for a quart of it, containing a label, one of those "Old Crow" stock labels, not saying where it is manufac-

tured?

A. How is that?

Q. Would the ordinary purchaser who was intending to buy Gaines & Company's "Old Crow" whiskey be deceived in purchasing

by having presented to him a bottle of whiskey priced at 65 or 70 cents a quart, containing one of these stock "Old Crow" labels?

A. I should not think so; I should not think so; there was no possibility of his being deceived if he knew enough to know that there was a genuine "Old Crow" whiskey made by W. A. Gaines & Company he ought to know enough also what it was worth and look for the genuine label.

Q. Gaines & Company have a regular label, have they not, upon

their bottled whiskey?

A. Well, they have now really two labels. Formerly, before the passing of the bottling in bond act, they bottled, of course, their own whiskey, under their own label; that was the old style "Old Crow" label. Since the passage of the bottling in bond act, the bottle has been changed to conform with the requirements of the bottling in bond act, but I think they still furnish the old fashioned bottle with the regular label.

Q. Does that contain their name as distillers?

A. Oh, yes.

Q. And where their distillery is located?

A. Yes.
Q. Do their present labels contain their name?

A. Well, the bottle in bond labels, have to show the bottle in bond

labels, use both on the revenue stamp bottling.

Q. Were you familiar with the bottling of Gaines & Company's goods before, that is goods that are bottled by Gaines & Company themselves, before the passage of this bottling in bond act?

A. Yes, I knew the whiskey; we handled it at Glassner & Barzen's

very extensively.

893 Q. Did Gaines & Company themselves bottle their genuine, the genuine "Old Crow" whiskey that they made, before the

passage of that bottling in bond act?

A. If I could quality that I would say no, they did not; they did not. If that whiskey that was sent in the barrels from the United States bonded warehouse was the genuine "Old Crow" whiskey, then the whiskey bottled by W. A. Gaines & Company was not "Old Crow," that is it was not the same whiskey as was in the barrels. There is no doubt in the world about that because we tested it, just for the fun of it, at the time.

### Cross-examination.

# By Mr. Ladd:

Q. Where is your house?

A. The house that I am now running?

Q. Yes? A. The Kansas City Supply Company.

Q. Where is it?

A. 443 West Fifth street.

Q. What is the nature of its business?

A. Wholesale liquors.

Q. And you are the secretary and treasurer?

A. Yes, sir.

Q. I will ask you if your house is now putting under "Old Crow" labels, labels purporting to represent "Old Crow" whiskey, other whiskey than "Old Crow" and selling it as such?

A. Will you repeat the question, please?

Q. I will ask you if your house is now engaged in selling whiskey other than W. A. Gaines & Company's genuine "Old Crow" whiskey and putting it into bottles with a label on it upon which are the words "Old Crow"?

A. Undoubtedly. Q. You are doing it?

A. Yes, sir: have been doing it ever since I can remember.

Q. The labels that you use on whiskey which is not "Old Crow" whiskey?

A. (Interrupting.) I did not say that.

Q. I am asking you now, which is not "Old Crow" whiskey manufactured at Gaines & Company's Distillery, in Woodford County, Kentucky, have the words "Old Crow" on the labels, do they?

A. Now let's get together. You mean I am bottling it with the

words "Old Crow" on the labels?

Q. Don't get fierce.

A. I don't want to get fierce; I want to answer your question fairly.

Q. Is your house now engaged in selling whiskey which is not the genuine product of W. A. Gaines "Old Crow" Distillery in Wood-

ford County, Kentucky, by putting it into bottles on which 894 are labels on which appear the words "Old Crow"?

A. Yes, sir.

Q. And you intend to continue it, do you?

A. We expect to continue it, yes, sir.

Q. Well, I will entertain you with a law suit.

Defendant's counsel objected to the question and moved to strike it out, which motion is by the Court sustained.

A. My place of business is at 443 West Fifth street.

Redirect examination.

By Mr. C. R. Pence:

Q. Just one more question, Mr. Garrigues. What was the date of this conversation that you had with Mr. Homan as near as you can remember?

A. Oh, that must have been six or seven years ago, probably in 1897 or 1898, somewheres along there, five or six years ago.

Q. Four or five years ago? A. Four or five years ago.

Mr. Pence: I offer in evidence the original petition in this case.

Said original petition in this case, filed October 24, 1900, was marked by the stenographer "Exhibit Z" and is in words and figures as follows, to-wit:

See Record, page —.

Mr. Pence: I also offer in evidence, if I have not already done so, a certified copy of the petition filed by the plaintiff in the cases begun in New York City, referred to by the witness, Blood.

New York Supreme Court, City and County of New York.

W. A. GAINES & Co., Plaintiff.

WILLIAM M. LESLIE, WILLIAM M. LESLIE, JR., and WARREN E. TROTT, Defendants.

The plaintiff appearing by Wise and Lichenstein, its attorneys, complains of the defendants, and shows to this Honorable Court:

First. That at the several times as hereinafter alleged, the plaintiff was, and still is, a corporation duly incorporated by and under the laws of the State of Kentucky, and being engaged in the bus-895 iness of distilling and manufacturing whiskies, at its distil-

lerv in the State of Kentucky.

Second. That as this plaintiff is informed and verily believes, the defendants are co-partners trading under the firm name of William M. Leslie, and engaged in the liquor business in the City of New

Third. That, as this plaintiff is informed and verily believes, the business now operated by plaintiff corporation was founded by James Crow, in about the year 1835, a period of over sixty years ago; the said Crow was a distiller, and he originated and devised his trademark "Old Crow" for whiskies distilled by him at his distillery in Woodford County, Kentucky, which became known as the Old Crow Distillery; and the "Old Crow" whiskey distilled and sold by the said James Crow, by reason of its purity, high standard of quality and excellence of manufacture, obtained a most excellent reputation. That thereafter, and in about the year 1866, the firm of Gaines, Berry & Co., purchased, and succeeded to the business, distillery, good will, and trade-marks of the business originated by the said James Crow, and continued the distilling, preparing and selling of whiskies at said distillery in Woodford County, Kentucky, and which partnership of Gaines, Berry & Co., was thereafter changed to the firm or partnership of W. A. Gaines & Co., who acquired the business property. trade-marks, good will, and distillery of said preceding firm, and continued the business of distilling and selling "Old Crow" whiskey.

Fourth. That among the trade-marks originated and devised by the said James Crow, and used by him, and continued to be used by the plaintiff and its predecessors, was the certain trade-mark for whiskey known as, and consisting of, the arbitrary words "Old Crow," which were attached to the packages, barrels and bottles containing the genuine "Old Crow" whiskey distilled by the said James Crow, and succeeding parties in interest, and which became, and is, the distinguishing mark of the whiskies distilled and sold by said plaintiff and its predecessors at the said Old Crow Distillery in Woodford County, in the State of Kentucky, and which brand of "Old Crow"

whiskey commanded, and still does command, a large and ready sale on the market, and was, and is, well known to the dealers in, and purchasers and consumers of whiskey in the United States and elsewhere.

Fifth. That in the year 1887, a corporation was formed as aforesaid, under the laws of the State of Kentucky, under the corporate name of W. A. Gaines & Co., and which corporation succeeded

to, and acquired, the business of the aforesaid firm of W. A.

Gaines & Co., and all its property, distillery, rights, good will and trade marks, including the "Old Crow" trade-mark, and said plaintiff corporation has continued to manufacture the said "Old Crow" whiskey at its distillery in Woodford County, in the State of Kentucky, pursuing the same methods and exercising the same care and supervision in the manufacture of its product as had theretofore been given to it by the predecessors of said corporation. And this plaintiff further shows, that the genuine "Old Crow" whiskey has usually been sold under the trade-mark consisting of the title "Old Crow' and also with the arbitrary symbol or device of a crow perched on the branch of a tree, and the branding of the packages or labeling of the bottles containing the said whiskey, either with the arbitrary words, "Old Crow" alone, or in combination with said symbol of a crow, has been and is generally understood by the liquor trade throughout the United States as well as the dealers in and consumers of whiskey to indicate genuine "Old Crow" whiskey distilled by the plaintiff, or its predecessors, at the Old Crow Distillery in Woodford County, in the State of Kentucky.

The petition then proceeded to allege that the defendants therein named were violating the trade-mark rights of plaintiff as above set forth, and prayed for an injunction and accounting for profits. The petition was signed by Wise and Lichenstein, attorneys for the plaintiff, and was verified by Edson Bradley, second vice-president of the plaintiff corporation, and was filed October 10th, 1898, in the New

York Supreme Court, City and County of New York.

Defendant's counsel also read in evidence the deposition of John M. Nuckols, which is in words and figures as follows, to-wit:

Deposition of John M. Nickols, of lawful age, being produced, sworn and examined on the part of the defendant, deposeth and saith:

Direct examination.

# By Mr. Pence:

Q. Please state your name?

A. John M. Nickols.

Q. Where do you live, Mr. Nickols?

A. I live at 3212 Vine street, Kansas City, Missouri.

Q. How long have you resided in Kansas City, Missouri?

A. About 12 years.

Q. What official position, if any, do you now occupy?

A. Clerk of United States District Court and United States Commissioner.

Q. How long have you officiated in that capacity?

A. I have been clerk since 1891, and I was appointed commissioner in February, 1893.

897 Q. Where were you born, Mr. Nickols? A. In Woodford County, Kentucky.

Q. In what year?

A. 1828. The 12th day of September, 1828.

Q. In what part of Woodford County, Kentucky, were you born?
A. Well, about a mile and a quarter from Versailles, the county seat.

Q. Were you acquainted with one James Crow, of Woodford

County, Kentucky?

A. Yes, sir. Well, I had no special acquaintance with Mr. Crow, but I knew him—knew him by sight, and knew of him. I knew his whiskey better than I knew him.

Q. About how long did you know Mr. Crow?

A. Well, I should think, I would think something in the neighborhood of six years—five or six years, or something like that.

Q. Do you remember when he died?

A. I do not. I remember the circumstance of his death, but I cannot say positively just when he did die.

Q. When did you remove from the State of Kentucky?

A. In 1863. In April, 1863.

Q. Did James Crow die before or after you moved from the state?

A. Before. He died before I left there. Q. In what business was Mr. Crow engaged?

A. He was distilling for Oscar Pepper on the Versailles and Frankfort pike, about half way between the two places or thereabouts. It was between Versailles and Frankfort. Pepper's place was not immediately on the pike, for you had to leave the pike to get to his house, and the distillery was on what is known as Glenn's creek.

Q. By what name was that distillery known?

A. The distillery was known by the name of Oscar Pepper's Distillery, but the whiskey manufactured or concocted there was always known as "Crow whiskey."

Q. What was the reputation of the Crow or Old Crow whiskey? A. Well, I think that nearly everybody who knew anything about it regarded it as about the finest whiskey that was ever made. It not only had that reputation with us who lived in the vicinity, but as far as I ever heard its reputation had reached New York and other places, and it was so regarded as the finest whiskey to be had in the country, and Crow whiskey was as well known or nearly as well known in New York as it was in Woodford county.

Q. State whether or not it had attained the reputation you speak

of before the death of James Crow?

A. Oh, yes, yes, long before his death.
Q. To what was the reputation of that whiskey due, if you know?

A. To what was it due?

Q. Yes, sir.

A. To its excellence, I presume, for everybody seemed to think or imagine that it was the purest and best whiskey they could get.

Q. Well, to what was its excellence ascribed?

A. Well, I don't know excepting it was to its purity of make, I imagine. I know that everybody seemed to imagine that old Jim Crow made better whiskey than anybody else.

Q. Its excellence then was ascribed to the skill of the distiller,

James Crow?

A. I suppose so. I imagine it was. I don't know what else, excepting the purity of the whiskey, and it certainly was so regarded by all as being the best whiskey to be had in the county. We had other good whiskies, too, but more after that than before. was not so much whiskey made in Woodford county at that time, and particularly whiskey that afterwards attained a reputation that it did until after Jim Crow's death. I used to hear it claimed by some that the purity and excellence of the whiskey was attributable to the water and the corn. They thought that the corn was a little better-a little sounder or something, and they always claimed that that limestone water that they got right fresh from the spring was better and purer than elsewhere. Now, I only know from a man named Pollock who afterwards made whiskey in Illinois, and one day in talking of this man Pollock, who had gone from Kentucky out to Illinois, and who had worked for years in a distillery in Bourbon county, and that distillery in which he had worked had a fine reputation for the production of fine whiskey, and he told me one day in Springfield. Well, it came about this way: I said something to him about his whiskey having a sloppy smell, and he said, yes, it did, and he could not account for it for the life of him; and he said; I have worked in this distillery where I am working for years until I thought I had mastered the distilling business and the making of whiskey, and I concluded that because grain or corn was so much cheaper, that is that it was so much cheaper in Illinois than in Kentucky, that he certainly could go there and make good whiskey for a good deal less money, and consequently make more money; so he went out in the breaks in the hill country where he could get the water coming down from the hills, and he told me that he did everything just as he had done it in this distillery in Bourbon county, and for the life of him he could not get the same whis-

key. He said: "I can't account for it, and I went back to Kentucky. I went back to that old distillery and I spent another year there purposely to see if I could perfect myself and find out what is was that made so much difference in the quality of the whiskey, and then I went back and I made the tubs exactly like them. I made them the same size and I prepared my mash in the same way, and I did everything just exactly as I did in Bourbon county, and still, after I had done it, I knew that I had as good whiskey and as pure whiskey as ever," and he went on to say that he could not rid it of that sloppy smell. Strange to say if you were to take that whiskey, take the straight goods and smell it, it smelt just

like new whiskey, even if it was three or four or five years old, for it had a kind of a sloppy or new smell to it, but if you would make a toddy of it it would lose it, and was as good whiskey as you ever drank. A man by the name of J. Taylor Smith who was banking there bought all the product of that still and kept it for years and stored it away in a warehouse until it was six or eight years old, and then it was as fine whiskey as you ever saw or drank, and it was sought for all over the country, but he said at first he could not get rid of the new smell about it, and I think that, well I suppose the excellence of the Crow whiskey was attributable to the purity of the water and the corn, or something of that kind. Now, I don't know anything about the making of whiskey, but if you take the straight goods, smell it, or pour it out in a glass and smell it in the glass, it had a fine aroma—as fine as you ever smelled in the world. It smelled like real pure corn whiskey.

Q. You may state, Mr. Nickols, whether or not there was a celebrated spring at the distillery where James Crow worked as a dis-

tiller?

A. Oh, there was a spring there, but I don't know that it was any more celebrated than other springs in that locality. There were a number of springs that I imagine were just as good and just as pure; for nearly all those springs that ran out from the rock and from those hill sides were as pure as they could be and as clear as crystal.

Q. Well, at that distillery where James Crow was employed as a

distiller, did they use water from a spring?

A. Yes, sir.

Q. That is at the Oscar Pepper Distillery?

A. Yes, sir.

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Q. They use spring water?

A. Yes, sir, and I think all of them did. Epler, who afterwards became one of the celebrated whiskey makers—for I have been at his place and knew him—brought his water from a spring on the hill side, and I presume all of them used spring water.

Q. You may state, if you know, who originated the brand

of "Crow" or "Old Crow" for whiskey?

A. Well, that would be only guess work, but I imagine that Crow did. I never heard of it before. Oh, well, I was almost too young to know anything about whiskey when he commenced making it, but when I was a young man, or about grown, why then I knew nothing about any other whiskey other than Crow whiskey, or any other whiskey as Crow whiskey, excepting that that was made by Jim Crow, and I don't think that I ever heard of any other whiskey as Crow whiskey until after James Crow's death. I don't think that I ever heard of that brand being on any other whiskey excepting that made by Jim Crow, until after his death.

Q. I believe you have stated that it was a well-known brand dur-

ing his life time?

A. Yes, sir.

Q. And before his death?

A. Oh, yes, it was. There is no doubt about that. It was a very noted whiskey.

Q. Did you ever see any whiskey bottles and barrels branded with

that brand "Old Crow"?

A. Yes, sir. I would not say or be positive about it, but I don't believe that it had "Old" on it. I don't believe it had the "Old" to it, but it was "Crow" whiskey. It was so understood in those days by everybody.

Q. Was that before you left the State of Kentucky?

A. Yes, sir.

Q. And you left Kentucky in the year 1863? A. Yes, sir; I left Kentucky in the year '63.

Q. You may state, Mr. Nickols, whether or not Oscar Pepper ever branded whiskey as "Crow" whiskey or "Old Crow" whiskey after the death of James Crow?

By Mr. Ladd: I object to the question for the reason that the witness has already stated that it was never called "Old Crow," but that it was called "Crow."

A. Yes, sir, I think that it was always called "Crow" until possibly a year after it had gotten very old. A person would speak of it as "Old Crow whiskey," but that went merely as to the age of the whiskey.

Q. I believe that is all.

Cross-examination.

## By Mr. Ladd:

Q. Mr. Nickols, how far did you live from this distillery?

A. About seven miles.

Q. And what was your business? A. Farming.

Q. You never were interested in the whiskey business? A. Sir?

901 Q. You never were interested in the whiskey business as a dealer or manufacturer, were you?

A. Oh, no, not in the least in the world. Never.

Q. Did you live there until you moved from Kentucky in 1863?

A. Yes, sir.

Q. On the farm?

A. After I was married, and I married in 1852, I lived on the farm with my father, where I was born, from 1828 to 1852—or rather it was in January, 1853, that I went to farming for myself and went to housekeeping, but I was only three-fourths of a mile from my father, and a little nearer the county seat, or a little nearer town than the old home was, for I was only about three-quarters of a mile away. My land ran up to the town limits, but my house was threequarters of a mile from Versailles, on a different turn pike from my father's.

Q. Well, what I want to get at is, did you live there until 1863?

A. Yes, sir.

Q. Now, where did you move to in 1863?

A. To Springfield, Illinois.

Q. And you lived there until you came here about twelve years ago?

A. Yes, sir.

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Q. At Springfield, Illinois?

A. Yes, sir.

Q. And you never were in the whiskey business directly or indirectly?

A. No, sir, never in any way whatever.

Q. I think that is all.

JNO. M. NICKOLS.

Defendant here rested.

Mr. Ladd: These other deeds, tracing the title from old Elijah Pepper—I offer them all just to show that, and whatever may not bear on it, of course may be disregarded.

Mr. Pence: One of the witnesses seemed to testify there was a part-

nership between Crow and Pepper.

Mr. Ladd: These deeds show the title to the property. I offer them just as I got them—about twenty of them.

These deeds and instruments were the following:

1. Certified copy of deed dated May 12th, 1821, from Charles Raily and others, Commissioners, to Elijah Pepper of 350 acres of land on Glenn's Creek, in Woodford County, Kentucky, described by metes and bounds, duly signed, acknowledged and recorded.

Certified copy of Will of Elijah Pepper dated Feb. 17th, 1831, devising all of his real estate to his wife, Sarah Pepper, for life with remainder to his children then living, to-wit: Elizabeth
 Sullegner, Saml. Pepper, Nancy N. Pepper, Presly N. Pepper,

Amanda F. O'Bannon, Matilda Perry, and Oscar Pepper and grandson Elijah Enoch Pepper in equal parts, and appointing Presly N. O'Bannon and John O'Bannon executors, duly probated March,

1831.

3. Certified copy of deed dated Nov. 12th, 1836, from Samuel Pepper and wife to Oscar Pepper conveying their interest in the estate of Elijah Pepper, deceased, duly signed, acknowledged and recorded.

 Certified copy of deed dated March 26th, 1838, from S. W. Garnett and wife, formerly Nancy N. Pepper to Oscar Pepper conveying their interest in estate of Elijah Pepper, deceased, duly signed,

acknowledged and recorded.

5. Certified copy of deed dated July 4, 1840, from Jno. Suilinger and wife Elizabeth to Oscar Pepper, conveying their interest in the estate of Elijah Pepper, deceased; duly signed, acknowledged and recorded.

Certified copy of deed dated Jan. 16, 1848, from Jno. W. O'Bannon and wife Amanda, formerly Amanda Pepper, to Oscar Pepper, conveying their interest in the estate of Elijah Pepper, deceased;

duly signed, acknowledged and recorded.

7. Certified copy of deed, March 7, 1849, from Jno. B. Perry,

Ann E. Perry, Robt. S. Perry, Jno. B. Perry, Jr., and Sarah M. Perry, the last four named being children of Matilda Perry, deceased, to Oscar Pepper, conveying their interest in the estate of Elijah Pep-

per, deceased; duly signed, acknowledged and recorded.

8. Certified copy of deed dated Sept. 1, 1851, from Wm. Bell, guardian for Mary L. Pepper, Matilda P. Bell, Joseph L. Bell and Isham S. Bell, by commissioner, to Oscar Pepper, conveying their interest in the estate of Eijah Pepper, deceased; duly signed, acknowledged and recorded.

9. Certified copy of deed dated May 28th, 1857, from Presley N. Pepper and wife to Oscar Pepper, conveying their interest in the estate of Elijah Pepper, deceased; duly signed, acknowledged and

recorded.

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Certified copy of deed, dated October 17th, 1869, from Ed.
 M. Wallace, commissioner in partition, of the Woodford County
 Court, in the case of Chas. L. Raily against Nannie Pepper, guardian and others, to execute a deed of partition conveying to

each party in severalty the part of the lands of the late Oscar

Pepper, allotted to him or her by commissioner appointed to allot and divide said lands to the parties entitled thereto, to James E. Pepper, a tract of land in Woodford County, Kentucky, on the Versailles and Midway Turnpike, containing 82 acres and the three roads, it being lot No. 1 in a survey and piat of the lands of the said Oscar Pepper, deceased; recorded in the clerk's office of said Court, in Will Book "T," pages 539 to 543, which lot was allotted to the said James E. Pepper by the said commissioners, duly signed,

acknowledged and recorded.

11. Certified copy of deed, dated November 25th, 1872, from Ed. M. Wallace, commissioner appointed by the Woodford County Court in the case of James E. Pepper, vs. Nannie Pepper, guardian, etc., to James E. Pepper, conveying the interest of defendants in said suit, to-wit: Ada Raily, Charles L. Raily, Thomas E. Pepper, O. Neville Pepper, Belle Pepper and Dixie Pepper in a certain tract of land in Woodford County, Kentucky, on the waters of Glenn's Creek, containing 33 acres and 13 square poles, being the same lot surveyed and allotted to James E. Pepper by the commissioner in the said suit, duly signed, acknowledged and recorded.

12. Certified copy of deed, dated September 21st, 1877, from F. H. Dudley, assignee of James E. Pepper, bankrupt, to W. H. Sneed, assignee in bankruptcy, of E. H. Taylor, Jr., about 33 acres of land in Woodford County, Kentucky, situated on the waters of Glenn's Creek and known as the land used by Oscar Pepper, for distilling

purposes, duly signed, acknowledged and recorded.

13. Certified copy of deed, dated January 18th, 1878, from W. H. Sneed, assignee in bankruptcy of E. H. Taylor, Jr., to E. H. Taylor, Jr., same premises as in next preceding deed, duly signed, ac-

knowledged and recorded.

14. Certified copy of deed, dated January 18th, 1878, from E. H. Taylor, Jr., and wife to Geo. T. Stagg, same premises as in next preceding deed, duly signed, acknowledged and recorded.

15. Certified copy of deed, dated May 11th, 1878, from George T.

Stagg, and wife to James H. Graham, same premises as in next

preceding deed, duly signed, acknowledged and recorded.

16. Certified copy of deed dated August 24th, 1878, from James H. Graham to L. Labrot, conveying an undivided one-half interest in same premises as in next preceding deed, duly signed, acknowledged and recorded.

904 17. Certified copy of deed, dated November 18th, 1899, from James H. Graham and wife to L. Labrot, conveying said first party's remaining undivided one-half interest in same premises as in next preceding deed, duly signed, acknowledged and

recorded.

18. Certified copy of power of attorney from Geo. H. Allen to Marshall J. Allen, dated February 1st, 1887, to act for first party in and about the incorporation of W. A. Gaines & Company, duly signed, acknowledged and recorded. All the foregoing deeds were expressed to be for a valuable consideration.

I don't know whether this price list that was attached to one of

these depositions was formerly offered or not.

Mr. Pence: Yes, it may be so considered—and I don't believe

you formally offered your certificate of registration.

Mr. Ladd: It is in the papers; yes, I intended to offer it along with those deeds, and that price list.

Mr. Pence: That is all right. For price list see Record, P —.

T- Certificate of registration is as follows:

Trade-Mark.—W. A. Gaines & Company Whiskey. 102, Registered December 13th, 1870. "Old Crow" Distillery, Copper Distilled Whiskey. W. A. Gaines, Distiller, Woodford County, Kentucky.

W. A. GAINES & COMPANY, Per MUM & CO., Attorneys.

Witness-:

ALEX F. ROBERTS. FRANK BLORKLEY.

United States Patent Office.—W. A. Gaines & Company of Frankfort, Kentucky. Registered December 13th, 1870. No. 102. Trade-Mark for Whiskey.

#### Statement.

To All Whom it May Concern:

Be it known that we, W. A. Gaines & Company, of Frankfort, in the County of Franklin and State of Kentucky, use a trade-mark for whiskey, of which the following, together with the fac-simile hereto attached, is a correct description.

The said Trade-Mark consists of the words "Old Crow Distillery. Copper Distilled Whiskey, W. A. Gaines, Distiller, Woodford

County, Kentucky.

905 The Trade-Mark is to be applied as a brand to barrel

heads and also to be used on show cards, circulars, bottles, labels, barrel heads, etc. It is printed in black or other suitable colors.

W. A. GAINES & COMPANY.

Witnesses:

A. E. BEACH. J. R. THOMSON.

Trade-Mark.—W. A. Gaines & Company. (No. 102. Registered December 13th, 1870.) Whiskey—No. 9278. Registered April 11, 1882.

"Old Crow" Distillery, Copper Distilled Whiskey. W. A. Gaines, Distiller, Woodford County, Kentucky.

W. A. GAINES & COMPANY,

Proprietors,

By Their Attorney, E. N. DICKERSON, JR.

Witnesses:

W. A. POLLOCK. GEO. H. EVANS.

United States Patent Office. W. A. Gaines & Company of Frankfort, Kentucky. Trade-mark for whiskey. Statement and declaration of trade-mark. No. 9278. Registered April 11th, 1882. Application filed January 9th, 1882.

## Statement.

To All Whom it May Concern:

Be it known that we, W. A. Gaines & Company of Frankfort, in the County of Franklin and State of Kentucky and doing business in said city and state, have adopted for our use a trade-mark for whiskey, of which the following is a full, clear and exact specification. Our trade-mark consists of the words, "Old Crow Distillery. Copper Distilled Whiskey. W. A. Gaines, Distiller, Woodford County, Kentucky." These have been arranged as shown in the accompanying fac-simile. The trade-mark is to be applied as a brand to barrel heads, and also to be used on show cards, cards, circulars, bottle labels, barrel heads, etc. It is printed in black or other suitable color. This trade-mark we have used continuously in our business since January, 1870. The class of merchandise and the particular description of goods to which our trade-mark is appropriated is that of whiskies. The essential and distinguishing part of this trade-mark are the words "Old Crow."

W. A. GAINES & COMPANY.

Witness-:

ED. BRADLEY, Jr. WM. POLLOCK. Declaration.

STATE OF NEW YORK, County of New York, 88:

George H. Allen, being duly sworn, deposes and says that he is a member of the firm of W. A. Gaines & Company, the applicants named in the foregoing statement; that he verily believes that the foregoing statement is true; that the said firm has at this time a right to the use of the trade mark therein described; that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that it is used by his said firm in commerce with foreign nations, and particularly with England, China, the West Indies and Germany, and that the description and fac-simile represented for record truly represents the trade mark sought to be registered.

GEORGE H. ALLEN.

Sworn and subscribed before me this 5th day of January, 1882.

[L. s.] DAVID B. BARNUM,

Notary Public (259), New York County.

This was all the evidence offered and introduced in the trial of this cause.

And thereafter, to-wit, on the argument of the motion for a new trial by defendant, the Court stated that it had no recollection of any motion having been made by defendant for a special finding of the facts and conclusions of law.

And afterwards, to-wit, on Saturday, September 6th, 1902, under the pleadings and the evidence introduced, the Court entered its decree and judgment in said cause, which is in words and figures as follows, to-wit:

See Record page -.

And afterwards, to-wit, on September 9th, 1902, and within rour days after the rendition of said judgment and decree, defendant herein filed its motion for a new trial and its motion in arrest of judgment, which said motions are in words and figures as follows, to-wit:

## Motion for a New Trial by Defendant.

Now on this day in due time, comes the defendant in the above entitled cause, and moves the Court to set aside the verdict rendered in the said cause on the sixth day of September, 1902, and to grant it a new trial therein for the following reasons:

1st. The verdict in said cause is against the evidence.
2nd. The verdict is against the weight of the evidence.
3rd. The verdict is against the law under the evidence.

4th. The verdict was for the wrong party.

5th. The Court erred in admitting incompetent, irrelevant and immaterial evidence offered by the plaintiff over the objection of the defendant.

6th. The Court erred in rejecting competent, relevant and material evidence offered by the defendant.

7th. The Court erred in taxing all the costs against the defendant. 8th. The Court erred in failing and refusing to apportion the costs

between the plaintiff and defendant.

9th. The Court erred in refusing to tax the costs of the depositions taken by the defendants under the original petition, against the defendant, for the reason that the issues upon the original petition were substantially changed by the amended petition, in this to-wit: That the original petition counted upon a purchase by the plaintiff of the trade mark in question from the original inventor thereof, while the amended petition alleged that the trade mark in question was originated and devised by the plaintiff, and there was no proof whatever of any title to said trade mark in plaintiffs by purchase as alleged in said original petition.

10th. The Court erred in admitting evidence of abandonment of the trade mark in question by the original inventor thereof, and of the adoption thereof by plaintiff for the reason that no such

issue was presented by the pleadings.

11th. The Court erred in refusing to hold that the Statute of

Limitations applied to plaintiff's action.

12th. The Court erred in refusing to strike out the amended petition on the ground that the same constituted a departure and a change of the cause of action from the original petition.

13th. The Court erred in refusing to make a special finding of the facts and conclusions of law thereon as requested by defendant.

CHAS. R. PENCE AND WALTER POSTON, Attorneys for Defendant.

In the Circuit Court of Jackson County, Missouri, at Kansas City, April Term, 1902.

908 W. A. Gaines & Company, Plaintiffs,

E. WHYTE GROCERY, FRUIT AND WINE COMPANY, Defendants.

Motion in Arrest of Judgment by Defendant.

Now comes the defendant herein and moves the Court to arrest the judgment in said cause for the following reasons:

First. Because the amended petition filed in said cause does not state facts sufficient to constitute a cause of action.

Second. Because, upon the record, the judgment is erroneous.

Third. Because the Court erred in overruling defendant's motion to strike out the amended petition on the ground that the said amended petition constituted a departure, and a change of the cause of action, as alleged in the original petition. Fourth. Because the judgment of the Court was based upon a different theory and a different cause of action from that alleged in the amended petition.

CHARLES R. PENCE, WALTER POSTON, Attorneys for Defendant.

And afterwards, to-wit, on Saturday, September 27th, 1902, defendant files motion to retax costs herein, which motion is in words and figures as follows, to-wit:

In the Circuit Court of Jackson County, Missouri, at Kansas City.

W. A. Gaines & Company, Plaintiff,

E. WHYTE GROCERY, FRUIT & WINE COMPANY, Defendant.

Motion to Tax Costs by Defendant.

Comes now the defendant, and moves the Court to tax the costs

in the above entitled cause as follows, to-wit:

1st. To tax the costs of all the depositions taken by the plaintiff under the original petition, and while the said original petition was pending and before the amendment thereof, against the plaintiff for the reason that the issues upon the said original petition were substantially charged by the amended petition in this, to-wit: The original petition counted upon a purchase by the plaintiff of the trade mark in question from the original inventor thereof; while

the amended petition alleged that the trade mark in question was originated and devised by the plaintiff, and there was no proof whatever of any title to said trade mark

in plaintiff by purchase, as alleged in said original petition.

2nd. To tax the costs of the trial, including witness fees, against the plaintiff, for the reason that the amended petition was based upon the allegations that plaintiff originated, devised, adopted and used the trade mark in question, while the evidence shows that plaintiff did not originate and devise the trade mark in question, but appropriated the same to its use after the alleged abandonment thereof by the original inventor; and the finding of the Court is based upon such alleged abandonment, and no such issue of abandonment is made by the pleadings.

3rd. To apportion and tax the costs between plaintiff and defend-

ant as justice and equity require.

CHAS. R. PENCE AND WALTER POSTON, Attorneys for Defendant.

And afterwards, to-wit, on Wednesday, November 26th, 1902, defendant's motion for a new trial and motion in arrest of judgment are by the Court overruled; to which ruling of the Court defendant then and there duly excepted. And defendant's motion to retax

costs was by the Court overruled; to which ruling defendant then and there duly excepted.

And afterwards, to-wit, on Saturday, December 5th, 1902, comes defendant and files affidavit for appeal, which appeal is by the Court allowed to the Kansas City Court of Appeals, and defendant has

ninety days in which to file its Bill of Exceptions.

And afterwards, to-wit, on Saturday, February 28th, 1903, comes the E. Whyte Grocery, Fruit & Wine Company, defendant herein, and moves the Court to grant an extension of time to defendant in which to file its Bill of Exceptions herein and the Court being satisfied that good cause has been shown for such extension of time extends the time for filing defendant's Bill of Exceptions until on or before June 6th, 1903.

And afterwards, to-wit, on Tuesday, June 2nd, 1903, in vacation, comes E. Whyte Grocery, Fruit — Wine Company and prays for an extension of time in which to file its Bill of Exceptions herein, and it appearing to the judge in vacation that good cause has been shown for such extension of time, it is ordered that the time for filing defendant's Bill of Exceptions be and the same is hereby extended until on or before August 6th, 1903. Stipulation for extension of time filed

910 Wherefore, the defendant prays the Court to settle and allow this its Bill of Exceptions to all and singular the acts, rulings and orders of the Court in the premises, and that the same may be signed, sealed and made part of the record in this cause.

Now, therefore, the Court being fully advised in the premises, doth find the foregoing to be a correct Bill of Exceptions on the part of defendant herein, and doth order that the same be made a part of the record in said cause.

Given under the hand of Andrew F. Evans, successor in office of the judge before whom the said proceedings were had, on the 27th day of July, 1903.

ANDREW F. EVANS.

Judge of the Circuit Court of Jackson County, Missouri, at Kansas City, Division No. 5.

In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 1835.

## W. A. GAINES & COMPANY

VS.

E. WHYTE GROCERY, FRUIT & WINE COMPANY.

Be it remembered, that at the April term, 1902, of said Court, and at the conclusion of the argument of counsel and before the submission of said cause to the Court for its finding and judgment, defendant by its counsel orally requested the Court to make a special finding of the facts and conclusions of law thereon in said cause

which said request was denied by the Court; to which ruling of the Court defendant at the time excepted.

CHARLES R. PENCE. WALTER POSTON. C. H. RUCKER.

STATE OF MISSOURI,

County of Jackson, ss:

Before me, a Notary Public, came the above named Charles R. Pence, Walter Poston and C. H. Rucker, who being duly sworn upon their oaths, state that they were present in Court when defendant, by its counsel, made oral request for a special finding of facts and conclusions of law in said cause, and that the foregoing Bill of Exceptions in relation thereto is true.

Witness my hand and Notarial seal this 24th day of July, 1903.

[SEAL.] LEON E. BLOCH,

Notary Public in and for Jackson County, Missouri.

911 My commission expires October 2nd, 1906.

The above and foregoing Bill of Exceptions was presented to me on the 27th day of July, 1903, and I declined to sign the same for the reason that the judge before whom said cause was tried, states that he has no recollection that a request for a special finding of facts and conclusion of law was made in said cause; and the foregoing bill after being signed by Charles R. Pence, Walter Poston and C. H. Rucker is hereby ordered to be filed.

Given under my hand as successor in office of the judge before whom said proceedings were had, on this 27th day of July, 1903.

> ANDREW F. EVANS, Judge of the Circuit Court of Jackson County, Missouri, Division No. 5.

STATE OF MISSOURI, 8ct:

I, L. F. McCoy, Clerk of the Kansas City Court of Appeals do hereby certify that the foregoing is a true and complete copy of the Appellant's abstract of record filed in the above entitled cause of E. Whyte Grocery, Fruit and Wine Co., Appellant, vs. W. A. Gaines & Co., Respondent, as fully as the same remains on file in my office.

Given under my hand and the seal of said Kansas City Court of Appeals. Done at office in Kansas City, Missouri, this 23d day of

March, A. D. 1907.

SEAL.

L. F. McCOY, Clerk.

912 STATE OF MISSOURI, sct:

I, Elbridge J. Broaddus, Presiding Judge of the Kansas City Court of Appeals do hereby certify that L. F. McCoy is the duly appointed

and acting Clerk of said Court and that his attestation to the foregoing copy of Appellant's abstract of record is genuine.

Given under my hand this 23rd day of March, 1907.

# ELBRIDGE J. BROADDUS,

Presiding Judge of the Kansas City Court of Appeals.

STATE OF MISSOURI, set:

I, L. F. McCoy, Clerk of the Kansas City Court of Appeals do hereby certify that the Hon. Elbridge J. Broaddus is the Presiding Judge duly elected, qualified and acting as such of the Kansas City Court of Appeals and that his signature is genuine and entitled to credit.

Given under my hand and the seal of said Kansas City Court of Appeals. Done at office in Kansas City, this 23rd day of March, A. D. 1907.

SEAL.

913

L. F. McCOY, Clerk.

## (Complainant's Exhibit Voss' Price List.)

## H. W. Voss & Company, Cincinnati.

## Price List.

## January, 1904 (Pages 18-19).

"40	Old	Crow,	Spring	96		 0				 						 \$1.50
85	Old	Crow,	June '9	7 .	 					 						1.40
60	Old	Crow,	Spring	'98						 		* 1		×		1.30
85	Old	Crow,	Fall '9	8.	 											 1.171/2
75	Old	Crow,	Spring	'99			٠			9						 1.15
100	Old	Crow,	Spring	'00							 					 .971/2
200	Old	Crow,	Spring	'01						 				*	*	 .81
200	Old	Crow,	Spring	'02		 •				 			 *			 . 76

# (COMPLAINANT'S EXHIBIT W. C. BILES' PRICE LIST.)

## Wm. C. Biles & Company, Cincinnati, Ohio.

# Whiskey Price Current, Vol. 7, No. 8, July 10, 1899.

(Page 6.)	
5 Fall '90 Old Crow	$\begin{array}{c} \$2.951_{2} \\ 1.55 \end{array}$
(P. 7.) 5 Spring '93 Old Crow	
(P. 15.) 10 Spring '91 Old Crow (imp. Gau.)	1.55

95	Spring	'93	Old	Crcw																۰	۰	۰	0	$96\frac{1}{2}$	
05	Spring	193	Old	Crow			 																*	$\frac{2.40}{95}$	
0=	Coming	'05	Old	Crow																				.95	
0=	Comina	106	Old	Crow																	*		*	.88	
0=	Comina	207	Old	Crow																			*	.80	
25	Spring	'98	Old	Crow	٠	٠	•		*	۰	9	0	0 (	• •	 0	0	0	•	 	۰	۰	۰	٠	.00	

# (COMPLAINANT'S EXHIBIT J. W. BILES' PRICE LIST.)

Biles' Semi-monthly Popular Edition.

Whiskey Price List.

(Copyright, 1907, by The J. W. Biles Co.)

Vol. 17, No. 15, Feb. 9th, 1907.

Cincinnati, Ohio.

(Page 17.)

Old Crow:

	Color Co				4004	4000	1899
106	1905	1904	1903	1902	1901	1900	
	F. S.		F. S.	F. S.			
	95 130			160	160	180	195

## Odds & Ends.

Old	Crow	50	Spring '06												٠	۰					,	\$ .90	
Cita		0 =	12011 205												٠	٠							2
		0.5	Spring '01														٠		۰			 00	
		0.5	Chainer '00									 ۰						0	۰	0 6		 .00	
		10	Spring '99			۰	۰	0			0	 ٠	. 0	۰	۰	٠	٠	۰	۰		۰		

914 (Original Bill in Equity.)

In the United States Circuit Court, Eastern Division of the Eastern District of Missouri.

W. A. Gaines & Company, Complaintants,

ABRAHAM M. HELLMAN and MORITZ HELLMAN, Defendants.

To the Honorable the Judges of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri:

W. A. Gaines & Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of Kentucky, and having its principal office at Frankfort, in the County of Franklin, in the State of Kentucky, brings this, its bill, against Abraham M. Hellman and Moritz Hellman, each of whom is a cit-

izen of the State of Missouri and resident of the City of St. Louis, in the eastern division of the Eastern district, State of Missouri, and thereupon your orator complains and says: First: That it is and for many years last past has been a corporation created, organized and doing business under and by virtue of the laws of the State of Kentucky, and is engaged in the business of distilling and manufacturing whiskey at its distillery in the State of Kentucky.

That the defendants are co-partners doing business under the firm name of A. M. Hellman & Company in the City of St. Louis,
915 Missouri and are both citizens of the State of Missouri and residents of the eastern division of the eastern judicial district

of Missouri.

Your orator saith that, during the year A. D. 1835, one James Crow engaged in business as distiller of whiskey on Glenn's Creek in the County of Woodford and State of Kentucky, and did then and there invent, devise and formulate a certain novel process for the production and distillation of whiskey, which process he did not patent, or seek to have patented, but which he preserved for his own benefit as a secret process. That said James Crow did from and after said time continuously remain in the vicinity aforesaid, and engaged in the continuous practice of his avocation as such distiller. until his death in the year A. D. 1855, and that during all of said time, from and after the year A. D. 1835, the whiskey produced by the said secret process was known and styled as "Old Crow" whiskey. That the words "Old Crow" were first adopted and used as a trademark to designate the whiskey made by the said secret process, in the year A. D. 1835. That from the death of the said James Crow in 1855, as aforesaid, and until about the first day of January, A. D. 1867, one William F. Mitchell, to whom James Crow in his lifetime had communicated his said secret process, continued the distillation of the whiskey designated as "Old Crow" on Glenn's Creek in the County and State aforesaid, and on or about the first day of January, A. D. 1867, a certain copartnership known and styled Gaines, Berry & Co., predecessor of young orator, obtained possession of the distillery wherein whiskey was being and had been distilled by the said process and did thereafter continue to produce the same whiskey by the same process until it, the said copartnership, was succeeded in business by the copartners known as W. A. Gaines & Co., hereafter referred to.

And your orator avers that during the year A. D. 1870, the said copartnership Gaines, Berry & Co., was succeeded in business 916 by W. A. Gaines & Co., a copartnership which said W. A. Gaines & Co. acquired all the partnership assets of said

Gaines & Co. acquired all the partnership assets of said Gaines, Berry & Co. and that the said copartnership W. A. Gaines & Co. did continue to produce whiskey by the same process, until the incorporation of your orator, whereupon, all the assets of the said W. A. Gaines & Co. were acquired by your orator.

And in this behalf your orator further avers that the name "Old Crow" when first applied by said James Crow to the whiskey distilled and produced by his secret process on Glenn's Creek, in Woodford County, Kentucky, as aforesaid, was and it now is, a subsisting

and valid trademark; and that the same has at all times since its adoption been applied continuously to the whiskey produced by the said secret process, and to no other whiskey whatsoever, and that the distillation and production of said whiskey made by said secret process has always been made on Glenn's Creek in Woodford County, Kentucky, and at no other place or places in the United States or

anywhere else in the world.

That the said trademark, consisting of the words "Old Crow" has continuously since the year 1835 and down to the present time indicated to the public and particularly to consumers of and dealers in whiskey throughout the world, whiskey made by the said secret process devised and invented by the said James Crow, and no other whiskey whatsoever. That the said trademark, consisting of the words "Old Crow" has continuously, since the year A. D. 1835 and down to the present time, indicated to the public and particularly to consumers of and dealers in whiskey throughout the world that the whiskey to which it was and is applied was produced and distilled on Glenn's Creek, in Woodford County, Kentucky, and nowhere else in the world.

So, being the sole and lawful owner of the said trademark consisting of the words "Old Crow," this plaintiff has caused the same to be registered in the Patent Office of the United States under the provisions of the act of Congress entitled "An act to authorize the registration of Trademarks and protect the same," approved March 3, 1881, as will more fully appear by reference to the Certificate of Registration of the said Trademark, numbered 42,919, issued the 28th day of June, 1904, which Certificate of Registration your orator is ready to produce upon the hearing of this cause.

And your orator further states that the trademark "Old Crow" is of the value of five hundred thousand (\$500,000) dollars, that the said trademark is an integral part of the good will of your orator's business and that the whiskey to which the said trademark is applied is sold at a higher price than any other whiskey of equal age produced in the United States by reason of the great value of the secret process above referred to and the uniformity which your orator and its predecessors in title to the said secret process have ad-

hered to the process.

Your orator states that notwithstanding the premises the defendant above named has heretofore and since the first day of January, A. D. 1903, in violation of your orator's trademark rights and in invasion of your orator's good will made, or caused to be made, and sold, or caused to be sold, in the City of St. Louis, in the eastern division of the eastern judicial district of Missouri, a certain spirituous or alcoholic fluid not made under your orator's secret process, and that it has marked or labeled the same with the words "Old Crow" without the license and against the consent of your orator, in fraud of your orator's rights.

That the said unlawful use of your orator's trademark, unless restrained, will destroy the value of your orator's secret trademark and will greatly lessen the value of your orator's secret process, and will greatly impair and damage the value of your orator's good will.

That your orator is without adequate remedy at law in the prem-

ises.

And your orator says that the acts of the defendant-, hereinbefore recited, have caused the diversion from your orator to the defendant- of large gains and profits, the exact amount whereof is unknown to your orator, and for the ascertainment whereof an accounting will be necessary.

To the end, therefore, that your orator may obtain relief in the premises in this Honorable Court in which alone it can obtain ade-

quate relief, your orator humbly prays:

decree, as may be made against them.

First. That the said Abraham M. Hellman and Moritz Hellman be made defendants to this bill, and compelled to answer each and every allegation herein contained (but not under oath, an answer under oath being hereby expressly waived), as fully as if directly in-

terrogated as to each and every of said allegations.

Second. That the said Abraham M. Hellman and Moritz Hellman may be compelled to render before a master of this court, a full, true, complete and perfect account of all profits divested from your orator, or made by its lawful use of the words "Old Crow" in connection with whiskey not produced by your orator and not made by the secret process of the late James Crow, or by the said whiskey in connection with which the words "Old Crow" have been by them unlawfully used, and may be decreed to pay unto your orator the full amount of such profits.

Third. That the said Abraham M. Hellman and Moritz Hellman, their agents, servants and employees, and each of them, to be perpetually and forever enjoined and restrained from making, keeping on hand for sale, or selling, and whiskey under the name of "Old Crow" which has not been produced by your orator under its

secret process.

Fourth. And finally, to the end that equity may be done between the parties hereto, and that the relief herein expressly prayed for and all other proper and equitable relief in the premises, may be afforded to your orator, may it please your honors such relief fully to grant, and award against the said Abraham M. Hellman and Moritz Hellman a writ of subpœna ad respondendum of the United States of America, issuing out of and under the seal of this Honorable Court, commanding the said Abraham M. Hellman and Moritz Hellman on a certain day therein to be named, and under a certain penalty, to be and appear in this Honorable Court, then and there to answer all and singular the premises and to stand to, perform and abide such further order, direction and

#### Second Count.

And for another and further cause of action and ground for equitable relief herein, your orator W. A. Gaines & Company, a corporation duly created, organized and existing under and by virtue of

the laws of the State of Kentucky, and having its principal office at Frankfort, in the County of Franklin, in the State of Kentucky, brings this its bill against Abraham M. Hellman and Moritz Hellman, each of whom is a citizen of the State of Missouri and resident of the City of St. Louis, in the eastern division of the eastern district, State of Missouri, and thereupon your orator complains and says:

First. That it is, and for many years last past has been, a corporation, created, organized and doing business under and by virtue of the laws of the State of Kentucky, and is engaged in the business of distilling and manufacturing whiskey at its distillery on Glenn's Creek in the County of Woodford, in the State of Kentucky.

That the defendants are co-partners doing business under the firm name of A. M. Hellman & Company in the City of St. Louis, Missouri, and are both citizens of the State of Missouri, and residents of the eastern division of the eastern judicial district of Missouri.

Your orator saith that, during the year A. D. 1835, one 920 James Crow engaged in business as a distiller of whiskey on Glenn's Creek in the County of Woodford, and State of Kentucky. and did then and there invent, devise and formulate a certain novel process for the production and distillation of whiskey, which process he did not patent, or seek to have patented, but which he preserved for his own use and benefit as a special process. That said James Crow did from and after said time continuously remain in the vicinity aforesaid and engaged in the continuous practice of his avocation as such distiller until his death in the year A. D. 1855, and that during all of said time, from and after the year A. D. 1835, the whiskey produced by the said process was known and styled as "Old Crow" whiskey. That the words "Old Crow" were first adopted and used as a trademark to designate the whiskey made by said process, in the year A. D. 1835. That from the death of the said James Crow in 1855 as aforesaid and until about the first day of January, A. D. 1867, the said "Old Crow" whiskey was continuously upon the market; that on or about the first day of January, A. D. 1867, a certain co-partnership known and styled Gaines, Berry & Co., predecessors of your orator, leased the distillery wherein said James Crow had in his lifetime produced and distilled said "Old Crow" whiskey and did then and there continue the distillation and production of whiskey by the said process.

And your orator avers that during the year  $\Lambda$ . D. 1870, you- orator's predecessor, W. A. Gaines & Co., a co-partnership acquired from the said Gaines, Berry & Co., all of its property and assets and that the said process was thereafter used in the distillation of whiskey on Glenn's Creek by said W. A. Gaines & Co. until the incorporation of your order, and so has been used in said locality by your orator con-

tinuously since the incorporation of your orator.

921 And in this behalf your orator states that from and after the time when said process was first devised and put into use by said James Crow in A. D. 1835, as aforesaid, down to the present time, the words "Old Crow" have always applied continuously to the whiskey produced by the said process and to no other whiskey whatsoever; and that the distillation and production of said whiskey

made by said process has always been made on Glenn's Creek, in Woodford County, Kentucky, and at no other place in the United States, or anywhere else in the world.

That the said words "Old Crow" have continuously, since the year A. D. 1835, and down to the present time, indicated to the public and particularly to consumers of and dealers in whiskey throughout the world, the whiskey made by the said process, devised and invented by the said James Crow, and no other whiskey whatsoever.

That the said words "Old Crow" have continuously since the year A. D. 1835 and down to the present time, indicated to the public and particularly to consumers of and dealers in whiskey throughout the world, the whiskey to which it was and is applied on Glenn's Creek, in Woodford County, Kentucky, and nowhere else in the world.

Your orator further states that the whiskey to which the words "Old Crow" are applied is sold at a higher price than any other whiskey of equal age produced in the United States, by reason of its uniform excellence, and the skill and care devoted by your orator to the selection of the materials used and to the process of its distillation, together with the natural advantages of the locality in which your orator's said distillery is situated. That your orator and its predecessors have expended large sums of money in and about advertising the said whiskey throughout the United States.

Your orator further avers that its rights to be subjected to none but fair and lawful competition is of the value of five hundred thousand (\$500,000) dollars and upwards; that the good will of your orator's business is of the value of five hundred thousand

(\$500,000) dollars and upwards.

Your orator further states that well knowing the rights of your orator, and for the purpose and with the intent of passing off upon the public whiskey not produced by your orator, and not produced in the locality aforesaid, the defendant, above named, has heretofore and since the first day of January, A. D. 1903, in violation of your orator's trade rights, and in invasion of your orator's good will and for the purpose and intent of establishing and maintaining an unfair, fraudulent and unlawful competition with your orator made or caused to be made and sold or caused to be sold in the City of St. Louis and in the eastern division of the eastern judicial district of Missouri, a certain blended or compounded alcoholic fluid not made under your orator's secret process, and that it has marked or labeled the same with the words "Old Crow" without the license and against the consent of your orator.

That by means of its said use of the words "Old Crow" the defendant has intended to and has succeeded in fraudulently passing off upon the public the alcoholic fluid made by it as and for the "Old Crow" whiskey, produced by your orator on Glenn's Creek, in Woodford County, in the State of Kentucky, and that the public has been so actually deceived and misled by the defendant into buying and consuming the defendant's alcoholic fluid under the false belief that it was purchasing and consuming the said whiskey of your orator and under the false belief that it was whiskey produced on Glenn's Creek, Woodford County, in the State of Kentucky.

That by reason of its unlawful and unfair competition with your orator, the defendant has diverted and appropriated to itself much profitable trade which belongs to your orator, and that the defendant has thereby caused the diversion from your orator to the degradant, of large gains and profits, the exact amount whereof

is unknown and for the ascertainment whereof an accounting

will be necessary.

That the alcoholic fluid so sold by the defendant is and has been inferior and unwholesome in character, and purchasers thereof having used the same in the belief that they were consuming the product of your orator have been *laid* thereby to falsely believe that the quality of your orator's product was deteriorating in value.

That your orator is without adequate remedy at law in the prem-

ises.

To the end, therefore, that your orator may obtain relief in the premises in this Honorable Court, in which alone it can obtain relief,

your orator humbly prays:

First. That the said Abraham M. Hellman and Moritz Hellman may be made defendants to this bill, and compelled to answer each and every allegation herein contained (but not under oath, an answer under oath being hereby expressly waived), as fully as if directly

interrogated as to each and every of the said allegations.

Second. That the said Abraham M. Hellman and Moritz Hellman may be compelled to render before a master of this Court, a full, true, complete and perfect account of all profits diverted from your orator, or made by its unlawful use of the words "Old Crow" in connection with whiskey not produced by your orator and not made by the secret process of the late James Crow, or the sale of whiskey in connection with the words "Old Crow" have been by it unlawfully used and may be decreed to pay the full amount of such profits.

Third. That the said Abraham M. Hellman and Moritz Hellman, their agents, servants, employees, and each of them be perpetually and forever enjoined and restrained from making, keeping on hand for sale, advertising for sale, or selling, any whiskey under the name

"Old Crow" which has not been produced by your orator at 924 its distillery in Woodford County, Kentucky, and from maintaining a fraudulent and unfair competition with your orator by falsely representing any whiskey not produced by your orator, to be the "Old Crow" whiskey of your orator.

Fourth and finally, to that end that equity may be done between the parties hereto and that the relief herein expressly prayed for and all other and proper equitable relief in the premises may be afforded your orator, may it please your honors such relief fully to grant and to award against the said Abraham M. Hellman and Moritz Hellman a writ of subpæna ad respondendum of the United States of America, issuing out of and under the seal of this Honorable Court, commanding the said Abraham M. Hellman and Moritz Hellman on a certain day therein to be named, and under a certain penalty, to be and appear in this Honorable Court, then and there to answer all and singular the premises, and to stand to, perform and abide such further order, direction and decree as may be made against them.

And your orator in duty bound will ever pray.

JAMES L. HOPKINS, Solicitor for Complainant.

JOHN C. HIGDON AND EDWARD E. LONGAN, Of Counsel.

A true copy.
Attest:

JAMES R. GAY, Clerk.

The petition filed by complainant as plaintiff in the Circuit Court of the City of St. Louis, offered in evidence of Defendants' Exhibit AB. No. 1, at the close of defendants' oral evidence, is as follows:

925

(Defendants' Exhibit A B No. 1.)

## A. E. M.

In the Circuit Court of the City of St. Louis, State of Missouri, to the December Term, 1904.

W. A. Gaines & Co., a Corporation, Plaintiff,

VS.

ABRAHAM M. HELLMAN and Moritz Hellman (Co-partners as A. M. Hellman & Co.), Defendants.

#### Petition.

Plaintiff states that it is and for many years last past has been a corporation created, organized, existing and doing business under and by virtue of the laws of the State of Kentucky, and engaged in the business of distilling whiskies at distilleries owned and operated by it in said State.

That at the time of the commission of the acts of infringement hereinafter recited, the defendants, Abraham M. Heliman and Moritz Hellman, were and they now are co-partners engaged in business at the City of St. Louis, and State of Missouri, under the firm name

and style of A. M. Hellman & Co.

That the plaintiff is the sole and rightful owner of the certain trademark for whiskey consisting of the words "Old Crow" and that the said words "Old Crow" constitute a valid and subsisting trademark of whiskey, and as such trademark have been continuously applied to whiskey by this plaintiff and its predecessors in business since the year A. D. 1835.

That the whiskey to which said trademark has been applied by this plaintiff and its predecessors, during the period named, has been extensively advertised throughout the United States, and

926 that upwards of two hundred and fifty thousand (\$250,000) dollars has been so expended by this plaintiff in such adver-

tising; that the said whiskey has acquired and now commands a large sale throughout the United States.

That the said trademark consisting of the words "Old Crow" has become and now is an integral part of the good will of the plaintiff.

That the exclusive right and title of the plaintiff in and to the said trademark has been acquiesced in by the producers and con-

sumers of whiskey throughout the world.

That well knowing the premises, the defendants above named without the knowledge and against the will and without the consent of the plaintiff, have, since the first day of January, 1904, on divers days and times, in fraud and in violation of the plaintiff's rights in and to its said trademark, and in invasion of the plaintiff's good will, have made or caused to be made, and sold or caused to be sold, in the City of St. Louis, and State of Missouri, a certain spirituous or alcoholic fluid, not the product of or distilled by this plaintiff, and that they have marked or branded the same with the words "Old Crow."

That the said words "Old Crow" have never been lawfully applied to any whiskey but that produced by the plaintiff and its predecessors, and distilled by them at their distilleries in the County of

Woodford, and State of Kentucky.

That the whiskey so dealt in by the defendants and marked or branded with the words "Old Crow" was so marked or branded for the purpose and with the intent to deceive and mislead the public and consumers of whiskey to purchase the defendants' whiskey in the belief that it was the whiskey distilled by the plaintiff, and that the public and consumers of whiskey have by the said acts of the defendants been led into purchasing the defendants' whiskey under the false belief that it was the whiskey of the plaintiff and that by means of the said fraud and imposition upon the public, the

defendants have sold very large quantities of their whiskey, so falsely marked and branded, to the plaintiff's damage in the sum of ten thousand (\$10,000.00) dollars, for which sum, together with its costs herein expended, plaintiff prays judgment.

(Signed)

JAMES L. HOPKINS, Attorney for Plaintiff.

A true copy.

Attest:

[SEAL.] WILLIAM HAUSCHUTE, Clerk.

(Defendants' Exhibit A B No. 2.)

Internal Revenue Service, 7th District of Kentucky, Collector's Office,

LEXINGTON, Ky., December 8, 1906.

Mr. Arthur N. Sager, Circuit Attorney, St. Louis:

I hereby certify that public Record 10 kept on file in my office shows J. P. Williams, of Frankfort, Kentucky, to have paid special

tax as Rectifier and Wholesale Liquor Dealer, for the periods hereinafter mentioned, as follows:

Name.	Business.	Place.	From what time.	Amt. of tax.		ate of ment, o	Serial Number of Stamp
J. P. Williams	Rect. of	Frankfort, Ky.	July 1, 1897	\$200	July	1, 1897	362
J. P. Williams	W. L. D.	44	July 1, 1897	\$100	July	1, 1897	2377
J. P. Williams	Rect. of more	44	July 1, 1898	\$200	July	1, 1898	461
J. P. Williams	W. L. D.	44	July 1, 1898	\$100	July	1, 1898	3045
J. P. Williams	Rect. Less	44	July 1, 1899	\$100	July	5, 1899	512
J. P. Williams	W. L. D.	66	July 1, 1899	\$100	July	5, 1899	1443
J. P. Williams	Rect. Less	44	July 1, 1900	\$100	July	2, 1900	741
J. P. Williams	W. L. D.	4.6	July 1, 1900	\$100	July	2, 1900	2279
J. P. Williams	Rect. Less	**	July 1, 1901	\$100	July	3, 1901	1771
J. P. Williams	W. L. D.	4.6	July 1, 1901	\$100	July	3, 1901	5032
J. P. Williams	Rect. Less	45	July 1, 1902	\$100	July	2, 1902	1081
J. P. Williams	W. L. D.	69	July 1, 1902	\$100	July	2,1902	3461
J. P. Williams	Rect. Less	44	July 1, 1903	\$100	July	1, 1903	681
J. P. Williams	W. L. D.	44	July 1, 1903	\$100	July	1, 1903	2452
J. P. Williams	Rect. of more	44	July 1, 1904	\$200	July	6, 1904	461
J. P. Williams	W. L. D.	66	July 1, 1904	\$100	July	6,1904	2347
J. P. Williams	Rect. Less	44	July 1, 1905	\$100	July	12, 1905	1012
J. P. Williams	W. L. D.	64	July 1, 1905	\$100	July	12, 1905	3734
J. P. Williams	Rect. Less	**	July 1, 1906	\$100	July	3, 1906	1601
*J. P. Williams	Rect. of more	**	July 1, 1902	\$200	July	3, 1903	461

928 \*The last special tax stamp, No. 461 issued on July 3, 1903, for Rectifier of More is for increased liability for the special tax year ending June 30, 1903.

Respectfully,

SAM J. ROBERTS, Collector 7th District Kentucky.

(Defendants' Exhibit A B No. 3.)

A. E. M.

United States of America, Department of the Interior, Patent Office.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the Records of this office of the Trade-Mark Registered by W. A. Gaines & Co., April 11, 1882, Number 9,278 for whiskey.

In Testimony Whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington this eighteenth day of November in the year of our Lord one thousand nine hundred and four of the Independence of the United States of America the one hundred and twenty-ninth.

SEAL.

F. I. ALLEN, Commissioner of Patents.

No. 9278.

THE UNITED STATES OF AMERICA:

To all whom it may concern:

This is to Certify That by the records of the United States Patent Office it appears that W. A. Gaines & Co. of Frankfort, Kentucky, did, on the 9th day of January, 1882, deposit in said Office for Registration fac-similes of a certain Trade-Mark for Whiskey and the date of the receipt thereof was duly noted and recorded; that on the 9th day of January, 1882, they deposited therewith a statement, and a written declaration under oath of George H. Allen, a member of said firm copies of all of which are hereto annexed; and the said firm having made the payment of a fee of Twenty Five Dollars and complied with the regulations in such cases prescribed by the Commissioner of Patents, and in all other respects complied with an Act of Congress approved March 3, 1881, entitled "An Act to authorize the Registration of Trade-Marks and protect the

929 & 930 same," the said fac-similes, statement, and declaration were duly recorded and the said Trade-Mark has been duly registered in the said Patent Office this 11 day of April, one thousand eight hundred and eighty-two, and protection therefor will remain in force for thirty years from said date unless terminated in

accordance with Section 5 of said Act.

In Testimony Whereof the seal of the Department of the Interior is hereto affixed this eleventh day of April, 1882, and of the Independence of the United States the one hundred and sixth.

Given under my hand, at Washington, D. C.

SEAL.

E. M. MARBLE, Commissioner of Patents. (Here follow trade mark drawing and specification No. 9278, marked pages 931 and 932.)



# UNITED STATES PATENT OFFICE.

W. A. GAINES & CO., OF FRANKFORT, KENTUCKY.

### TRADE-MARK FOR WHISKY.

STATEMENT and DECLARATION of Trade-Mark No. 9,278, registered April 11, 1882.

Application filed January 9, 1882.

#### STATEMENT.

To all whom it may concern:

Be it known that we, W. A. GAINES & Co., of Frankfort, in the county of Franklin and State of Kentucky, and doing business in 5 said city and State, have adopted for our use a Trade-Mark for Whisky, of which the following is a full, clear, and exact specification.

Our trade-mark consists of the words "Old Crow Distillery Copper Distilled Whisky, W. 10 A. Gaines, Distiller, Woodford Co., Ky." These have been arranged as shown in the accompanying fac-simile.

The trade-mark is to be applied as a brand to barrel-heads, and also to be used on show-

cards, cards, circulars, bottle-labels, barrel- 15 heads, &c. It is printed in black or other suitable color.

This trade-mark we have used continuously in our business since January, 1870.

The class of merchandise and the particu- 20 lar description of goods to which our trademark is appropriated is that of whiskies.

The essential and distinguishing part of this trade mark is the words "OLD Crow." W. A. GAINES & CO.

Witnesses:

E. BRADLEY, Jr., Wm. Pollock.

#### DECLARATION.

State of New York, county of New York, ss:
GEORGE H. ALLEN, being duly sworn, deposes and says that he is a member of the firm of W. A. GAINES & COMPANY, the applicants named in the foregoing statement; that he verily believes that the foregoing statement is true; that the said firm has at this time a right to the use of the trade-mark therein described; that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that it is

used by his said firm in commerce with foreign nations, and particularly with England, China, the West Indies, and Germany, and 15 that the description and fac-simile presented for record truly represent the trade-mark sought to be registered.

GEORGE H. ALLEN.

Sworn and subscribed before me this 5th day of January, 1882.

[L. S.] DAVID B. BARNUM, Notary Public, (259,) New York Co.

	]	Defe	ndants Exhibit A. Rheiusti Cincinnati, July, 1866		Dep	si		49
1026		539 266	B. G. Powell To Merchandise 25 Bbls. New Bowen in Bond		1199	10	1199	10
251/2				00.25				
			5 Bbls. 3 year Bourbon	92.25				
				40.00				
			Drayage	4.20				
		78	S. Kaufman & Co.		393	33		
		266	To Merchandise				393	3:
			4 Bbls. Whiskey 161 1/2 A	3.00				
			200/2 0	74.63				
			Add 5%	18.70				
		536	Smith & Plows		447	43		
		256	To Merchandise				447	43
			5 Bbl. Duncan Bourbon					
			/-	46.63				
			Drayage 27	80				
		367	Baer & Jacobs		52	35		
		266	To Merchandise				52	3
			1 Hlf. Bbl. 85 Whiskey 22 @ 2.25	50.35				
			1 Empty Ifon ba. ½ Bbl.	2.00				
		395	Forcheimer Bros.		1748	76		
		266	To Merchandise				1748	7
			10 Hlf. Bbl. Crow 2101/2 2.31 4	96.26				
			5 Bbls. Do 211½ 2.31 4	88.57				
				92.18				
				10.00 60.00				
				75.00				
			27	.0.00				
		390	C. R. Clarke		78	02		-
		266	To Merchandise				78	0
				86.68				
200			10% Off	8.66				~ (
932			Cincinnati, Aug., 1866.					58
		266	J. C. Brinkmeyer		7725	83		
	т	399	To Merchandise				7725	8:
			40 Bbls. New 16/59° Bowen 61 232 1691 @ 2.55 43 421	12.05				
	$\mathbf{V}$		10 Bbls. " Do - 403½ " 2.60 10	49.10				
			4251/2					
			10 "Old Do 38 3871/2 @ 4.00 15					
				99.60 $93.50$				
				51.38				
				60.00				
				10.20				
	64.	-27						

13					
Stall & Meyer		2	40		
To Merchandise 6 Empty Bitters Boxes 40	2.40			2	40
S. Kaufman		2862	83		
To sacremente	040 55			2862	83
10 Bbl. V. A. Brown 419 @ 2.25 10 " Crow 4271/2 2.25					
10 Crow 42/ 1/2 2.23	961.88				
	470.25				
3 " Hall Gin 129 2.25 2 " Brandy 86 2.25	290.25				
Dray	193.50				
S. Kaufman & Co. To Merchandise		408	70	408	70
4 Bbls. Whiskey 173 2.25	389.25			400	10
Add 5%	19.45				
14	10.40				
J. & A. Freiberg		538	83		
To Merchandise				538	83
1 Bbl. Brandy 36 @ 2.25	81.00				
1 " Apple Do. 411/2 " 2.40	99.60				
1 " Apple Do. 41½ " 2.40 2 " Catawba 90½ " 1.75	161.38				
THE PERSON OF TH					
83 Gallons 2.25	186.75			•	
Add 5%	9.30				
Dray	.80				
Cincinnati, Aug., 1860	6.				59
Henry Reese & Co.		175	00		
To Merchandise		110	00	175	00
1 Bbl. Brandy 411/2 @ 2.20	91.30			ATO	041
1 " Krimmel 42 @ 2.00	84.00				
Drayage	.60				
Nil 1 P	-				
Niles & Reynolds		9	(10)		
To Merchandise 2 Boxes Claret 4.50	9.00			9	00
14	2.00				
E. N. Kendall		612	50		
To Merchandise				612	50
	611.90				
Drayage	.60				
14					
Merchandise		6094	77		
To Foote Nash & Co.				788	02
To Bill of 13 & 14th					
H. Groten Kemper & Co. 50 Bbls. Whiskey 30 d's				5306	75
Fechheimer & Werkum		1905	25		
To Merchandise				1905	25
10 Bbls. Crow @ 2.25	949.50				
10 " Rye 423 @ 2.25	951.75				
Drayage	4.00			-	~
AHN ADMR. VS. W. A. GAYNE	s & C	0.		9;	35
15					
A. J. Dunning		913	30		
To Merchandise		- 415		913	30
	609.00			- 40	
15 Baskets Champaign pts 12.50					
10 Boxes St. Marceaux pts. 11.50					

		*					
	84 266	Young & Holmes To Merchandise		1035	13	1035	13
		10 Bbls. Whiskey 414½ @ 2.25 2 " Muscat 82 1.25	932.63 $102.50$			1000	
934		Cincinnati, Aug., 186	6.				69
	546 266	L. Barber & Son To Merchandise 5 Bbls. Crow Bourbon		460	28	460	28
		202½ gallons 2.27 Drayage	459.68 .60				
	538	Foster & Walsh		688	40		
	266	To Merchandise C. 1/8 Casks Brandy 136 @ 2.50 2 Bbls. Do. 86 @ 2.45	210.70			688	40
		1 " 3 yr. Bourbon 42 @ 3,25 Drayage 31	136.50 1.20				
	547 266	Flachs & Montgomery To Merchandise		277	45	277	45
		£ Bbis. Duncan 122½ 2.26 Drayage -31	.60				
	392	E. M. Pattison & Co. To Merchandise		168	95	168	95
		1 Bbl. N. E. Rum 40½ 40 1½ 54½ @ 3.10	168,95				
	165	Fechheimer & Workum To Merchandise		373	18	373	18
		2 Bbls. Bourbon 82 @ 2.25 2 " Rye 83½ 2.25 Drayage	184.50 187.88 .80				
	84 266	Young & Holmes		199	76	199	76
	200	To Merchandise 2 Bbls. Whisky 88 gallons 2.27	199.76			100	
	160	Buchanan & Co. To Merchandise		137	85	15.	85
		1 Hlf. Bbl. Ginger C. 22½ gallona 1.20 7 Gross Hock Bottles 16	25.00 112.00				
935		Cincinnati, Aug., 186					70
	397 267	Thomas Blighe To Merchandise 25 Bbl. Bowen in Bond		4299	51	4299	51
		10111/2-38-973 calls. 55	535.15				
	60 d's	5 Bbls. Brown's tye 205½ 2.32 5 "Shafer Do. 205 2.32 6 "Crow Bourbon 200½ 2.32	475.60				
		5 " Duncan Do 203 2.32 2 " Keller Do 83½ 3.00 1 " Cast Valletto Sherry 37 2.8	472.96 250.50 50 92.50	4			
		1 Cask Double Palm Tree Gin 13 5.25	609.00				
	4 m's	1 " Claret 60 2½" Do 37.50	60.00 $75.00$				

		,					
	60 d's	2 Bbls. Shawhan 82 3.25 266.50 2 " 63 Bowen 86½ 3.75 324.38					
	90 d's	1 " 61 Do 42 4.50 189.00					
		227 Drayage 9.00					
	85	Stall & Meyer	683	96	220	0.0	
	266	To Merchandise 30 Bbls. Bowen in Bond			683	96	
		1258-681/2=11891/2 @ 571/2c 683.96					
	266	Merchandise To Sundries 148.84					
	146 148	" J. T. Morren & Co. " Collin & Hodgson			110	.90	
	30 380	" W. & B. Loder				00	
	266	Merchandise 31	1868	60			
	258	To Wine House			1868	60	
		Wine sold in Aug. 66 1868.60					
	82	A. Rheinstrom	40	00			
	228	To Int. & Disc Int. on \$1600 from July			40	00	
		18 for 3 months at 10% . 40.00					
936		Cincinnati, Sept., 1866.				79	
	530	. Wm. Kyle	129	84			
	000	To Merchandise		01	129	84	
		1 Bbl. Whiskey 42 @ 2.22 93.24 1 Keg 1.25 Bourbon 10 3.50 36.25					
		232 Drayage .35					
	160	Buchanan & Co.	60	38			
	267		00	00	60	38	
		1 Cask Sherry 34½ 1.75 60.38					
	479	F. Greenwald	160	60			
	267	To Merchandise 1 Bbi. Bourbon 40 @ 4.00 160.00			160	60	
		Drayage .60					
	84	Young & Holmes	396	72			
	260	To Merchandise			396	72	
		4 Bbls. Whiskey 171 @ 2.32 396.72					
	546	Sondheimer & Weiskopt	885	43			
	267	To Merchandise 8 Bbls. Bowen 331 @ 2.67½ 885.43			885	43	
	244 267	King & Daly To Merchandise	1	50	1	50	
		1 Gallon Catawba Wine 1.50				00	
	275	F. Sarran & Co.	91	88			
	267	To Merchandise		00		88	
		1 Bbl. Whiskey 44 @ 2.32 102.08 B 15 10% off 10.20					
		17					
	165 267	Fechheimer & Workum To Merchandise	2713	79	2713	70	
	201	10 Bbls. Crow 421 @ 2.32 978.88			2113	19	
		3 1ty 200 72 (c) 2.02 910.10					
		10 " New Bowen 409½ @ 2.70 1245.65 Ins. 2200 @ 35c 7.76					
		Drayage 4.80					

				8	)37
	Cincinnati, Oct., 1866.				92
411		2145	64		
267	To Merchandise		-	2145	64
	100 Bbls. Taylors Bourbon in Bond 4102 Gallons 57c 2338,14				
	Less Freight @ 50c 192.50				
007	Washing No. 7 Section	000	=0		
$\begin{array}{c} 267 \\ 252 \end{array}$	Merchandise To Sundries Ly. Distillery	332	70	320	00
	100 Empty Bbls. 290.50				00
550	100 Bus. Oats 30.50			10	70
000	Rikoff & Bro. ud. B. W. of Oct. 3.00			12	70
	B. B. 127 104 12.70				
299	S. H. & E. Block	2675	99		
267	To Merchandise	2013	00	2675	88
	5 Rhla Crows 216 @ 233 503 28				
	5 " Schafers 214½ " 2.33 499.79 5 " Browns 214 " 2.33 498.62				
	8 " Bowen 328½ " 2.77½ 911.59				
	5 " Schafers 214½" 2.33 499.79 5 " Browns 214 " 2.33 498.62 8 " Bowen 328½ " 2.77½ 911.59 2 " Keller 84½ " 3.00 253.50 Ins. on \$2200 @ ½% 5.50				
	Ins. on \$2200 @ ¼% 5.50 Drayage 3.60				
	10				
28	J. A. Freiberg	439	24		
267	To Merchandise 1 Bbl. Ginger Brandy 40½ @ 1.60 64.80			439	24
	1 Roy Ristora Pottles 14.50				
	4 Bbls. Whiskey 171½ 2.33 399.60				
	10% off 39.96 359.64 Drayage .80				
	10				
275 267	F. Sarran & Co. To Merchandise	436	66	490	00
.01	4 Bbls. Whiskey 168½ A. 6			436	00
	178½ gallons @ 2.33 415.91				
	Add 5% 20.75				
60	Buchanan & Co.	52	20		
	To Merchandise			52	20
	Cincinnati, Oct., 1866.				97
527	S. F. Metcalfe	252	40		
67	To Merchandise	202	40	252	40
	1 Hlf. Bbl. Gin 24 @ 2.60 62.40				
	1 Do Fr. Brandy 24 @ 2.60 62.40 1 Do Apple Do 24½ @ 2.60 63.70				
	1 Do Peach Do 24 @ 2.60 62.46				
	Drayage 1.50				
84	Young & Holmes	387	95		
267	To Merchandise	001	00	387	95
	4 Bbls. Whiskey 166½ 2.33 387.95				
44	King & Dayle	47	85		
67	To Merchandise		30	47	85
	1 Rbl Muscat 431/. @ 110 47 95				

19				
405 Walker & Wire 267 To Merchandise	194	10		10
1 Bbl. Rye Whiskey 43 @ 4.50 193.50 Drayage 19 .60				
160 Buchanan & Co. 267 To Merchandise	45	00	45	00
2 Basketh Champagne qts. 10.50 21.00 2 Do qts. 12.00 24.00				
410 Baer & Jacobs 267 To Merchandise	1	00	1	00
1 Empty Hlf. Bbl. 1.00			•	00
165 Fechheimer & Workum 267 To Merchandise	4905	77	4905	77
25 Bbls. Crow 1040½				
Drayage 9.60				
Cincinnati, Nov., 1866.			1	05
228 " Int. & Disc	3289	85	121	80
80 "S. Kaufman & Co.			9124	
1 Note dated No. 60 dys 1 " Nov. 10 90 3359.02				
335 J. Seifirth & Co.			2043	96
1 Dated Oct. 8, 90 d's  J. & A. Freiberg Co. 1 dated 2nd 6 m's			2000	00
394 Forcheimer Bros.	2482	54		
10 Bbls. Crows 410½ @ 2.40 985.20 10 Hlf. Bbls. <sup>1000</sup> Crows 217@2.40 530.80 10 " Pine Apple 421@2.29 964.09 Drayage 2.45			2482	54
85 Stall & Meyer	28	70		
267 To Merchandise 1 Keg 1.20 Punch Ess. 10 @ 2.75 28.70	20	10	28	70
407 R. & A. Carson	893	55		
267 To Merchandise 10 Bbls. Whiskey 4071/2 2.18 888.35			893	55
1-15 J. B. Ins. on \$900 @ 1/2% 4.50				
Drayage .70				
148 Cellen & Hodgson 267 To Metchandise	11.5	25	11	0
1 Basket Champagne qts. 12.50 10% off 1.25			41	
R. C. Lyons			·	
To Merchandise  4 Bbls. Malaga Not Del.  Ins. on. \$				
Dravage				

2 Bbls.Bowen ** 1/3 4 ½ 79	87 :	
Hlf. Bbl.   100 Cherry   24 @ 1.75   43.00   6 " 2.25   14.60   1 Case Cabinet pts.   16   17   33.00   - 3.30   29.70   - 3.3		
536 Troost & Co.  To Merchandise  2 Bbls.Bowen ** 1/3 4 1/2 79	361 (	62
2 Bbls.Bowen **1/* 4 ½ 79	361	62
536 Smith & Plows 494 54		
268 To Merchandise 5 Bbls. Duncan 211 @ 2.34 493.74 Drayage .80	194	54
942 Cincinnati, July, 1868.	35	57
445 Bohde & Dasher 1428 85		
To Merchandise 14	128	85
10 " Brand Son   973@1.45 1410.85 Extra for Iron Hoops 60c a Bbl. 15.00 120 Drayage 3.00		
943 Cincinnati, Aug., 1868.	35	38
24 F. Sarran & Co. 232 05 43 To Merchandise 4 Bbls. Whiskey 170 @ 1.30 221.00 5 Add 5% 11.05	232	08
34 Jacob Stall & Co. 21 00		
43 To Merchandise 3 Empty ½ Strick 7.00 21,00	21	00
32 Fechheimer & Workum 1337 31 43 To Merchandise 1: 12 Bbls. Crows 511 <sup>1</sup> @ 1.25 639.38	337	31
13 " Rye 554 <sup>2</sup> @ 1.25 693.13 Drayage 4.80		
Int. on \$2641.48 to date as per %	221	52
444 H. Wolff & Co. 2444 55		
m 11 1	144	55
Branded 10 Bbls. Dugan Rye 431 @ 1.40 608.30		

	5				
	34 Geo. C. Ware 43 To Merchandise 100 Empty Bbls. 1.00 100.00	100	00	100	00
	352 Buchanan & Co.  To Merchandise 20 Bbls. Smith Ky. Bourbon 67 <sup>2</sup> 851 37 bl. 769 gallons 1.80 1384.20	1383	70	1383	70
944	Off for broken stave .50 Cincinnati, Aug., 1868.			3	63
	649 A. Danner  43 To Merchandise 4 Bbls. & Schafer Rye 171@1.50 256.50 C.O.D.'s 1. 20 Drayage .50	257	00	257	00
	450 Louis Stern  To Merchandise 10 Bbls. % Schafer Rye 417@1.55 646.35 130 Drayage 1.00	647	35	647	35
Dodsworth	469 John Siefirth & Co.  43 To Merchandise 20 Bbls. D. O. Bourbon 8122 4% A 845 @ 1.60 1352.00	1354	50	1354	50
	60 d's Drayage 2.50  13  Fechheimer & Workum  To Expense %  Storage % and Crendd for Bal.ce of 50 Bbls. Bowen on Storage (Shipped)	21	10	21	10
Н. G.	42 Chas. Frank & Co. 43 To Merchandise 10 Bbls. Bourbon 407½ 3% A 419½ 1.50 629.25	629	85	629	85
	32 Fechheimer & Workum  43 To Merchandise  25 Bbls. Crows 1% 1060@1.53 1621.80  25 Schafer Rye 1% 1060 @  1.53 1621.80  60 cents per Bbl. for Iron Hoops on	3283	20	3283	20
	Do 30.00 9.60 9.60  Waire & Franklin To Merchandise 150 Empty W. Bbls. 85 127.50	127	.50	127	50

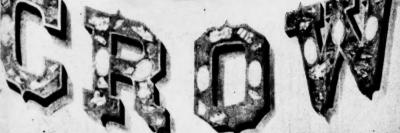
Defendant's Exhibit No. 6

(Here follow Defendants' Exhibits 6, Manning A, Manning B, Moritz Hellman A, and Moritz Hellman B, marked pages 942 to 946, inclusive.)

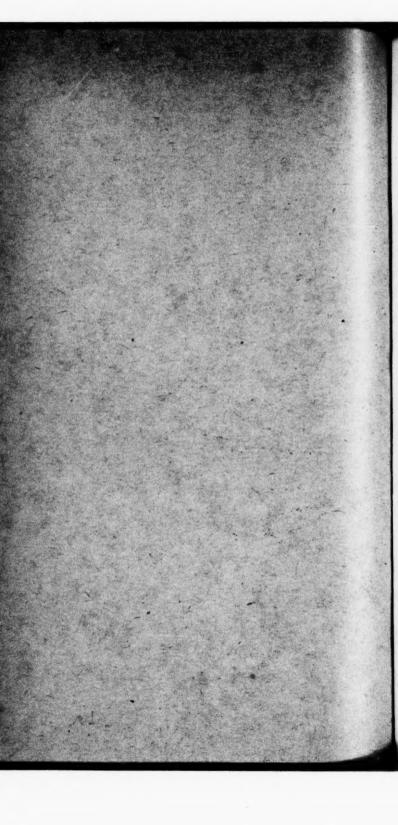
CELEBRATED

Defendant's No. 6.





BOURBON.
1. & L. M. HELLMAN,
STILOUIS.



1871 Decr.	31	To A. M. Hellman			1871 Jany.		By	Bal. fr	om Lett	er	
"	46	Priv. Acet. " Balance	$\begin{array}{c} 1800 \\ 2802 \end{array}$	00 11					olio 32		
			4602	11						4602	1
Door	21	339 To A. M. Hellman			1872	-					
	"	Priv. Acet.	$\begin{array}{c} 1400 \\ 5301 \end{array}$		Jany. Decr.	1 31	Ву	Balance Profit	e & Loss	2802 3890	
			6701	91						6701	9
1873 Deer	31	494 То А. М. Hellman	-		1873						
seci.		Priv. Acct.						Balance		5301	
		" Balance	8649	-	Decr.	31	.,	Pront	k Loss	3347 8649	-
			8041	99						5049	-
874	_	-	-		1874						
Decr.		To Sundries 656 657		88	Jany.	1	By	Balance	е	6474	4
	••		2225		Decr.	31	44	Profit &	k Loss	656 683 3622	5.
		" Balance	8177	86	+ 5	31	4.6	46	66	3622	70
		1	0780	74						10780	7
875		-			1875	-					
		297	200 4	00 32	Jany.	1	Ву	Balance Cash	286 284	8177 49	
une	30	" Bal. to Ledger B. Folio 3	8026	46	May	3	4.6	46	306	3	2
			8230	78						8230	78
	_										
53	1	Defendant's Ex	hibit	N	0. 2.	U	rne	r Tes	timon	Υ.	
		St. Louis,	Mo.,	D	ecem	bei	r 3	1, 18	81.	2	12
1	L. 1	rest Dr. To Sundri M. Hellman on \$3	5,000.0	0 fe	or 6 M	08.			2642 70	1500	0
2	A. 1	M. Hellman " \$25 er Harris " 3	5,000.0	0 fe	or 6 M	08.				750	
		B. Hellman Due he					000	Note		300	
1	L. N	d. Hellman (Capt.	0/2 ) D	r. I.	M. Ho	llm	an	(per-			
		sonal %) ount personal Expe						, pes	2935 14	2935	1
2	A. 1	M. Hellman (Capt.	0/2)	Dr.	to A. ?	M.	Hel	lman			

48				
3 Mr. Harris (Capt. %) Dr. To M. H 22 Amount personal Expenses duri Jany. 2, 1882—		1435 (	1435	58
2 A. M. Hellman Dr. To L. M. He 1 Bonus for % share of his good w His prospective profit as per Br	rill in Business	9879 9	5000	00
31/81			4879	98
Shea & Brooks Dr. To Mdse.  Amt. goods turned over to them  Stock.	out of Drewery'	100 (	100	00
A. M. Hellman & Co. Dr. To Md Inventory of firm transferred to		31681 9	31681	21
Merchandise Dr. To B. P. Drew	are	66 (	00	
Amt. allowed him for stock good	s by J. W. Wrigh			00
Merchandise Dr. To Sundries		273 8	39	
J. Guggemnoos Keg Cognoc Re 22/81	eturned sent Sepi			60
C. C. Custer " "	" " " 22/8	1		25
Rasbach & Lambert Whiskey & Oct. 29/81	Gin Returned se	nt	227	04
000. 20/01			201	04
antity of Spirits received for rectif May 1, 1881. antity of Spirits Rectified since May		7181.88 119 W. G. G. 927 1/2 W.	64522.65	
for Janu	ary 1882.	P. G.		
ived for rectification Dumped fo	r rectification 2954 1/2 W. G. 70	Spirits Pkgs. 28 2660.23		G.
Removed after rectification	70	Pkgs. 28 2660.23		3.
ntity of Spirits received for rectific	ation since 65	3731/2 W.		.65
May 1, 1881. ntity of Spirits Rectified since Ma	ny 1, 1881. 78	P. G. 304 W. G. G.	69003.44	P.
Defendant's Exhibit No		l'estimo	ny.	32
	Brannin.			
870 7 31 To Cash 152 75 00 1	May 1 By Balar	ce Folio 9	20 122	61
e 30 " " 158 75 00	" 31 " Exper			33
	une 30 " Do			33
	July 30 " "	164		33
. 00 110 10 00 1	Aug. 31 " " Sept. 30 " "	170 176		33 33
31 110 00 00 0	Det. 31 " "	182		33
, 80 100 00 00	Nov. 30 " "	189		33
	Decr. 31 " "	196		33
789 25			789	25
				_

A. M. Hellman

949 Decr. 31	To Cash 193 202 95 Decr. 1 E	y Bal. from	Folio 9	E 190	2 0
" 31		Cash	193		0 00
	B. 1275 00 " 31 "	Expenses	196	15	00
	1502 95			150	2 95
955 D	efendant's Exhibit No. 7. U	rner Test	imon	y.	
	Saint Louis, March 1	8, 1863.			48
	R. P. Hall City.				
Paid	1 Bbl. Malaga		.41 7	0 28	73
18	Wm. Yates				
	Atchison				
	½ Bbl. 125 Gin 2 " Bourbon 49" each		23-110		55
	2 Dourbon 42 each		85 8		25
	2 " Nectar Whisky 42' each 1 1 " Brandy		85 4	_	28
	1/2 " 125 Sherry Wine		42° 116 23 100		75
	3 Box Claret		550		25 50
	1/2 Bbl. 121 Port		23 8		80
	1 Keg 1 Peppermint Gal. 5		5 150		50
	2 " 1 Stougton 5		5 150		50
	2 Faucits No charge				
	Permit 40 Dray 60			1	00
				260	38
18	Robt. Forbriger				-
	Atchison				
	1 Bbl. Bourbon P. Crow	:	38° 85		72
	6 Box Lemon Syrup 1 Keg 1 Bourbon best for Zachar		350		00
	Permit 40 Drayage 30		5 300	16	00
	Torinio to Drayage 30				70
	H. Diesbach			70	42
	Atchison				
	6 Bbls. Nectar Whiskey 41° 43				
	41' 41 41' 42'	25	1 40	100	40
	Permit 40 Drayage 30	44	1 40	100	70
		4		101	10
956 De	fendant's Exhibit No. 8. Ur	ner Tosti	mony	101	10
	St. Louis, December 26	, 1866.	mony		43
	H. K. Farmer				
	Amts. Brt. forward 1 Box 25 Race Ginger 25			1583	-
	4 Bags Prime Coffee 659	.30			75
	3 Doz. Blueing	.28 .50		184	
	1 Caddy 30c Imp. Tea 6	1.50			50
	1 " G. J. Tobacco 20	.65		13	30
	1 " National Leaf Do. 16	1.40		22	
	1 Case Matches			8	
TO 4	1 Bble. Lead 25	.12*		3	
Entered	1M Waterproof Caps			1	
	1 Keg 40c Tecumseh Tobacco 10 ½ Bbl, 50c Mild Do 39	.30		3	40
	½ Bbl. 50c Mild Do 39 2 Doz. Castor Oil	.21		8	
	- See Constitution	1.50		3	00

50	1 Coil Rope 13	.25			3	2
	½ Doz. Seives	3.00				5
	Boxes & Drayage					0
	Ins. on \$2060 to Randolph				15	4
	27				1875	9
-	Capt. Steamer Princeps					
Ent.	1 Bbl. Magonlia 42 Dray	2 00			82	5
					82	5
-	M. M. Hellman Dr. To L. M. Hell	man				
Ent.	Amt. transferred by order of L. l				235	5
	-28-		*			
	O. Waldkirch Baton Rouge					
-	1 Bbl. Crows Bourbon 40 <sup>2</sup>	3.00			121	5
Ent.	1 " Arnolds Do 41"	3.00			124	
	Ins. on \$275 \$2,75				2	7
					248	7
	T. W. Moody Warrensburg					
	1/2 Bbl. 1.25 Bowen 201/2 31/2				73	6
Ent.	1/2 " 1.00 Nectar 211/4	2.25			49	
Ent.	1.00 Nectar 211/2 Dray.	2.25				3
Ent.	1/2 " 1.00 Nectar 211/2	2.25				6
_	½ " 1.00 Nectar 21½ Dray.		imo	nv	122	6
_	1/2 " 1.00 Nectar 211/2 Dray.  Dray.  efendant's Exhibit No. 9. Urne Saint Louis, December 28, O. Waldkirch	er Test	imo	ny	122	3 6
_	1/2 " 1.00 Nectar 211/2 Dray.  efendant's Exhibit No. 9. Urne Saint Louis, December 28, 0. Waldkirch Baton Rouge	er Test: 1866.			122	99
57 De	1/2 " 1.00 Nectar 211/2 Dray.  Dray.  Dray.  Pfendant's Exhibit No. 9. Urne Saint Louis, December 28, 0. Waldkirch Baton Rouge 1 Bbl. Crows' Bourbon	er Test: 1866.	3	00	122 	9 9
_	1/2 " 1.00 Nectar 211/2 Dray.  efendant's Exhibit No. 9. Urne Saint Louis, December 28, 0. Waldkirch Baton Rouge	er Test: 1866.	3		122	9 9
57 De	1/2 " 1.00 Nectar 211/2 Dray.  Dray.  Dray.  Defendant's Exhibit No. 9. Urne Saint Louis, December 28, O. Waldkirch Baton Rouge 1 Bbl. Crows' Bourbon 1 " Arnold's Do.	er Test: 1866.	3	00	122 . 2	9 5 5 7
57 De	1/2 " 1.00 Nectar 211/2 Dray.  Dray.  Dray.  Defendant's Exhibit No. 9. Urne Saint Louis, December 28, O. Waldkirch Baton Rouge 1 Bbl. Crows' Bourbon 1 " Arnold's Do.	er Test: 1866.	3	00	122	9 5 5 7
57 De	1/2 " 1.00 Nectar 211/2 Dray.  Dray.  Dray.  Dray.  Defendant's Exhibit No. 9. Urne Saint Louis, December 28, 0. Waldkirch Baton Rouge 1 Bbl. Crows' Bourbon 1 " Arnold's Do. Ins. on \$275 \$2.75  T. W. Moody Warrensburg	1866.	3 3	00 00	122 2 121 124 2 248	9 5 5 7 7
350	1.00 Nectar 21½ Dray.  Dray.  Dray.  Dray.  Dray.  Defendant's Exhibit No. 9. Urne Saint Louis, December 28, O. Waldkirch Baton Rouge 1 Bbl. Crows' Bourbon 1 " Arnold's Do. Ins. on \$275 \$2.75  T. W. Moody Warrensburg 1 Hf. Bbl. 1.28 Bowens Whisky	er Test: 1866.	3 3	00 00	122 2 121 124 2 248	9 557
57 De	1/2 " 1.00 Nectar 211/2 Dray.  Dray.  Dray.  Dray.  Defendant's Exhibit No. 9. Urne Saint Louis, December 28, 0. Waldkirch Baton Rouge 1 Bbl. Crows' Bourbon 1 " Arnold's Do. Ins. on \$275 \$2.75  T. W. Moody Warrensburg	1866.	3 3	00 00	122 2 121 124 2 248	9 557
350	1/2 " 1.00 Nectar 211/2 Dray.  efendant's Exhibit No. 9. Urne Saint Louis, December 28, O. Waldkirch Baton Rouge 1 Bbl. Crows' Bourbon 1 " Arnold's Do. Ins. on \$275 \$2.75  T. W. Moody Warrensburg 1 Hf. Bbl. 1.25 Bowens Whisky 1 " " 1.00 Nectar Do	er Test: 1866.	3 3	00 00	122 2 121 124 2 248	3 6 9 9 5 5 7 7 7 0 3 6 9
350	1/2 " 1.00 Nectar 211/2 Dray.  Dray.  Dray.  Defendant's Exhibit No. 9. Urne Saint Louis, December 28, 0. Waldkirch Baton Rouge Bourbon Marnold's Do. Marnold's Do. Marnold's Do. Marrensburg Marrensb	er Test: 1866.	3 3	00 00	122 2 121 124 2 248 73 49	3 6 9 9 5 5 7 7 7 0 3 6 9
350	1/2 " 1.00 Nectar 211/2 Dray.  Dray.  Dray.  Defendant's Exhibit No. 9. Urne Saint Louis, December 28, 0. Waldkirch Baton Rouge Bobl. Crows' Bourbon ' Arnold's Do. Ins. on \$275 \$2.75  T. W. Moody Warrensburg Hf. Bbl. 1.25 Bowens Whisky ' " 1.00 Nectar Do Drayage  Ruhmann City	er Test: 1866.	3 3 2	00 00 50 25	122 2 121 124 2 248 73 49	9 5577
350 350	1/2 " 1.00 Nectar 211/2 Dray.  Dray.  Dray.  Defendant's Exhibit No. 9. Urne Saint Louis, December 28, 0. Waldkirch Baton Rouge Bourbon Marnold's Do. Marnold's Do. Marnold's Do. Marrensburg Marrensb	er Test: 1866.	3 3 2	00 00	122 2 121 124 2 248 73 49	9 9 5 5 7 7 0 3 6
350 350	2 " 1.00 Nectar 21½ Dray.  Dray.  Dray.  Defendant's Exhibit No. 9. Urne Saint Louis, December 28, O. Waldkirch Baton Rouge 1 Bbl. Crows' Bourbon 1 " Arnold's Do. Ins. on \$275 \$2.75  T. W. Moody Warrensburg 1 Hf. Bbl. 1.25 Bowens Whisky 1 " 1.00 Nectar Do Drayage  Ruhmann City 1 Demijohn 50e Brandy ½ Gal.  H. K. Farmer	er Test: 1866.	3 3 2	00 00 50 25	122 2 121 124 2 248 73 49	9 5577
350 350	2 " 1.00 Nectar 21½ Dray.  2 pray.  3 pray.  4 pray.  4 pray.  5 pray.  5 pray.  5 pray.  6 p	er Test: 1866.	3 3 2	50 25	122 2 121 124 2 2 248 73 49 122 4	3 6 9 9 9 5 5 7 7 7 0 3 6 9 9 5 5
350 350	2 " 1.00 Nectar 21½ Dray.  Dray.  Dray.  Defendant's Exhibit No. 9. Urne Saint Louis, December 28, O. Waldkirch Baton Rouge 1 Bbl. Crows' Bourbon 1 " Arnold's Do. Ins. on \$275 \$2.75  T. W. Moody Warrensburg 1 Hf. Bbl. 1.25 Bowens Whisky 1 " 1.00 Nectar Do Drayage  Ruhmann City 1 Demijohn 50e Brandy ½ Gal.  H. K. Farmer	er Test: 1866.	3 3 2 8	60 00 50 25	122 2 121 124 2 248 73 49	3 6 9 9 5 5 7 7 7 0 3 6 6 9 5 5 5 6 0 0
350 Paid	2 " 1.00 Nectar 21½ Dray.  2 pray.  3 pray.  3 pray.  4 pray.  4 pray.  5 pray.  5 pray.  5 pray.  6 pray.  7 p	er Test: 1866.	3 3 3 2 8 8 21 43	50 25	122 2 121 124 2 2 248 73 49 122 4 4 45	3 6 9 9 9 5 5 7 7 7 7 0 0 3 6 9 9 5 5 7 7 7 7 7 7 7 7 7 7 7 7 7 7 7 7
350 Paid	2 " 1.00 Nectar 21½ Dray.  Dray.  Dray.  Dray.  Defendant's Exhibit No. 9. Urne Saint Louis, December 28, O. Waldkirch Baton Rouge 1 Bbl. Crows' Bourbon 1 " Arnold's Do. Ins. on \$275 \$2.75  T. W. Moody Warrensburg 1 Hf. Bbl. 1.25 Bowens Whisky 1 " 1.00 Nectar Do Drayage  Ruhmann City 1 Demijohn 50c Brandy ½ Gal.  H. K. Farmer Covington 2 Boxes Scotch Snuff 1 Bbl. Coal Oil	20° 21° 43	3 3 3 2 8 8 21 43	50 25 00	122 248 73 49 122 4 4 45 522	99 8857777

	29						
Paid	Geo. W. Bass Mineral Point	t					
	2 Bedsteads			6	00	12	00
351	Sundries Dr. To Morgan & Bills Receivable Note 60 d Merchandise Deduction on	ays for	Dec. 17			250 12	00
						262	00
958	Saint Louis, Ap T. W. Moody Warrensburg 1 Hf. Bbl. 1.25 Bowens B			3	50		73 50
				U	00	,,	00
	Brown Weber & Grahs	Cit	v				
	1 Case Ginger Brandy		*				00
Paid	1 " Catawba Do. 1 " Jamaica Rum						00
					-	00	
	20					23	00
	W. G. Wear & Co. Memphis	412 402					
	5 Bbls. Magnolia Whisky	42 42	(30) 2073	1	90	394	25
370	2 " Crows Bourbon	41 <sup>3</sup> 40	823 .	2	75	226	88
	5 Cases Congress Bitters Drayage	422		8	75		75 00
						665	88
Void	Wm. Meyer Sedalia						
	Brown Weber & Graha						
Paid		City					
-	1 Gal. Domestic Gin		(10)			2	50
	- Foster (at S. C. Davis						
Carried to Profit & Lose Book Page 24		City	7			5	00
	Roche Boyce & McCabe						
Paid	1 Demijohn 85c Stoughton	C	(20) 1	3	00	3	85
959	Saint Louis, Ap	ril 25,	1867.		,	3	78
	City 4 Cases P. M. Claret 1 "Sparking Catawba	Pts.		5	25	-	00 00

370	1 " Dry Isabella 1 " Fine Catawba				00 00
-	2 Bottles Absynthe 1 Demijohn 1.25 Port Wine	3	3 00 2 75		00 50
	F. Desloge			75	50
370	Potosi	30) 40°	1 90		95 50 50
				88	95
371	Mdse. Dr. To O. Waldkirch 1 Bbl. Crows Bourbon Retd. Frt. 2.50 Ins. 1.35	402	3 00	121	50 3.85
	Less 3 Galls. taken out		3 00	125 9	35 00
	Add Diff as per Bill Recd.			116	35 60
	A			117	95
371	S. Mendelshon Baton Rouge  1 Bbl.Crows Bourbon sold by Charropi Baton Rouge Deld fr O. Walkiro  26		2 70	87	75
	G. T. Payne Natchez				
371	2 Bbls, Pl. Fav. Whisky 40 (1 1 " Arnolds Bourbon (p) Ins. on \$320 \$3.20 Drayage 50	17) 81 39 <sup>2</sup>	2 10 3 00	170 118 3	
				292	30
386	Saint Louis, August 8, Mdse. Dr. To G. Stepper 1 Gal. Whisky Diff. in Bbl. Exchang				62
	1 Gai. Whisky Din. in Dbi. Exchang	eu		3	50
384	S. Mendelsohn Baton Rouge 1 Bbl. Crows Bourbon Ins. on \$135 \$1.35 Drayage 50	41*	3 00	124	50 85
				126	35
	Craigne & Farnham Topeka				
384		25) 80	1 75	140	00
384	41 (1	(0) 82° (p) 41°	2 20 3 50	181 145	
	Drayage Do	p) 41 <sup>3</sup>	S 50	140	60
				467	95

384	Young & Bro. Topeka 1 Bbl. Bowens (p) Drayage	41*	3	50	145	25 60
					145	85
384	Jacob Strauss City 1 Gal. Whisky (p)				5	00
	T. W. Moody Warrensburg 1 Hf. Bbl. 1.25 Bowens Whisky (p)	213		50	70	50
384	1 " " 1.00 Nectar Do. (17)	21	2	05	44	05
	5 Galls. Peach Brandy (p)		4	00		00
					140	55
961		1867. lys) enver	,		4	162
	Warrensburg 25 Cases Congress Bitters @	8.75	218	75		
	10 " Old Tom Gin	8.00		00		
	15 " Bourbon Whiskey	7.00		00		
	15 " Rye Do.	7.00	105			
	o branay	8.00		00		
	o rott wine	7.00	-	00		
1	o Sherry wille	7.00		00		
1	10 " Cabin Bitters 41"	9.00	90	00		
_	2 Bbls. Bowens Bourbon 42° 84 gall	. 3.50	294	00		
	1 " Nelson Co. Do. 44 "	4.50	198	00		
	1 " Pepper Bourbon 39 "	6.50	253	50		
	1 " Qr. Cask Sherry Wine 37 " Insurance on above \$1700 to Omaha " on Goodwine B. & C. \$1071	2.75 34.00 21.42	101	75		
	Less 10% on Insurance	55.42 5.54	49	88		
	Drayage		2	50	1608	38
	9			_		
	9 Bushey & Ducker					
Paid	1 Demijohn 1.25 2 Gall. Bourbon	5,00			11	25
	9 McCoin and Haskinson					
1	1 Copper Worm				32	50
	D. Brunner					
1	Montgomery City  1 Bbl. Crows Bourbon 43 gall. @  1 Box Lemon Syrup pr  Drayage	3.25	139	75 75 50	143	00
		_		_		

	10					
Paid	10 John P. Murphy City 1 gall. demijohn 85c Whisky	5.00			5	88
962	Saint Louis, Mo., September	18, 18	867.		4	85
5	El Paso  1 Bbl. Bourbon 42.  1 Keg 1.50 Bowens 10  1 " 1.50 Port Wine 10  1 " 1.50 Cherry Brandy 10  1 Case Claret St. Julian Drayage 50	2.40 3.50 2.25 2.75	24 29	80 50 00 00 00 50	196	. 80
	Cazalet and Calloham	0.40	102	00		
-	1 Bbl. Rye Whisky 42° 1 Keg 1.50 Brandy 10 1 " 1.50 Gin 10 Drayage	2.40 2.75 2.75	29	00 00 50	160	5(
- 5	Philip Link Peru 1 Keg 1.50 Rye Whisky 10 1 " 1.50 Nelson Co. Do. 10	4.00		50 50		
_	Ins. by river \$90 45c Drayage	.25		70	83	70
5	Ottawa  1 Bbl. Bowen Whisky 41 <sup>2</sup> 1 Hlf. Bbl. 1.25 Gin 21  Ins. by river on \$225 \$1.12 Drayage	3.50 2.75 .50		25 00 62	205	8
- 5	Bernard & Albrecht Ottawa 1 Bbl. Crows Whisky 41	3.00	123	00		
_	Ins. by river \$135 68c Drayage	.30	120	98	123	98
5	M. Formhalls Ottawa 1 Bbl. Nelson Co. Whiskey 43 Ins. by river on \$190 95c Dray	4.00	172	00 25	173	28
63	Saint Louis, November 9, 1 D. Bruner Montgomery City	1867.			5	15
31	1 Bbls. Crows Whisky 41 <sup>2</sup> 1 " Magnolia Do. 39 1 Box Cheese 47 1 " Long stick Candy	3.25 1.70 .16°		30 75 30		
	Drayage	_		60	215	83

	J. B. Murphy					
Paid	City 1 G. D. J. 85 Nelson Co. Whisky	5.00			6	85
	Brown Weber & Graham					
Paid	2 Boxes Congress Bitters 2½% off	9.00	18	45	17	55
	C. C. Kellam & Co.					
11	Topeka ½ Bbl. 125 Nelson County Whiskey					
_	21	4.00			85	25
	Benjamin					
Paid	2 Gallon No. 1 Bourbon	7.50			15	00
-	H. Cazalet					
	Assumption	0.50	107	F0.		
11	1 Bbl. Rye 43 ½ " 1.25 Gin 20	2.50	107	25		
-	Drayage	2.10	90	50	164	25
	S. H. Young & Co.	-				
	Vicksburg					
11	10 Cases Congress Bitters Ins. on \$100 \$1.00 Dray	9.00 .50e		00 50	91	50
964	Saint Louis, November 15,	1867.			5	18
	Ch. Fiddler Beardstown					
12	2 Cases Cong. Bitters	9.50			19	00
_	Lohman & Beckstead					9
	Havana					
	1 Bbl. Crows Whisky 40°	3.00	121 65			
12	34 " 1.25 Old Tom Gin 21 <sup>8</sup> 1 Case Congress Card	3.00		50		
_	Ins. on \$260 1.30 Drayage 50	_		80	329	80
	Henry Vornhalt					
	Havana					
	1/2 Bbls. 1.25 Brandy 22	2.75	61			
	1½ " 1.25 Rye 22 <sup>1</sup> 1 Keg 1.25 Rum 5	2.45	56 16			
12	1 " 1.25 Rve 5	4.00	21			
_	1 " 1.25 Peach Brdy 5	5.00	26			
	1 Case Congr. Bitters	9.50		50	100	0.2
	Ins. on \$210 1.05 Dray 50	_	1	55	192	92
	Jacob Schausten					
	Havana	2.00	10	OF		
12	1 Keg 1.25 Catawba Brdy 5 1 " 1.50 Brandy 10	3.00 2.75	16			
12	Ins. on \$50 25e	4.10	27	25	45	50
*		-		_		

	J. Nussberger & Co. Sedalia				
	40 392				
12	5 Bbls. Arnold Whisky 40° 39° (	1981 3.25	045 1	3	
_	Drayage	_	6	0 645	73
	Scott & Mellier				
	City				
Paid	1 Case Congress 2½% off		9 0		78
965	Saint Louis, November 23	3, 1867.		5	23
	Bloomington  1/2 Bbl. 1.25 Congress Bitters 22	@ 3.50	78 2	5	
	1 Keg 1.50 Gin 10	" 3.50	36 5	0	
_	1 " 1.50 Cherry Brandy 10		31 5		
12		@ 2.50	102 5		
_	1 Keg 85c Stoughton 2 1 " Peppermint 2	" 3.50 " 3.50	7 8		
	1 Box Absynthe p		18 0		
	Drayage	_	5	0 282	9
	M. D. Thatcher Pueblo				
	6 Bbls. Rye & Bour $40^{\circ}42^{\circ}$ bon Whisky $40^{\circ}40^{\circ}$ $40^{\circ}40^{\circ}$	@ 2.40	594 0	0	
	4 hlf. Bbls. 100 Bour- 21 <sup>3</sup> 21 bon Whisky 21 <sup>3</sup> 21 } 85	" 2.40	208 0	0	
	4 Bbis. Crows Bour- 41 <sup>2</sup> 40 <sup>2</sup> bon 41 <sup>2</sup> 40 <sup>2</sup> } 164	" 2.85	467 4	0	
_	10 Cases Congress Bitters	8.50	85 0		
12	10 " Bourbon Whisky	7.00	70 0		
_	10 " Rye do. 5 " Brandy	7.00 8.00	70 0 40 0		
	2 " Port Wine	7.50	15 0		
	1 "Sherry Wine Extra hoops on 10 Bbls. 40 @	pr.	7 5		
	Extra hoops on 10 Bbls. 40 @	.30	12 0	0 1571	4
	Drayage	-	2 0	- 15/1	-81
	J. E. Walker & Co. Ellsworth				
	2 Bbls. Bowen Whisky 40° } 7	9 3.50	278 2	.5	
	2 " Pl. Far. do. 39 8	0 2.10	168 0	0	
	2 " Magnolia do. 42 8	41 1.75	147 8	8	
19			99 0	0	
12		2 4.50			
12	% " Cask Brandy 2: Drayage 2:	2 4.50	1 2		3
12	% " Cask Brandy 2: Drayage	2 4.50			3
12 Paid	1/8 " Cask Brandy 2:	9.00		694	3

Paid	Saint Louis, January 18, J. M. Anderson & Co.			551
	l Case Star Bitters			8 00
20	Merchandise Dr. to L. Helstein  Amt. deducted by order of E. L. Char	ropin		20 75
19	Peter Moliter El Paso ½ Bbls. 1.25 Arnolds 21 <sup>2</sup> 1 Keg 1.25 Rum 5 Dray	3.75 3.00	81 88 16 25 60	98 73
19	Cazalet & Callahan El Paso 1 Keg 1.50 Star Bitters 10	2.75		29 00
	Albert Ertel			
19	El Paso  1 Bbls. Bourbon Whisky 42  1 " Crows do. 40 <sup>3</sup> ½ " 1.25 Brandy 20  1 Keg 1.50 Peach do. 10  Drayage	2.45 3.00 2.75 3.00	102 90 121 50 56 25 31 50 60	312 75
	Chas. Albert			
19	Ottawa 1/2 Bbls. 1.25 Bourbon 22 1/2 " 1.25 Brandy 20 1/2 " 1.25 Q. Whisky 22 1 Keg 1.50 Gin 10 1 " 1.50 Rum 10 2 Cases P. M. Claret 2	2.50 3.00 3.50 3.00 3.00 6.00	56 25 61 25 78 25 31 50 31 50 12 00	
	1 " Congress Bitters 1 drayage	9.50	9 50 60	280 85
967	Saint Louis, March 5, 18 Bushey & Drucker City	868.		565
Paid	1 Bbl. Copp. Dist. Whisky 1 Keg 1.50 Sherry 1 " 1.25 Brandy 5 1 " 1.25 Gin 5 1 " 1.25 Rum 5 1 " 1.50 Q. Whisky 10 ½ M. H. Clay Cigars	1.85 3.25 2.50 2.75 2.75 3.50	74 93 34 00 13 75 15 00 15 00 36 50 15 00	204 18
				201 10
	Moody Michell & Co. , City			
Paid	l Case Congress Bitters 9 less 2½% l "Star do.	_	8 78 8 00	16 78
	Louis Chaudet Prairie du Rocher  1 Keg 1.25 Cherry Bounce 5 @ 1 " 1.25 Peach Brandy 5 @	2.75 3.50	15 00 18 75	

	2 Caddies garibaldi Tobac	eeo 38	@	.70		60		
26	2 Box Ass. Candy			5.25		50		
	1 " 1 lb. Oyster doz. 2			1.85		70		
	6 doz. Pionier Tob. Sacks			1.75	10	50		
	Ins. on \$90 45c dray.			.25		70	85	75
	Th. Chaudet							
	Prairie	du Ro	cher					
-	1 Bbl. Plant Fav. 42°			2.20	93	50		
26	1 Box Ass. Candy					25		
-	Ins. on \$100 50c dray			.25		75	99	50
	Paul Pautler							
	Evansville 1/2 Bbl. 1.25 Crows Whisky			2.75	62	13		
26	1.25 Bourbon	220		2.10		50		
20	Ins. on \$130 65c dray	22		.50		1.15	101	*0
	ins. on \$130 osc dray			.00		1.10	121	78
968	Saint Louis, Ma		1, 1	868.			5	71
	Faulkner McCorn & Littl	e Pine	у					
	9 Dbls Man 1971-1-1-	421	107	1 572	000	00		
	3 Bbls. May Whiskey		127	1.57	200	03		
		43						
	3 " Roughon	41	200	0.00	00.00			
26	3 " Bourbon	41	125	2.30	287	90		
	3 3 3° 37 D	43		0.40				
some	1 " N. Y. Brandy	41		2.40		40		
	- Onciry intentry	42		2.50	105			
	8 Cases Star Bitters			873/4		00		
	1 Keg 1.25 Rye Whiskey	5		5.00	26	25		
	Drayage				1	20	780	38
_	L. F. Bartles & Co. Denve							
26	25 Cases Congress Bitters			8.50	212	50		
-	Drayage			_		50	213	00
	John Scheyenig							
	Ottav							
26	1 Bbl. Fullers Bourbon 41 <sup>2</sup> Ins. on \$180 to Peoria 90c		ceo.	4.00	166		167	90
	ins. on \$150 to Teoria occ	drays	-gc	.00			101	20
	David Bernard							
37	Ottav	VIII.		4.00	170	00		
27	1 Bbl. Fullers Bourbon 44			4.00	176			
	Ins. on \$190 to Peoria 95c	drays	ge	.30	1	25	177	25
-	Philip Schoch Ottav	20						
27	14 Bbl. 1.25 Bourbon Whia			2.25	51	99		
	Ins. on \$56 to Peru 28c dr			.22	91	50	52	38
				-		_		

	John Aaron				
27	Peru 1 Bbl. Crows 40 1ns. on \$130 65c drayage .35	120	00 00	121	00
969	C. W. Kitchen Las Vegas 12 panes glass @ 2.35 & drayage .60 Saint Louis, March 30, 1868.				80 75
27	Mrs. B. Hellman Dr. Est. I. Hellman Amt. paid for house allowed by Probate Court			3100	00
27 —	Bradley & Monesmith Hewy 2 Cases Congress Bitters Drayage 9.50	19	00 50	19	50
<del>-</del> <del>-</del> <del>-</del> <del>-</del> <del>-</del> <del>-</del> <del>-</del> <del>-</del> <del>-</del> <del>-</del>	George Herb & Co. Peru, Ia. 1575  Cask Broken Glass 125 1390 lbs. @ .01 Less freight		90	10	90
Paid	Edward Beckman City				
27	Merchandise Dr. To Sundries  Von Maignan & F. Laborde Bill Claret Mch 13 M. D. Thatcher to square Acct.	352	02	352	50 00 02
1	A. Heffley Nebraska City  10 half Bbls. 100 Eagle Bourbon 22° 22½ 22½ 22½ 266 @ 2.10 23 22½ 22½ 23	484	60		
27	½ 1½ Crows Do     21 " 3       3 Qrt. Flasks     8.50       3 Pts. do.     6.50       1½ half do.     5.00       1 Keg 1.25 Gin     5 3.50		50		2
27	Merchandise Dr. To Wm. McGrath Two Bbls. Whisky sent him Feby. 27		50	621	
970 	taken from him by Covert Saint Louis, Mo., Apr. 11, 1868. H Spinsby Montgomery City			181	80 80
30	2 Bbls. Arnolds Whisky 41 <sup>1</sup> 83 <sup>1</sup> 3.50 dray	292	25 60	292	85

960							
000	Erfort & Petring						
	Ci	ty					
Paid	3 Cases Congress Bitters		9.00	27	00	0.0	-
	21/2% off				67	20	33
D 0	L. L. Banell & Co.						
Profit & Loss	City						
Book Page 28		40					
	3 Bbls. Copp. Dist Whisky	421 124	1.72			213	28
		412					
	J. H. Daniels						
_	Sturg	reon					
30	14 Bbl. 1.25 Bowen 212	,	4.00	87	25		
_	1 Keg. 1.25 Port Wine deli	v 5	4.00	21	25	108	50
			-				
	J. Taylor Agent						
	Sturgeon						
	1 Keg 1.50 Port	16	3.50		50		
30	1 " 1.50 Congress 1 " 1.50 Cognac	10 10	$3.50 \\ 5.00$		50 50	194	80
	1 " 1.50 Cognac	10	3.00	91	00	124	30
	Cross & Lockridge						
30	Sturg		~ 00			0.0	0.5
-	1 Keg 1.25 Port	5 @	7.00			30	25
	V. L. Todd & Co. Care F.	M. Clark &	Co.				
	Fort Wallace,	Hays	City				
	a Dille Commander	392	0.00	003	F0		
_	3 Bbls. Crows Bourbon	41° 120° 39°	3.00	361	90		
30	5 Boxes Bourbon		7.50	37	50		
-	5 " Rye		7.50	37	50		
	1 Case Star Bitters				00		
	1 " Congress			9	00	484	20
	drayage		-		60	454	10
971	Saint Louis, Apr	ril 21, 186	88.			5	86
	Moody Michel & Co.						
D. L.	Cit	У			00		
Paid	1 Case Congress 2½% off			9	22	8	78
	272 /6 011		_			0	, 0
	Bushey & Drucker J	. H. H. Osc	eola,				
	Ark.						
Paid	1/2 Bbl. 100 Magnolia Whi		1.80	42	40		
	1 Demijohn 1.25 Old Bourb		4.00	13	25	55	65
			-				
_	Merchandise Dr. To	Vor Maigna	n A	4			
31	F. Laborde						
-	13 Cases P. M. Claret @		4.52			58	76
	Field Sanford & Wal	lla.					
Paid	Field Sanford & Wel	City					
	7 M. F. Casks	0.03	.60			4	20

	Bushey & Ducker				
Paid	City 1 Bbl. Copp. Dist. Whisky 41 1.92 <sup>3</sup> 1 Case Whisky Bourbon 1 Keg 1.50 Q. Whisky 10 36.50		92 75	123 1	17
Paid	Hughes Changes & Fletcher City		_		
	1 gall. Stoughton 32 Wm. S. Rosenbaum			2 7	5
31	1 Bbl. Nelson Co. Whisky 41 4.00 1 Case Congress Bitters Drayage	164	00 25 50	173 7	75
31	P. C. Paterson Lexington 1 Bbl. Crows Whisky Drayage 3.00	126	00 50	126 8	50
972	Saint Louis, Mo., May 5, 1868.			59	3
Paid	City 1 Demijohn 1.00 Port Wine 2 @ 5.00			11 (	00
33	H. F. Pieper & Co. St. Charles, Mo. 1 Bbl. Magnolia 41 <sup>3</sup> 1.80			74 7	70
	Joseph Albrecht Ottaws	100	00		
33	1 Bbl. Rye Whisky 1 " Crows do. 41" 3.00 Ins. on \$270 by river 1.35 dray .50	126 124 1		252 3	35
Paid	H. Aron City 3 galls. 1 gall. Demij. 85c Gin 3 @ 2.50			8.3	35
	Threlkeld & Co. Kansas City				
33	10 Cases Congress Bitters @ 8.50 15 " Star do " 7.50 drayage 7	85 112	00 50 60	198 1	10
33	Faulkner McCoin & Co. Little Piney  2 Bbls. M. D. Whisky 43, 42 4 hlf. do. do. do. 160 222 222 222 23	316	39		
-	drayage		60	316 9	9
Paid	Z. F. Wetzel & Co. City 1 Bbl. Magnolia Whinky 41 <sup>2</sup> 1.78			73 8	17

	Saint Louis, May 18, 18 G. Henneldall & Co.	868.		
	Fort Scott			
	1 Keg 1.00 Stoughton 5 @	2.25	12 25	
	1 Keg 1.00 Stoughton 5 @ 1 " 1.00 Peppermint 5 "	2.25	12 25	
		7.00 4.25	21 00	
ŀ	3 " Eagle Claret 1 Keg 1.25 Sherry 10	4.20	12 75 16 25	
	1 Keg 1.25 Sherry 10	1.50 8.25	16 25	
	3 doz. Rhein Wine Ungsteiner drayage	8.20	24 75 2 90	192 15
	J. C. Mackay & Co. Omaha			
	5 Casks Rec. Charcoal	11.00	55 00	
	1 doz. 2 gal Jugs		4 25	
	1 Refrigerator		40 00	
	Ins. on \$110 \$1.65 Boxing & Drayage	1.50		102 40
	F. W. Moody Warrensburg			
	Warrensburg  1 Bbl. Bowen Whisky 41* @  1/2 " 1.00 Nectar 22 "  1 Keg 1.50 Gin 10 "  1 " 1.50 Port 10 "  1 " 1.50 Sherry 10 "  1 " 1.50 Apple 10 "  1 " 1.50 Peach 10 "  1 " 1.50 Brandy 10 "  5 galls. Congress 5 "  1 Case Eagle Claret pr.  1 " Catawba	3.75	155 63	
	16 " 1.00 Nectar 29 "	2.15	48 30	
	1 Keg 150 Gin 10 "	3.50	36 50	
	1 " 150 Port 10 "	3.50	36 50	
	1 " 150 Sherry 10 "	3.50	36 50	
	1 " 1.50 Apple 10 "	4.00	41 50	
	1 " 150 Peach 10 "	4.00	41 50	
	1 " 150 Pennder 10 "	4.00	41 50	
	5 calls Congress 5 6	3.50	17 50	
	I Case Fagle Claret	0.00	5 50	
	1 " Catawba		9 00	
	1 " Pts. Flasks ½ gross	7.50	3 75	
	dr yage	1.50	60	474 28
	20			
	Mrs. F. Keller Independence			
	2 Bbls. Crows Whisky 41, 43 84 @	3.00	252 00	
	drayage	0.00	60	252 60
	Saint Louis Mo. Tune 1	1000		605
	Saint Louis, Mo., June 1, 1 F. Mitchell & Bro.	1000.		605
	City 1 Case Congress Bitters \$9.00 less 2½	% .22		8 78
	Y7 1 (1)			
	Hughes Changes & Fletcher			
	1 Keg 50c Jamaica Rum 1 @	2.75		3 25
	Joe Swope	the of the desire species		
1	City 1 gall No. 1 Bourbon Whisky			7 60
	Bussey & Co.			
	1 Bhl. Imt. Bourbon 41 @	2.05		84 05

	_		А. Не	Nebrask									
	37			e Bourbo	n 40, 45			2.20		81			
	-	1 "	CIUN	s do.		43	64	3.00	_	29			
		1,6 4	(110 01	nange) Po			44	3.00		67			
		1/2 "			erry do	· de de	44	3.0		67			
	Paid		g 1.00 (			10	44	3.5		36			
	-			gress Bit				9.0		45			
		5 "	Star		do.			.8.00	) .	40		568	00
			Chas.						-				
	Paid	5 gal	ls. Whi	city sky			5 @	2.10	0			10	50
		The companion of	F. W.	Moody			U. S	. Ex					
	0.79		47 734		rensburg								
	37			s. Bottles		88				3			
	entation	1 1/2 (	ross As	ssorted Co	orks					1 (	00	4	75
67				ent us for					0.00			15	00
11				To J. Ro ne 24 @ 6		l & C	0.		878	50		878	50
17	Mercha	ndise	Dr. To	Sundries					50	25			
216				o5 Cask	s Schnar	pps O	et. 24		00	20		45	00
352				3 M. T. B			ct. 24						25
100	P	D.			77.		1.1		405	00			
139 85	Expense M. Har				10	Sun	aries	5	435	vv		100	00
184	John O											100	
189	H. K. I											100	
51	Edward												00
188	Wm. M												00
147	M. O'H												00
976			Saint	Louis,	Sept.	30,	186	35.				2	56
17	Sundrie	es Dr.	To Mer	chandise				24	1503	23	25	5399	57
138			ollock &	Co			28	3		00			
222	Klug &	Tem	pie						122				
113	A. L. I Mrs. N	inder	-07				29			25			
77			OII				46			60			
16	M. Liel					4	58		169				
220	T. M. I		h Daca						439				
99 352	Hamme					,	30		28	00			
	G. M. F									50			
153	S. S. V	inton	Dr. To	Jas. Wat	t & Co.				54	60			
132	Amoun	t tran	sferred	by order	of S. S.	V.						54	60

159	J. G. Tesch & Co. Dr. To J. G. Tes	ch		4209	40		
83	Amt. improperly charged J. G. Te	sch	Aug 28			4209	40
218	Sundries Dr. To A. Fans					353	70
17 11	Merchandise Deduction on Wine Bills Receivable Note for balance			30 323	00 70		
47	Sundries Dr.	T	Charges			22	00
16 99	M. Lieblich Hammerslough Bros.		2 30		00 00		
11	Bills Receivable Dr.	To	Sundries	1032	80		
82 319	Rupell Hays & Co. Bailey & Posey		19 25	852 180			
139	Expense Dr.	To	Sundries	418	00		
85	M. Harris		30			100	40.00
184	John O. Urner		**			100	
189	H. K. Farmer		46			100	
51	Edward Brannin		61				00
188	Wm. Michel M. O'Heron 13/30 Mo.		66				00
17	Merchandise Dr.	To	Sundries	1674	66		;
181	Blum & Siegel		5			700	25
67	Commission		41			32	00
339	B. Fish		11			191	25
348	W. H. & W. Smith & Co.		30			6	66
337	Bartholow & Bro. Deduction on B	itter				20	00
299	James Carroll Drayage from Jany		41			537	75
339	B. Fish Bbl. Whisky not Received		ei .			186	75

965 & 966 United States of America, Eastern Division of the Eastern Judicial District of Missouri, ss:

I, James R. Gray, Clerk of the Circuit Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the writing hereto attached marked Volume III together with Volumes I and II accompanying the same the whole being numbered from page 1 to page 976 inclusive consecutively, constitute a full, true and complete transcript (as restricted by complainant's practipe therein set forth) of the Record and proceedings in Case No. 5096 of W. A. Gaines & Company, Plaintiff vs. Max Kahn, Administrator of the estate, etc., Defendants, as fully as the same remains on file and of record in said case in my office, and that the original Citation is hereto attached and herewith returned.

In Witness Whereof, I bereunto subscribe my name and affix the seal of said Court, at office, in the City of St. Louis, in the Eastern Division of said District, this 19th day of September in the year of

our Lord, nineteen hundred and seven.

[Seal United States Circuit Court, Eastern Division, Eastern Judicial District of Missouri.]

JAMES R. GRAY, Clerk of Said Court.

Volume Three.

Filed Sep. 20, 1907. John D. Jordan, Clerk.

967

(Clerk's Certificate to Printed Record.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan. Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing printed record in the case of Max Kahn, Administrator of the Estate of Abraham Hellman, and Moritz Hellman, Appellants, v. W. A. Gaines and Company (a corporation), No. 2700, was printed under my supervision and is identical with the printed record upon which said cause was heard and decided in the Circuit Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Eighth Circuit, at Office in the City of St. Louis, Missouri, this fifteenth day

of June, A. D. 1908.

SEAL.

JOHN D. JORDAN,

Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. Pieas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1907, of said Court, Begun and Held at the United States Court-house, in the City of St. Louis, Missouri, on the First Monday of December, to-wit: the Second Day of December, A. D. 1907, Before the Honorable Walter H. Sanborn, Circuit Judge, and the Honorable John F. Philips, District Judge.

Attest:

[SEAL.]

JOHN D. JORDAN,

Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the twentieth day of September, A. D. 1907, a transcript of record, pursuant to and appeal allowed by the Circuit Court of the United States for the Eastern District of Missouri, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein Max Kahn, Administrator of the Estate of Abraham Hellman, and Moritz Hellman, were Appeliants, and W. A. Gaines and Company (a corporation), was Appeilee, which said transcript of record was filed and docketed in said Circuit Court of Appeals as No. 2700.

968 That thereafter the following proceedings were had in said cause, in said Circuit Court of Appeals, viz:

(Appearance of Counsel for Appellants.)

And on the twentieth day of September, A. D. 1907, the appearance of counsel for appellants was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2700.

Max Kahn, Administrator of the Estate of Abraham M. Hellman, Deceased, et al., Appellants,

W. A. GAINES & COMPANY.

The Clerk will enter my appearance as Counsel for the Appellants.

JACOB KLEIN, WARWICK M. HOUGH, LUTHER E. SMITH,

A. J. FREIBERG,

902 Rialto Building, St. Louis, Mo.

WARWICK HOUGH, Of Counsel. Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit. No. 2700. Max Kahn, Administrator of the estate of Abraham M. Hellman, deceased, et al., Appeilants vs. W. A. Gaines & Company. Appearance. Filed Sep. 20, 1907, John D. Jordan, Clerk. Jacob Klein, Warwick M. Hough, Luther E. Smith, A. J. Freiberg, Counsel for Appellants.

## (Appearance of Counsel for Appellee.)

And on the thirty-first day of October, A. D. 1907, the appearance of counsel for appellee was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2700.

Max Kahn, Administrator &c., et al., Appellants, vs.

W. A. GAINES AND COMPANY.

The Clerk will enter my appearance as Counsel for the Appellee.

JAMES L. HOPKINS.

Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit. No. 2700. Max Kahn, Administrator &c., et al., Appellants, vs. W. A. Gaines and Company. Appearance. Filed October 31, 1907, John D. Jordan, Clerk. James L. Hopkins, Counsel for Appellee.

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(Argument Commenced.)

And on the twenty-first day of January, A. D., 1908, in the record of the proceedings of said Circuit Court of Appeals is an entry in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1907, Tuesday, January 21, 1908.

No. 2700.

MAX KAHN, Administrator, &c., et al., Appellants, vs.
W. A. GAINES AND COMPANY, a Corporation.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

This cause having been called for hearing in its regular order and Judge Adams being disqualified retires and takes no part in the hearing and decision of this cause, and it is agreed between counsel in open Court, that if the Court deems it necessary, the cause may

be submitted to a third Judge upon the printed record and briefs. Thereupon argument was commenced before Judges Sanborn and Philips by Mr. Luther E. Smith in behalf of the appellants and continued by Mr. James L. Hopkins for the appellee, but the hour of adjournment having arrived before the conclusion thereof, the further hearing of this cause was postponed until to-morrow.

## (Order of Submission.)

And on the twenty-second day of January, A. D. 1908, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1907, Wednesday, January 22, 1908.

No. 2700.

Max Kahn, Administrator, &c., et al., Appellants,

W. A. Gaines and Company, a Corporation.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

This cause having been called this day for further hearing, argument was continued by Mr. James L. Hopkins for the appellee and concluded by Mr. Jacob Klein for the appellants. Thereupon this cause was submitted to the Court, composed of Judges Sanborn and Philips, upon the transcript of record from said Circuit Court and the briefs of counsel filed herein.

970 (Opinion.)

And on the twenty-seventh day of April, A. D. 1908, an opinion of said United States Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1907.

No. 2700.

MAX KAHN, Administrator of the Estate of Abraham M. Hellman, and Moritz Hellman, Appellants,

W. A. GAINES AND COMPANY (a Corporation), Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Mr. Jacob Klein and Mr. Luther Ely Smith (Mr. Warwick M. Hough and A. J. Freiberg were with them on the brief) for appellants.

Mr. James L. Hopkins (Mr. Daniel W. Lindsey was with him

on the brief) for appellee.

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Before Sanborn, Circuit Judge, and Philips, District Judge.

Philips, District Judge, delivered the opinion of the court.

The appellee (complainant below), obtained decree in the Circuit Court establishing its asserted claim to the words "Old Crow" as a trademark, enjoining appellants (defendants below), from the use thereof in their business, and finding the defendants guilty of unfair competition in business and ordering an accounting. original bill was filed in November, 1904.

The bill alleges that the complainant is the sole and exclusive owner of a trademark for whiskey consisting of the words "Old Crow," which words were open to adoption as a trademark for whiskey in the year 1867, when the complainant's predecessor in business, Gaines, Berry & Co., adopted and commercially applied the said trademark for whiskey distilled by them; and that it acquired by assignment said trademark, which has been continuously applied by it and its predecessors in business upon packages containing whiskey from the year 1867 to the time of filing the amended

The bill further alleges that in 1835 one James Crow became domiciled upon Glenn's Creek, Woodford County, Kentucky, when and where he began the manufacture of whiskey of superior quality,

which became designated about that time as "Crow" or "Old Crow," and that he was continuously engaged in the distilla-971 tion of whiskey as "Crow" or "Old Crow" to his death in That at that time a considerable quantity of said whiskey remained upon the market and was commercially known and dealt in until the year 1867; that no whiskey was produced during said period anywhere to which the words "Crow" or "Old Crow" were applied as a trademark; that in that year a predecessor of complainant, to-wit, Gaines, Berry & Co., began the production on said Glenn's Creek of their whiskey, using the same process and material theretofore used by said Crow; that from 1835 to this time, the words "Old Crow" have been applied continuously to whiskey produced by the process of Crow and to no other whiskey whatever; that the distillation and production of said whiskey has always been on said Glenn's Creek and not elsewhere.

The bill further alleges that Abraham M. Hellman and Moritz Hellman, the defendants, had been guilty of fraudulent acts and unfair competition in selling a spurious compounded liquor as and for the complainant's whiskey, to its damages in the sum of \$5000.00.

and prayed for an accounting.

The answer denied specifically the allegations of the bill, alleged the ownership of the word "Crow," "Old Crow," "J. W. Crow," and the celebrated "Crow Bourbon," together with a figure of a crow in connection with their own business upon packages of whisky in their and their predecessors' business, and so continued the use thereof from the year 1863 and prior thereto; alleging that the whiskey sold by complainant under the words "Old Crow" was an unrefined, harmful and deleterious article, and that the whiskey sold by them was a blend largely free from impurities. The replication was general.

The defendants filed a cross bill claiming the trademark in question and asking for an injunction. This need not be considered, as at the hearing the defendants' counsel declined to insist upon any

affirmative relief.

The evidence tended to show that a man named James Crow, usually called "Jim Crow" and sometimes known as "Crow" or "Old Crow," began the manufacture of whiskey in Woodford County, Kentucky, about the year 1850. The evidence does not show that he ever owned or operated any distillery in his own right, but worked for persons owning distilleries. He died about 1855. Prior to his death, he worked at various distilleries in that neighborhood, to-wit: at the Edwards Distillery, at Anderson Johnson's Distillery, at Johnson & Yancey's at the Oscar

Pepper's Distillery, and at Captain Henry's Distillery.
Whiskey made by him was called "Crow" or "Old Crow" as stated by one of the witnesses, just as whiskey made by

Taylor was called "Old Taylor."

The process employed by Crow was what is known as "hand made" whiskey, but there was no secrecy about his process, nor did it differ materially from that employed by other distilleries of the same period. He used in the manufacture the grain grown in the neighborhood, which was not different from that grown in the Western States. When he worked at Johnson & Yancey's Distillery, it was not known as "Crow's" Whiskey, but as "Johnson & Yancey's." The old Oscar Pepper's Distillery, at which Crow at one time worked was run by various distillers from 1855 to 1865. This whiskey was called "Old Oscar Pepper," and was sometimes called "Old Crow." The men who worked with him understood the process employed by Crow and used it in other distilleries.

The co-partnership firm of Gaines, Berry & Co. began business

as distilleries in Woodford County, Kentucky, in 1867 and operated the old Pepper distillery as claimed successor. This concern was later succeeded by W. A. Gaines & Co. a co-partnership, which on the 9th day of July, 1882, filed in the Patent Office at Washington City, application for registering the following as a trademark:

"Old Crow Distillery, Woodford County, Kentucky. Copper Dis-

filled Whiskey, W. A. Gaines, Distiller."

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Accompanying this application, was the statement that "this trademark we have used in our business since January, 1870." In 1887 W. A. Gaines & Company incorporated under the same name. In June, 1904, shortly before the institution of this suit and after controversy had arisen between the complainant and the defendants respecting the use of the name of "Crow" or "Old Crow" in business, the complainant corporation filed in the Patent Office application to register as a trademark the words "Old Crow." The sworn statement of the officer of the company accompanying the application asserted that:

"This trademark has been continuously used by the said W. A. Gaines & Company and its predecessors since the year A. D. 1835."

To say the least of it, these different statements show some jug-

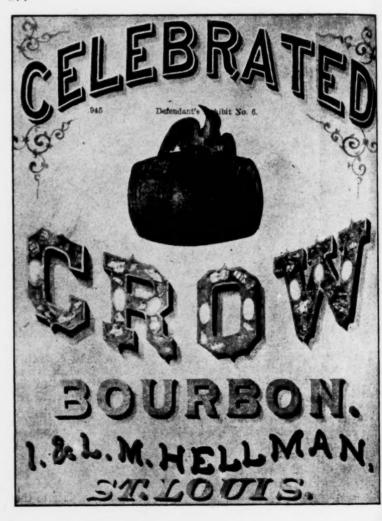
gling with facts and disclose inconsistent positions.

The record does not show any written devolution of title or right of trademark passing from Gaines, Berry & Company to W. A.

Gaines & Company and from the latter to the complainant corporation. Be this as it may, no unprejudiced mind can read the evidence in this case without the impression that the conception of a trademark in the words "Crow" or "Old Crow" did not enter the mind of Gaines, Berry & Co., prior to 1870; and they may not, under the issues presented by the pleadings, lay any claim thereto anterior to 1867. It is to be conceded that after 1870, Gaines, Berry & Company and W. A. Gaines and their successors, W. A. Gaines & Company, built up a large successful business in the manufacture of whiskey, which has extended throughout the country, and that their whiskey, under the designation of "Old Crow," attained wide celebrity. The question remains, however, to be answered: has the complainant maintained by proof the assertion that the defendants, or their predecessors in business, wrongfully invaded its exclusive right to the use of the words "Crow" or "Old Crow" in business?

The evidence, without contradiction, establishes the following facts: that as early as 1862, the firm of I. and L. M. Hellman, composed of Isaac Hellman and Louis M. Hellman, were engaged in the wholesale liquor business on Pine Street in the City of St. Louis, Missouri; that as early as 1862 or 1863, on the whiskey barrels employed in their trade, they had a bird with wings spread, in imitation of a crow burnt into the head of the barrel and the word "Crow," or the words "Old Crow" were burnt beneath this figure. This fact is affirmed by the testimony of Mr. Herman A. Haeussler, an Attorney-at-Law of St. Louis, whose reputation for intelligence and integrity is such as to entitle it to full credence. The firm of lawyers with which he was connected, whose office was the next door to the

business house of the Hellmans, acted as counsel for I. and L. M. Hellman, in the conduct of their business. Mr. Haeussler testified that as early as 1862-3, they had a brand of "Crow Whiskey"; that he saw the barrels on the sidewalk ready to ship with the figure of a crow either on the barrels or on the signs (and he thinks the barrels), with the word "Crow." The evidence further shows that as early as 1865, they had signs in frame prepared, displayed in the windows of their storehouse, like Exhibit No. 6, represented by the following cut, large numbers of which were used in connection with their whiskey trade:



Some of the books of said firm kept at that time were in evidence and showed sales of whiskey sometimes designated as "Crow" and "J. W." or "J. C. Crow." That they used also designative term "Old Crow" appears in the testimony of several witnesses.

Mr. Charropin of Covington, Louisiana, testified that he entered the employ of I. and L. M. Hellman about November, 1866, and continued therein until 1870; that he traveled first through Illinois and parts of Missouri, and afterward in the South as far as New Orleans, and in Tennessee, Arkansas and Mississippi. He gave the names of parties to whom he had sold Hellman's whiskey, and deposed

that he sold to customers "Old Crow" whiskey which the Hellmans handled, and that he remembered it was the brand used at the house at the time. Mr. Schaeffer, of Yazoo City, Mississippi, testified that he had dealings with I. and L. M. Hellman, in 1866 and probably the latter part of 1865, and that he purchased liquor from them under the name of "Crow" or "Old Crow."

"Q. Will you describe what marks, if any, these barrels bore?

A. They had on one end of the barrels a bird with wings spread out burnt in the head of the barrel and the words 'Old Crow' were burnt under them; they were all burnt, not marked; burnt in the

vood."

Mr. Heron, of Memphis, Tennessee, testified that he entered the employ of I. and H. M. Hellman, in September, 1865, and remained with the firm until 1882 or 1883, as assistant rectifier. He identified Exhibit as similar to the one used when he went there.

"Q. Now, will you state, Mr. Heron, how frequently the firm sold whiskey as 'Old Crow' whiskey during the time you were in the

employ of the firm?

A. Well, I couldn't say how often I sold it, but to the best of my knowledge, there was very seldom a month or week that some did not go out.

Q. By whom was the 'Old Crow' sold by the firm made?

A. It was blended right in the house. You could call it blend-

ing or compounding right in the house."

This condition continued up to 1867, during which the bill allezes the claimed trademark had not been appropriated by the complainant. In August, 1867, Isaac Hellman died. The business of this house has been continuously conducted in St. Louis, up to the time of this litigation, by the brother and their sons who succeeded thereto, doing business under the name of I. and L. M. Hellman, employing the same brands and designation in business. trade was confined principally to states down the Mississippi River and southwest. Several of the men who worked for this house between 1832 and 1870, as well as several of the traveling salesmen of the house are living and gave their depositions in this case. Since 1867, this house has conducted its business as heretofore with no knowledge carried home to its members that the complainant or its predecessors in business, were asserting any proprietary right to the use of the word "Crow" or "Old Crow" in trade. The evidence fails to show that the Hellmans, prior to this controversy, ever heard of

Glenn's Creek, in Woodford County, Kentucky. The whis-

ges, the fact that it was the whiskey of I. and L. M. Hellman of St. Louis, Missouri, or the name of the firm at the time in business. There is not a particle of evidence in this record to warrant the imputation that at any time or place, the defendants ever represented that their whiskey was manufactured on Glenn's Creek, or that it was the manufacture of the complainant. There is no evidence that any purchaser from them was ever deceived into the belief that he was obtaining from them whiskey manufactured by the Glenn's Creek monopoly. There is, therefore, no foundation in fact or law for the charge of unfair competition.

After alleging in the bill of complaint that by reason of the defendants' unfair competition, the complainant has been damaged in the sum of \$5000,00 and its vast business jeopardized and threatened with destruction by the defendants' competition, its counsel to impair the evidence that the Hellmans had sold whiskey as far back as 1863 under the name of "Crow" and "Old Crow," tacked course in argument by asserting that this use was so rare as to subject it to the maxim de minimus lex non curat. The right of the defendants to use in their trade the designative words "Old Crow" or "Crow" cannot be measured by the extent to which they employed it, whether more or less frequent at times. It is sufficient to protect them from the charge of an unlawful invasion of the complainant's claimed monopoly that they used in connection with their business as whiskey dealers the trade name in question prior to any appropriation thereof by the complainant, and that they have so continued to use Neither can their right to use it, ad libitum, be destroyed by the overshadowing comparative amount of the complainant's sales under the designation of "Old Crow" whiskey, nor by the asserted superiority of its product.

Passing by the criticism made by defendants' counsel of the words "Old Crow" as a trademark, on the ground that in its origin it referred merely to the name of "Crow" as the compounder of that grade of whiskey, and that its later use was merely designative of the quality of the article, and, therefore, it might not constitute a technical trademark if the complainant employed the words "Old Crow" and "Crow" in its trade as designating the quality of the whiskey sold by it, the defendants are not guilty of an invasion of the as-

serted exclusive monopoly of the complainant.

The bill stigmatizes the defendants' business as fraudulent in imposing upon the public a blended whiskey, impure and deleterious. And what it lacks in proof of this its counsel has undertaken to

supply by invective and epithets.

The learned trial Judge from his opinion in the record seemed impressed as to this charge of the bill by the opinion of the Kansas City Court of Appeals in the case of W. A. Gaines & Company v. The E. Whyte Grocery Fruit & Wine Co., (107 Mo. App. 570). It is assigned for error that the court admitted in evidence the entire record, including the voluminous evidence in the bill of exceptions in that case. In view of the conclusion reached by us on the merits, we may pass by this criticism with the observation,

that while the evidence in that case could not be employed as proof of the matter in contestation in the case here under review against this appellant who was not a party to that suit, it could be considered by the Chancellor for his information as to the scope of the decision in that case as a precedent. (Liebig's Extract of Meat Co. v. Libbey, et al. 103 Fed. 87-89; N. Y. Filter Mfg. Co. v. Jackson, 112 Fed. 678-680; Liebig's Extract of Meat Co. v. Walker, 115 Fed. 822-825; American Bell Tel. Co. v. Wallace Electric Co. 37 Fed. 672; Rose v. Fretz, 98 Fed. 112; Adams v. Tannage Patent Co., 81 Fed. 179.)

The evidence, especially on the part of the defendants, in the case under review is so materially different in character and effect from that in the case tried in the Jackson County Circuit Court, as also in that of Gaines & Co. v. Leslie, 54 N. Y. Supp. 421, cited by complainant's counsel as to render them of no controlling force on the facts in-

volved in and the principles of law applicable to this case.

The only evidence touching the character of the whiskey sold by the Hellmans is, that it was blended whiskey,—a mixture of socalled straight whiskey with refined spirits from which, the blenders claimed, the largest possible percentage of impurities were removed. Whether this made it better or worse than that manufactured by the complainant does not affect this case. No customer of the Hellmans is complaining, and the complainant has failed to show that the defendants palmed off their whiskey on anybody as that of the com-

plainant's manufacture.

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The complainant lays much stress upon the situs of its distillery on Glenn's Creek in Woodford County, Kentucky, as if there were some peculiar virtue in the air and water of that place adapted to the distillation of whiskey, which it had in some way wholly appropriated. The evidence does not show that Glenn's Creek in any way entered into the composition of the whiskey. The water used came from the springs some distance from the Creek, in no wise different from other springs in the limestone region of the Blue Grass district of Kentucky. We fail to perceive the relation of all this to the claimed trade-mark.

As there was no secret about the process of distillation employed by James Crow, which the complainant assumes to follow, as "hand-made" whiskey (and there was some evidence that the complainant now employs machinery in some material respect in the process of manufacture), the use of which process is not secured to the complainant by any patent, and as the defendants have not claimed to use either Kentucky corn, water or air in the composition of their blended whiskey, and did not represent that it came from Glenn's Creek, all these matters are quite immaterial on the issue of unfair competition in trade.

After a careful consideration of the mass of relevant and irrelevant evidence in this record, our conclusion is: (1) that inasmuch as the defendants' predecessors in business prior to the use or the adoption of the designative word "Crow" or the words "Old Crow" as a trademark, employed those words as descriptive terms in connection with their business as dealers in whiskey in St. Louis, Missouri; that said

predecessors and the defendants so continued to use the same, to a limited extent, up to the time of the institution of this suit, in good faith, they are not guilty of infringing the complainant's claimed trade-mark; and, (2), that the defendants are not guilty of having engaged in unfair competition with the complainant in the prosecution of their business.

It results that the decree of the Circuit Court must be reversed, and the cause remanded with direction to the Circuit Court to dismiss the

bill of complaint.

Filed April 27, 1908.

(Decree.)

And on the twenty-seventh day of April, A. D. 1908, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1907, Monday, April 27, 1908.

No. 2700.

MAX KAHN, Administrator of the Estate of Abraham Hellman, and MORITZ HELLMAN, Appellants,

VS.

W. A. Gaines and Company (a Corporation).

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court, in this cause, be, and the same is hereby, reversed with costs; and that Max Kahn, Administrator of the Estate of Abraham Hellman, and Moritz Hellman, have and recover against W. A. Gaines and Company, a corporation, the sum of Nine Hundred Nineteen and 50/100 Dollars for their costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to dismiss the bill

of complaint.

April 27, 1908.

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, do hereby certify that the foregoing

transcript contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said United States Circuit Court of Appeals (except the transcript of the record from the Circuit Court of the United States for the Eastern District of Missouri), in a certain cause in said Court wherein Max Kahn, Administrator of the Estate of Abraham Hellman, and Moritz Hellman, were appellants, and W. A. Gaines and Company (a corporation), was Appellee, No. 2700, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fifteenth day

of June, A. D. 1908.

[SEAL.]

JOHN D. JORDAN, Clerk of the U. S. Circuit Court of Appeals for the Eighth Circuit.

I, A. G. Ronald, Clerk of the United States District Court for the Western District of Kentucky, do hereby certify that the foregoing transcript consisting of Volume One, containing two hundred and sixty-five pages, exclusive of the index, citation, and petition for appeal; and Volume Two, containing nine hundred and seventy-nine pages, exclusive of the index, contains a full, true and complete copies of all the pleadings, record entries, and proceedings in a certain cause in said court in which W. A. Gaines & Company are the complainants and Rock Spring Distilling Company and Silas Rosenfeld, are the defendants, Number 237, Owensboro Division, made and copied in accordance with the præcipes filed by the appellant and appellees, copied herein and found on pages 227 to 236 of Volume One of this record, as full, true and complete as the originals of the same on file and of record in my office.

In Testimony Whereof, witness my hand and the seal of said court

this 28th day of November, 1913.

Clerk United States District Court for the Western District of Kentucky. Certified Copy, Volume 3.

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals for the Sixth Circuit.

No. 2572.

W. A. Gaines & Company, Appellant,

ROCK SPRING DISTILLING Co. and SILAS ROSENFELD, Appellees.

Volume 1.—Supplement.

Appeal from the District Court of the United States for the Western District of Kentucky.

Original Transcript Filed December 1st, 1913.

Filed Dec. 12, 1914. Frank O. Loveland, Clerk.

267½ Certain exhibits called for in the præcipes not included in the transcript as originally prepared are added by stipulation of counsel, to be inserted at the end of Volume I.

In the United States Circuit Court of Appeals for the Sixth Circuit.

No. 2572.

W. A. Gaines & Company, Appellants, vs. Rock Spring Distilling Company et al., Appellees.

Stipulation with Reference to Supplemental Transcript.

Whereas, the printed transcript of record in the above-entitled cause fails to include certain portions of the record in this case, namely: Hugo's cross-examination, Exhibits No. 1, No. 2, No. 3 (Transcript pages 252 and 253); Hellman's Exhibits No. 1 and No. 2 (Transcript pages 254 and 260), now therefore it is stipulated between the parties to this cause that the said exhibits shall be printed and be considered as a part of the transcript in this cause with the same force and effect as if same had been included in the transcript originally filed in this cause.

E. F. TRABUE,
D. W. LINDSEY,
JAMES L. HOPKINS,
Attorneys for Appellant.
W. E. ELLIS,
LUTHER ELY SMITH,
Attorneys for Appellees.

(ABS., P. 254, HELLMAN'S Ex. 1.)

## Petition in Saint Louis Probate Court.

February 21, 1905.

"The petition of Max Kahn, administrator of Abraham M. Hellman, deceased, respectfully represents that the deceased at the time of his death owned an undivided three-fourths interest in the firm of A. M. Hellman & Co., located at No. 508 North Second street, in the City of St. Louis, which firm was composed of Abraham M. Hellman and Moritz Hellman. The said firm was engaged in the wholesale liquor business, having on hand a stock in trade such as is usually carried in such a business, and a large amount of accounts due them from different parties in the States of Missouri, Arkansas, Texas and many other states, and owing debts to different parties, amounting in all to about \$32,500.00. That according to the books of said firm, deceased had to his credit \$34,163.45; all of which will appear by the attached statement of the affairs of said firm. for the administrator to take charge of said firm and wind it up would, in his opinion and that of the residuary devisees, entail a heavy loss to both parties in interest, as well as a large expense, and which will not likely occur in case the business is continued by the survivor or others with him. That said surviving partner has finally agreed with petitioner to buy all the interest of said estate in said firm, and its assets of all kinds on the following basis, to-wit:

First. To obtain from the creditors the release of said estate from

all liabilities for the debts of said firm.

Second. To pay to the estate (\$15,000) fifteen thousand dollars

in cash.

269 Third. To give to the estate his three notes, payable as follows, to-wit: One for five thousand (\$5,000) dollars at six months; one for six thousand dollars (\$6,000) at one year and one for six thousand five hundred dollars (\$6,500) at eighteen months, all to bear interest at the rate of six per cent per annum from date, said interest payable semi-annually.

The petition concludes with a prayer for an order directing the

sale as prayed.

Attached to the petition was a request signed by all the residuary legatees, as follows:

"The undersigned, residuary legatees of Abraham M. Hellman, deceased, do join in the foregoing petition by the administrator and request the court to make the order as prayed for, authorizing the administrator to sell to Moritz Hellman the interest of the deceased in the firm of A. M. Hellman & Co.

(Signed)

ROSE HELLMAN.

(Signed)

CECILE HELLMAN.

(Signed)

MAUDE HELLMAN."

Jan. 30, 1905.

Thereupon the Probate Court (February 21, 1905) entered its order (Abs., p. 252, Hugo, Cross-examination, Ex. 1) authorizing said administrator to make said sale as prayed.

Thereupon, on the 25th day of February, 1905, the said administrator of A. M. Hellman, executed the following instrument

(Abs., p. 252; Hugo, Cross-examination, Ex. 1):

270 "Assignment by Max Hahn, Administrator, to Moritz Hellman.

"This deed of assignment, made and entered into this 25th day of February, 1905, by and between Max Kahn, administrator, with the will annexed of the estate of Abraham M. Hellman, deceased, and Rose Hellman, widow, and Maude Hellman and Cecile Hellman, daughters and sole residuary legatees under the last will and testament of the said Abraham M. Hellman, deceased, parties of the first part, and Moritz Hellman, party of the second part, all of said parties being of the City of St. Louis and State of Missouri, wit-

nesseth, as follows:

"Whereas, in and by an order made by the Hon. Thomas B. Crews, Judge of the Probate Court of the City of St. Louis, on the 21st day of February, 1905, the said Max Kahn, as administrator, with the will annexed, of the estate of Abraham M. Hellman, deceased, was authorized and directed to sell at private sale, and to assign and deliver unto the said Moritz Hellman, all the interest of the estate of the said Abraham M. Hellman, deceased, in and to the property, effects, accounts and choses in action belonging to the late firm of A. M. Hellman & Co., a firm composed of the said Abraham M. Hellman, deceased, and Moritz Hellman, at and for the price of thirty-two thousand five hundred dollars (\$32,500.00), payable, as in said order specified, a certified copy of which order being hereto annexed and made part hereof, and,

"Whereas, the said Rose Hellman, Maude Hellman and Cecile Hellman have requested and directed the said May Kahn to include in said sale and in the instrument of assignment

clude in said sale and in the instrument of assignment thereof, all of the interest of the said Abraham M. Hellman, deceased in and to the good will of said firm of A. M. Hell

deceased, in and to the good will of said firm of A. M. Hellman & Co., and in and to all the brands, trade-marks, trade-names, formulas, recipes and other rights belonging to said firm, of every nature and description, and especially in and to the trade-mark 'Old Crow,' and the formula for making 'Old Crow' whiskey, made, produced and sold by the said firm of A. M. Hellman & Co., and including also the trade-mark, 'Kudros' and the formula and recipe for making the "Kudros" made, produced and sold by said tirm.

"Now, therefore, for and in consideration of the sum of thirty-two thousand five hundred dollars (\$32,500.00) to the said Max Kahn, as administrator as aforesaid, paid by the said Moritz Hellman, the receipt of which is hereby acknowledged, the said parties of the first part do hereby grant, bargain and sell, assign, set over, transfer and deliver unto the said Moritz Hellman, party of the second part, all and singular the rights and interest of the estate of the said

Abraham M. Hellman, deceased, in and to all of the property, effects, accounts and choses in action belonging to the said firm of A. M. Hellman & Co., and in and to the good will of said firm of A. M. Hellman & Co., and in and to all the brands, trade-marks, tradenames, formulas, recipes and other rights of every natu-e and description belonging to said firm and especially in and to the trade-mark, 'Old Crow' and the formula for making the 'Old Crow' whiskey, made, produced and sold by the said firm of A. M. Hellman & Co., and including the trade-mark, 'Kudros,' and the formula and recipe for making 'Kudros' made, produced and sold by the said firm.

272 "To have and to hold the same and every part thereof, and all rights and privileges incident or belonging thereto, unto the said Moritz Hellman, his heirs, assigns and legal representatives

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"In witness whereof, the said parties of the first part have hereunto set their hands, this 25th day of February, A. D. 1905.

MAX KAHN,

Administrator with the Will Annexed of the Estate of Abraham M. Hellman, Deceased.

(Signed) ROSE HELLMAN, (Signed) CECILE HELLMAN, (Signed) MAUDE HELLMAN."

Thereupon Moritz Hellman and the Hellman Distilling Company, then recently organized, entered into the following agreement (Abs., p. 252; Hugo, Cross-Examination, Ex. 2):

"Assignment by Moritz Hellman to Hellman Distilling Company.

"Whereas, A. M. Hellman & Co., a firm composed of Abraham M. Hellman and Moritz Hellman, and doing a wholesale wine and liquor business at No. 508 North Second street, in the City of St. Louis, Missouri, has been dissolved by the death of Abraham M. Heliman; and,

"Whereas, I, Moritz Hellman, surviving partner of the said firm of A. M. Hellman & Co., have purchased from Max Kahn, administrator with the will annexed, of the estate of Abraham M. Hellman, deceased, and from Rose Hellman, Maude Hellman and Cecile Hellman, residuary legatees under the will of the said Abraham M.

273 Hellman, all and singular the right and interest of the estate of Abraham M. Hellman, deceased, in and to all the property, effects, accounts and choses in action belonging to the said firm of A. M. Hellman & Co., and in and to the good will of the said firm of A. M. Hellman & Co., and in and to all the brands, trade-marks, formulas, recipes, trade names and other rights of every nature and description belonging to said firm and especially in and to the trademark 'Old Crow' and the formula for making 'Old Crow' whiskey, made, produced and sold by the said firm of A. M. Hellman & Co.,

and including also the trade-mark 'Kudros,' made, produced and sold

by said firm.

"Now, therefore, know all men by these presents, that I. Moritz Hellman, of the City of St. Louis, Missouri, have, in consideration of the sum of twelve thousand two hundred and thirty-one and 74/100 dollars (\$12,231.74) to me in hand paid by the Heilman Dis tilling Company, a corporation organized and existing under the laws of the State of Missouri, the receipt of which is hereby acknowledged, and in consideration of the assumption by the Hellman Distilling Company, and its agreement to pay the debts of A. M. Hell. man & Co., as of January 1, 1905, and those debts which I have incurred in the purchase of Abraham M. Hellman's interest in said firm, being represented by three notes dated January 31st, 1905 the first being for five thousand dollars (\$5,000), payable six months after date; the second for six thousand dollars (\$6,000), payable twelve months after date, and the third for six thousand five dollars (\$6,500), payable eighteen months date, have bargained, granted and sold, assigned, set over.

grant, bargain and sell, assign, set over, transfer and deliver unto said Hellman Distilling Company, of the City of St. Louis, all the property, effects, accounts and choses in action belonging to the said firm of A. M. Hellman & Co. on January 1st, 1905, and in and to the good will of said firm of A. M. Hellman & Co., and in and to all the brands, trade-marks, trade names, formulas, recipes, and other rights of every nature and description belonging to the said firm, and especially in and to the trade-mark 'Old Crow' and to the formula for making 'Old Crow' whiskey, made, produced and sold by the said firm of A. M. Hellman & Co., and including also the trademark 'Kudros' and the formula and recipe for making the 'Kudros' made, produced and sold by said firm.

"To have and to hold the same, and every part thereof, and all rights and privileges incident or belonging thereto unto the said Hellman Distilling Company, its successors and assigns forever.

"In witness whereof, I have hereunto set my hand this 25th day

of February, A. D. 1905.

(Signed)

MORITZ HELLMAN.

"Accepted and agreed to by Hellman Distilling Co.
(Signed) HELLMAN DISTILLING COMPANY,
By MORITZ HELLMAN, Pres."

Attest:

FREDERICK A. HUGO.

In order to protect the Hellman Distilling Company, then recently organized, which, as yet, was not a party to the litigation then pending in relation to "Old Crow" (and was not made a party until after final decree was entered in the Circuit Court, more than two years later), the following agreement was entered into between the Hellman Distilling Company and Moritz Heilman and the Hellman heirs (Abs., p. 260, Hellman Ex. 2):

"Contract Indemnifying Hellman Distilling Co. Against Expense in Missouri Case.

"This agreement made and entered into this 25th day of February, A. D. 1905, by and between Rose Hellman, Maude Hellman and Cecile Heliman, residuary legatees under the last will and testament of Abraham M. Hellman, deceased, and Moritz Hellman, parties of the first part, and the Hellman Distilling Company, a corporation of the City of St. Louis, State of Missouri, party of the second part, wit-

nesseth, as follows:

"Whereas, the said Moritz Hellman has sold, assigned, transferred and delivered unto the said party of the second part all of the property, effects, accounts and choses in action belonging to the late firm of A. M. Hellman & Co., and in and to the good will of said firm of A. M. Hellman & Co., and in and to all the brands, trade-marks, trade-names, formulas, receipts and other rights of every nature and description belonging to the said firm and especially in and to the trade-mark 'Old Crow' and the formula for making 'Old Crow' whiskey and including also the trade-mark 'Kudros' made, produced and sold by said firm; and,

"Whereas, there is now pending in the Ciruit Court of the United States in and for the Eastern Division of the Eastern Judicial Dis-

trict of the State of Missouri, a suit wherein W. A. Gaines and Co., a corporation, are plaintiffs, and Max Kahn, administrator with the will annexed of the estate of Abraham M. Hellman, deceased, and the said Moritz Hellman are defendants, wherein the rights of the said firm of A. M. Hellman & Co., to the said trademark 'Old Crow' and the rights of the said firm to make, produce and sell whiskey under the said name and trade-mark is involved; and.

"Whereas, for the purpose of protecting the rights of the said parties in and to the said trade-mark, it is necessary and proper that the said Hellman Distilling Co., as the successor of the said firm of A. M. Hellman & Co., should make and produce whiskey according to the formulas of said firm for the making of 'Old Crow' whiskey, made and sold by the said firm, and to continue to make and sell the same according to said formula and to use said trade-mark 'Old Crow' and

the brands connected therewith.

"Now, therefore, this agreement witnesseth: That the said party of the second part does hereby agree to continue to make as successor of the firm of A. M. Hellman & Co., according to the formulas used by the said firm, the whiskey designated as 'Old Crow' and to use said trade-mark 'Old Crow' in connection therewith, and to sell said whiskely and to apply to the packages and bottles in which the said whiskey is kept and sold, the trade-mark and brands representing said trade-mark 'Old Crow' so that the right of said Hellman Distilling Company to said brand and trade-mark shall not be impaired or lost.

"And the said party of the second part does hereby further agree to and with the said parties of the first part that the said parties of the first part and the said Max Kahn as such administrator to the estate of A. M. Hellman, deceased, shall have the right to make any settlement or compromise of said suit and in such compromise to agree to sell, assign and transfer all the rights of the said firm of A. M. Hellman & Co., as the same existed at the time of the death of A. M. Hellman, in and to the trade-mark 'Old Crow,' and in and to the formula or receipt for making the whiskey sold by said firm as 'Old Crow Whiskey' unto the complainants or to any other person or persons upon such terms and for such consideration as to them shall seem meet and proper. And in case of such settlement and sale, and said party of the second part does hereby agree to execute such assignment or bill of sale of the said right as may be necessary to invest in the purchaser all the right, title and interest of the late firm of A. M. Hellman & Co., in and to said trade-mark and in and to the formula for making such whiskey.

"And the said party of the second part does further agree that the said parties of the first part and the said Max Kahn, as administrator of the estate of A. M. Hellman, deceased, shall have the right to receive and retain according to their respective rights, all the proceeds of such settlement and sale, without any liability whatever to the said

party of the second part for or on account of same.

"And the said parties of the first part, in consideration of the premises, do hereby agree to and with the said party of the second part, that they shall and will save the said party of the second part harmless of and indemnified against all loss, damage and liability, including all judgments, costs and expenses connected therewith,

which the said party of the second part may sustain, incur 278 or become liable for or on account of the continued use of said trade-mark 'Old Crow' and for or on account of the manufacture and sale of 'Old Crow' whiskey, or 'Old Crow' Bourbon, all of which loss, damage and liability, including all judgments, costs or expenses connected therewith, said parties of the first part do hereby agree to pay for the said party of the second part as and when the

same are sustained or incurred by it.

"In witness whereof, the said parties of the first part have hereunto and to a duplicate hereof, set their hands the day and year first above written; and the said party of the second part has caused this instrument and the duplicate thereof to be executed in its corporate name by its president and its corporate seal to be thereunto affixed, the day and year first above written.

(Signed)

ROSE HELLMAN,
CECILE HELLMAN,
MAUDE HELLMAN,
MORITZ HELLMAN,
HELLMAN DISTILLING CO.,
By MORITZ HELLMAN,
President.

[SEAL.]

Attest:

FREDERICK A. HUGO, Secretary."

The foregoing agreement having been fully carried out, any claims that might be made by the heirs of  $\Lambda$ . M. Hellman were settled by the following instrument (Abs., p. 253; Hugo's cross-examination Ex. 3):

"This agreement made and entered into this 18th day of May, 1910, by and between Rose Hellman, Maude Hellman and Ce-279 cile Hellman Freiberg, residuary legatees of the late Abraham M. Hellman, hereinafter called the heirs, and the Hellman Distilling Company, a corporation of the State of Missouri, here-

inafter called the Company, witnesseth:

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"That, in consideration of the sum of (\$1.00) one dollar and other valuable considerations moving thereto, the heirs have assigned, transferred, conveyed and set over to the Company all their right, title, interest and claim of whatsoever nature in the trade-mark, 'Old Crow,' together with the good will, business and trade connected with the sale and manufacture of whiskey under the said trade-mark, 'Old Crow,' as the sale has been conducted by the Hellman Distilling Company, the firm of  $\Lambda$ . M. Hellman & Co., and their predecessors in business, together with all rights arising out of and resulting from

said business and the said use of said trade-mark.

"It is further agreed that in the event that the suit now pending in the United States Circuit Court for the Western District of Kentucky, Owensboro Division (No. 237), between W. A. Gaines & Company, as complainant, and the Rock Spring Distilling Company, and Silas Rosenfeld, as respondents, should result in a decree of injunction against the respondents therein of such a nature as to destroy or terminate the said trade-mark; then and in that event the heirs agree to release and hereby do release the Company from its obligation to pay any consideration other than the cash payments made on or about the date of the execution of this contract; and in the event that such adverse decree, if any, in said case shall be rendered after the payment of any such deferred payments, the heirs agree to refund to

280 the Company such deferred payments so made prior to the

rendition of such adverse decree, if any.

"It is further agreed that any and all royalties earned or payable under the terms of said royalty agreement up to and including the 18th day of May, 1910, shall be paid to the heirs with the same force and effect as if this contract had not been entered into.

"And the said Hellman Distilling Company hereby agrees to save harmless the heirs from any and all damage and claim of any kind whatsoever arising out of or in any way connected with any litigation relating to the said trade-mark or their connection therewith.

"It is further understood, however, that after said 18th day of May, 1910, the royalties payable under said contract shall cease."

"In witness whereof the said parties hereto have hereunto set their hands the day and year first above written, and to a duplicate hereof, and the said Company has caused this instrument and the duplicate thereof to be executed in its corporate name by its president, and its corporate seal to be thereto affixed the day and year first above written.

ROSE HELLMAN,
MAUDE HELLMAN,
CECILE HELLMAN FREIBERG,
HELLMAN DISTILLING COMPANY,
By MORITZ HELLMAN, President.

Attest:

F. A. HUGO, Secretary."

281 Certain exhibits called for in the practipes not included in the transcript as originally prepared are added by stipulation of counsel, to be inserted at the end of Volume I.

In the United States Circuit Court of Appeals for the Sixth Circuit.

In Equity. No. 2572.

W. A. Gaines & Company, Appellant, vs. Rock Spring Distilling Company et al., Appellees.

Stipulation with Reference to Supplemental Transcript.

Whereas, the printed transcript of record in the above-entitled cause fails to include certain portions of the record in this case, namely: Hugo's cross-examination, Exhibits No. 1, No. 2, No. 3 (Vol. I, pages 252 and 253); Hellman's Exhibits No. 1 and No. 2 (Vol. I, pages 254 and 260), Silas Rosenfeld Cross-examination Exhibits Nos. 1 to 34, inclusive (Vol. I, page 238), now, therefore, it is stipulated between the parties to this cause that the said exhibits shall be printed and be considered as a part of the transcript in this cause with the same force and effect as if same had been included in the transcript originally filed in this cause.

E. F. TRABUE,
D. W. LINDSEY,
JAMES L. HOPKINS,
Attorneys for Appellant.
W. T. ELLIS,
LUTHER ELY SMITH,
Attorneys for Appellees.

282 Rosenfeld's Cross-examination Exhibit No. 1.

Hellman Distilling Co., Successors to A. M. Hellman & Co.

Distillers and Blenders High Grade Whiskies. Sole Distributors of "Kudros."

St. Louis, June 2, 1910.

Bought of Rock Spring Distilling Company, Silas Rosenfeld, Lessee, three hundred barrels, more or less as the run may turn out, of their highest grade Bourbon whiskey, same as they have been making for us and A. M. Hellman & Co., the goods to be made in the name of the Hellman Distilling Company; the price to be 35 cents per proof gallon; the Rock Spring Distilling Company to carry these goods for us for a period of four years, we to give them our note for same, which is to be renewed at the end of each year and interest to be then paid at the rate of six per cent per annum. The note is not to be discounted. The cooperage to be the same high grade new barrels as we have been having. The charge for storage to begin at the time of entry in bond, we to pay state and county taxes and to keep the goods insured and to send the policies to the Rock Spring Distilling Company to be attached to the note which we give.

The above whiskey to be June, 1910.

HELLMAN DIST'G CO. MORITZ HELLMAN, P'd't.

283 Rosenfeld's Cross-examination Exhibit No. 2.

Rock Spring Distilling Co., Owensboro, Ky.

May 13, 1909,

Order No. 45.
Sold to Hellman Dis. Co.
City, St. Louis, Mo.
Terms, As per contract.

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Commercial heads to be blank.

ACK.

Signed, May 15, 1909. Salesman, ————.

Rosenfeld's Cross-examination Exhibit No. 3.

Hellman Distilling Co., Successors to A. M. Hellman & Co.

Distillers and Blenders High Grade Whiskies. Sole Distributors of "Kudros."

St. Louis, May 13, 1909.

Rock Spring Distilling Co., Owensboro, Ky.

GENTLEMEN: You will please make for us 150 barrels of whiskey, same as we have been having made by you, in our name as distillers, at 35 cents per gallon, under the following terms:

You to carry the goods for us for four years, we to give you yearly

notes bearing 6 per cent interest; the notes not to be discounted with the exception of the last one, or fourth note; interest to be paid annually; we to pay, as is customary, insurance, state and county taxes and storage; we to pay for anything which we take out before the four years are up.

Yours truly,

HELLMAN DISTILLING CO. MORITZ HELLMAN, P'd't.

May 15, 1909.

Rosenfeld's Cross-examination Exhibit No 4.

June 12, 1909.

A. J. Freiberg, Cincinnati, O.

DEAR SIR: Our information is that the Hellman Dist. Co., for whom we are bottling in bond some whiskey under the "Old Crow" label of the Hellman estate, will submit a design for a label to be approved by you to conform to and be within the exercise of your rights under the decision of the U. S. Court of Appeals, not to infringe upon W. A. Gaines & Co. or create the impression that it is W. A. Gaines & Co.'s "Old Crow" whiskey, there being some room to regard the present label not within the lines of the decision of the Court, and we respectfully suggest "Hellman's Celebrated Old Crow" in the absence of anything better.

Will you please inform us the conditions and duration of the

right to use the label given the Hellman Distilling Co.

Very truly yours,

ROCK SPRING DISTILLING CO., Per ————, Treasurer.

A. M.

285 Rosenfeld's Cross-examination Exhibit No. 5.

June 21/09.

A. J. Freiberg, Esq., Cincinnati, O.

Sir: Your favor of the 9th inst. is at hand and we certainly appreciate your reason for not granting the request in regard to the Hellman Distilling Co. matter. The request was not made from idle or impertinent curiosity on our part, but was intended simply to be filed along with the indemnifying bond given by them to us in the matter of using the label on goods bottled in bond under the "Old Crow" label for them.

Mr. Rosenfeld is now on his trip East.

Very truly yours,

ROCK SPRING DISTILLING CO.,
Treasurer.

A. M.

Rosenfeld's Cross-examination Exhibit No. 6.



HELLMAN DISTILLING CO. PROPRIETORS ST. LOUIS, MO.

287 Rosenfeld's Cross-examination Exhibit No. 7.

Feb. 5th, 1910.

Mr. A. J. Freiberg, Cincinnati, O.

DEAR SIR: Your letter of the first to hand and in reply will say if you and the Hellman heirs consent to the sale of the Old Crow brand to Arthur Rosenfeld and myself for \$15,000.00, a note to be given, interest at 5 per cent per annum, and in case the upper court-decide the brand cannot be used, then you are to return us the note and interest. If this proposition is accepted, make out the bill of sale to M. L. Mayer and also the note and Arthur Rosenfeld and myself.

Yours truly,

SILAS ROSENFELD.

Rosenfeld's Cross-examination Exhibit No. 8.

Jan. 27/1910.

Mr. A. J. Freiberg, Cincinnati, O.

Dear Sir: Referring to our conversation in reference to the purchase of ¾ interest in Hellman's Old Crow brand, will say we shall close the option under the following conditions:

A note for \$15,000.00—5 per cent interest, endorsed by Silas and Arthur Rosenfeld. Note to be paid when the courts decide that the brand can be used by Hellman estate on all kinds of whiskey.

In case suit is finally decided against Hellman estate, then the note and interest are to be returned to us.

The bill of sale to be made to such party as we may name, in case the above conditions meet your approval, draw up a contract and note and we shall consummate the deal.

Yours truly,

SILAS ROSENFELD.

Rosenfeld's Cross-examination Exhibit No 9.

(Copy.)

OWENSBORO, Ky., May 13/10.

A. J. Freiberg, Esq., Cincinnati, O.

DEAR SIR: On March 21st you wrote me that you would shortly go over to St. Louis and interview the heirs with a view of getting their consent to consummate the "Old Crow" deal.

Unless you can close the deal within ten days I desire to withdraw my proposition to you for the purchase of the brand.

Yours very truly,

SILAS ROSENFELD.

ROSENFELD'S CROSS-EXAMINATION EXHIBIT No. 10.

A. J. Frieberg, Lawyer, Union Trust Building.

CINCINNATI, February 26th, 1910.

Rock Spring Distilling Co., Owensboro, Ky.

289 Gentlemen: I am in receipt of a letter under date of February 5th, dictated by Mr. Silas Rosenfeld, with reference to the purchase of the Old Crow brand. I beg you to forgive me for not answering before this, but I have been almost continuously out of the city and have only just arrived home from Columbus.

I promised Mr. Rosenfeld over the telephone the other day that I would see the heirs with reference to the matter and try to get their consent. I expect to see them in a very few days and as soon as I have had an opportunity of talking the matter over with them,

I will let you know.

Very truly yours,

A. J. FREIBERG.

F. M.

ROSENFELD'S CROSS-EXAMINATION EXHIBIT No. 11.

A. J. Freiberg, Lawyer, Union Trust Building.

CINCINNATI, March 21st, 1910.

Mr. Silas Rosenfeld, Owensboro, Kv.

DEAR SIR: I have been wanting to reply to you for some time in reference to the proposal to purchase the "Old Crow" brand.

As I told you some time ago, I must see all of the heirs about it in order to confirm my own notions. I have been able to speak to two of them, but I still have the third to confer with.

I have been expecting to go over to St. Louis for a long time, but have never been able to make the trip. As soon as I get through writing a certain brief that I am now engaged in, I shall go over to St. Louis, and I shall soon be able to report to you one way or the other.

Very truly yours,

A. J. FREIBERG.

F. M.

ROSENFELD'S CROSS-EXAMINATION EXHIBIT No. 12.

A. J. Freiberg, Lawyer, Union Trust Building.

CINCINNATI, May 19, 1910.

Mr. Silas Rosenfeld, Owensboro, Ky.

DEAR SIR: I have been over to St. Louis and investigated the Old Crow situation.

I had word from the St. Louis attorney while I was over there that the attorneys for Gaines & Co. are on the point of deciding what steps they will take in the nature of appeal, and that this matter will be settled in a day or two.

This fact, combined with the fact that one of the interested parties was out of the city, and would not return before I left St. Louis, makes it necessary to withhold definite acceptance of your proposition for a few days. But I shall endeavor to get a definite reply to you within the ten days you prescribe.

Very truly yours,

A. J. FREIBERG.

F. M.

291 Rosenfeld's Cross-examination Exhibit No. 13.

(Copy.)

A. J. Freiberg, Lawyer, Union Trust Building,

CINCINNATI, February 1st, 1910.

Mr. Silas Rosenfeld, Rock Spring Distilling Co., Owensboro, Ky.

DEAR SIR: On my return from Washington I found your letter of January 27th, with reference to the purchase of the interests I represent in the Old Crow brand.

I do not believe you meant to say just what you did say in your letter, to-wit: "Note to be paid when the courts decide that the brand

can be used by Hellman estate on all kinds of whiskey."

What I proposed was this:—That you were to pay \$15,000.00 for our interest in the brand, partly cash and part on time if you wished it so, with interest on the deferred payments, and that in case you won the suit at Owensboro but the upper court reversed it against you, then and in such case I would stand ready to refund the money with the notes and interest accrued thereon; and I think that I can still get the heirs to consent to that proposition. I did not say that I would guarantee that the case in the lower court would be decided in your favor, although in fact I do think it will be.

You will remember my saying that after you have the case decided in your favor, my price might very likely be higher than \$15,000.00. In other words, if there is any speculating to be done, I am willing to speculate to this extent: That if the trial court decides in your favor, it will not be reversed by the upper court, but I expected you to do a certain amount of speculating on the decision in the lower court.

You will remember also that I took the point of view as it seemed to me that it would be far better for you to wait until the lower court had decided the case. Nor should I enjoy having your \$15,000.00 if

the lower court should by any chance decide against you.

This letter does not mean at all that I have any fear of what the lower court will do. The decision of the Court of Appeals in St. Louis is an absolute bar to the action that has been brought against you, and even if by any chance you should lose in the lower court, I am satisfied that the Court of Appeals here would set the lower court

right.

To sum up, therefore, I am quite willing to wait until after the lower court decides the case, in which event I shall take the liberty of increasing the price. If, on the other hand, you desire to pay \$15,000.00 either in cash or on time for our interest in the brand, I am almost sure I can prevail upon the heirs to accept the proposition, with the further guaranty that in case the upper court decides against you, I am willing to have the money refunded. You see from this that I have pretty deep confidence in what the upper court will do in this matter.

With my best wishes to you, I am,

Very truly yours,

A. J. FREIBERG.

F-M.

293 Rosenfeld's Cross-examination Exhibit No. 14.

A. J. Freiberg, Lawyer, Union Trust Building,

CINCINNATI, June 19th, 1909.

Rock Spring Distilling Co., Owensboro, Ky.

GENTLEMEN: I have just returned from the Atlantic City meeting and find your letter of June 12th.

The Hellman Distilling Co. have not as yet submitted to me the label which I recommended to them, but I have no doubt they will

do so in a few days.

You ask me to inform you the conditions and the duration of the right to use the label given the Hellman Distilling Co. I would be glad to give you all those conditions, and I really see no reason to conceal them. But inasmuch as it is a matter of private contract between the Hellman heirs and the Hellman Distilling Co., I presume I ought not to presume to give out that contract unless they authorize me to do so. You of course appreciate that they have the

right to be consulted. You might write to them direct, telling them I have no objection to your knowing fully what the conditions are and they will probably arrange to let you know in full. So far as I remember, I gave to the Messrs. Rosenfeld a complete resume of that contract verbally.

When does Mr. Rosenfeld start on his trip?

Very truly yours,

A. J. FREIBERG.

F-M.

294 Rosenfeld's Cross-examination Exhibit No. 15.

Hellman Distilling Co. Successors to A. M. Hellman & Co.

Distillers and Blenders High Grade Whiskies. Sole Distributors of "Kudros."

St. Louis, March 23, 1909.

Rock Spring Distilling Co., Owensboro, Ky.

Gentlemen: Please unbond for us five barrels Spring '06, Blank Heads, Serial No. 101321-25. This is covered by a warehouse receipt for 50 barrels, which is in your possession.

We also enclose you warehouse receipt No. 18633 calling for five barrels Spring '04, Serial No. 75566-70. Please unbond five barrels of '06 and these five barrels '04 and send to us in the next car.

We also enclose you warehouse receipt No. 18632 calling for five barrels, Serial No. 75561-65, which please bottle for us, ten cases half pints; 15 cases pints; balance 4's Old Crow. You will have to wait until you receive the skeletons, which we expect will be there shortly.

We are sending you labels; we have sent you the corks for the 4's. Please attend to this matter for us at your earliest convenience, and oblige.

Yours truly,

HELLMAN DISTILLING CO. F. A. HUGO, Sec'y.

P. S.—Send us empties.

295 Rosenfeld's Cross-examination Exhibit No. 16.

Warehouse Receipt 18632, issued June 2, 1904, by Rock Spring Distilling Co., U. S. Bonded Warehouse of Distillery No. 18, 2d District of Kentucky, to A. M. Hellman & Co., for 5 barrels Hand Made Sour Mash Whiskey, 241.50 net wine gallons, made June 1, 1904.

(No brand or trademark appears in any of the warehouse receipts

included in these exhibits.)

Rosenfeld's Cross-Examination Exhibit No. 17.

Warehouse Receipt 18633, issued June 2, 1904, by Rock Spring Distilling Co., same warehouse, to A. M. Hellman & Co., for 5 barrels

Hand Made Sour Mash Whiskey, 242.46 net wine gallons, made June 1,1904.

Rosenfeld's Cross-examination Exhibit No. 18.

Hellman Distilling Co. Successors to A. M. Hellman & Co.

Distillers and Blenders High Grade Whiskies. Sole Distributors of "Kudros."

St. Louis, April 14, 1909.

Rock Spring Distilling Co., Owensboro, Ky.

Gentlemen: Enclosed find warehouse receipt No. 18634 calling for five barrels Spring '04, Serial No. 75571-75, which please bottle in bond, same proportion as the last five barrels, under the brand Old

By giving this matter your immediate attention you will greatly oblige,

Yours truly,

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HELLMAN DISTILLING CO. F. A. HUGO, Sec'y.

P. S.—Please unbond 5 barrels Blank Head, Spring '05, warehouse receipt No. 21116, Serial No. 87967-71, and let same come forward in the car which you are now shipping. We will send ware house receipt for same tomorrow, being too late to get the papers today.

Rosenfeld's Cross-examination Exhibit No. 19.

Warehouse Receipt 18634, issued June 2, 1904, by Rock Spring Distilling Co., same warehouse as preceding Exhibit, No. 16, to A. M. Hellman & Co., for 5 barrels Hand Made Sour Mash Whiskey, 241.11 net wine gallons, made June 1, 1904.

Rosenfeld's Cross-examination Exhibit No. 20.

Arthur Rosenfeld,
Room 814 Chemical Building,
Representing Rock Spring Distilling Co. and Owensboro Distilling
Co. of Owensboro, Ky.

St. Louis, Mo., April 23, 1909.

The Rock Spring Distilling Company, Owensboro, Ky.

GENTLEMEN: Yours of the 22nd inst., to hand and contents noted. The Nelson Distilling Co. will want 35 cases of half pints Old Orchard and 15 cases of pints Old Orchard instead of 25 cases. Wish you would change their order accordingly.

The Hellman Dis. Co. want 300 or 325 barrels of whiskey made in their name as distillers so they can bottle the goods in bond in their name as distillers. They want the terms on these goods to be four years from date of production and will give their note for one year and pay the interest semi-annually, which is to be 6 per cent per annum. Of course we would hold the warehouse receipts and whenever they want any of the goods they would have to pay us for them. These goods are to be branded Old Crow. They have been offered this proposition by some other houses and stated they would give us the preference. I am in favor of giving them this time on the goods. Mr. Hirsch has met all the members of this firm personally. They are honest and upright and this brand is very valuable, and I do not see how we can lose if they do not take the goods. They are to pay 35 cents per gallon. Kindly let me know by return mail what you think of their proposition.

The box of advertising matter which you sent to the Wiegand-Boeker Dis. Co. has not arrived and I wish you would trace the same.

The following firms will or have sent you papers for the number

of barrels opposite their names:

Gehner Dis. Co	10 barrels
Griesedieck Dis. Co	barrels Kv. Club
Hellman Dis. Co	6.6
Gold Spring Dis. Co 5	
Sitterman Dis. Co	66
Kellerstrass Dis. Co	
Nelson Dis. Co	
Rauge-Willer Die Co 5	

Kindly route the car in the usual way and have wire tracers follow.

I wish you would have a quart same of our 1907 bourbon whiskey reduced to 90 proof and make the color about the same as our Spring 1905 and use in this sample in proportion about three quarts of sherry to a barrel. Kindly express this sample to me immediately.

I intend to leave here Monday night for Kansas City. I will send

you my route list before I leave.

Nothing further to report. With kind regards, I remain,

Yours very truly,

ARTHUR ROSENFELD.

Rosenfeld's Cross-examination Exhibit No. 21.

Hellman Distilling Co. Successors to A. M. Hellman & Co.

Distillers and Blenders High Grade Whiskies. Sole Distributors of "Kudros."

St. Louis, April 21, 1909.

Rock Spring Distilling Co., Owensboro, Ky.

Gentlemen: Please unbond for us five barrels, Blank Head

Spring '06, Serial No. 101326-30. You have a warehouse receipt in your possession which will take care of these five barrels.

We enclose you warehouse receipt No. 21117, calling for five

barrels Blank Head Spring '05, Serial No. 87972-76.

Please ship the ten barrels mentioned above in your next car to us here.

According to our figures, you have on hand from Nivison Weiskopf Co. the following Old Crow skeletons—21 quarts; 20 pints; 30 half pints. Please unbond enough of the Spring

'04, of which you sold us 15 barrels lately, and bottle, Old Crow—21 quarts; 20 pints; 15 half pints; and ship to us as quickly

as possible.

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o d In case you have a few gallons left out of the barrels which you are unbonding for Old Crow, you can fill what you have in the half pint cases.

By giving these matters your immediate attention you will oblige

Yours truly,

HELLMAN DISTILLING CO. CHAS. HELLMAN, Treas.

Rosenfeld's Cross-examination Exhibit No. 22.

Warehouse Receipt 21117, issued May 1, 1905, by Hellman Distilling Company, same warehouse as preceding Exhibit No. 16, in blank, for 5 barrels Sour Mash Whiskey, 237.57 net wine gallons, made Apr. 29, 1905.

ROSENFELD'S CROSS-EXAMINATION EXHIBIT No. 23.

Warehouse Receipt 18010, issued Apr. 17, 1909, by Rock Spring Distilling Co., same warehouse, of Distillery No. 18, 2d Dist. Ky., to Hellman Distilling Co., for 5 barrels Hand Made Sour Mash Whiskey, 238.54 net wine gallons, made Apr. 21, 1904.

Rosenfeld's Cross-examination Exhibit No. 24.

Hellman Distilling Co. Successors to A. M. Hellman & Co.

Distillers and Blenders High Grade Whiskies. Sole Distributors of "Kudros."

St. Louis, April 28, 1909.

Rock Spring Distilling Co., Owensboro, Ky.

GENTLEMEN: Enclosed find warehouse receipts Nos. 21118-19, calling for ten barrels, Serial No. 87977-88, Spring '05, Blank Heads, which please bottle under the brand Crow—ten half pints; 20 pints; and balance quarts. Send to us as soon as possible.

Yours truly, HELLMAN DISTILLING CO. F. A. HUGO, See'y,

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ROSENFELD'S CROSS-EXAMINATION EXHIBIT No. 25.

Warehouse Receipt 21118, issued May 1, 1905, by Hellman Distilling Company, warehouse of Distillery No. 18, 2d Dist. Ky., in blank, for 5 barrels Sour Mash Whiskey, 240.13 net wine gallons, made Apr. 29, 1905.

Rosenfeld's Cross-examination Exhibit No. 26,

Warehouse Receipt 21119, issued May 2, 1905, by Hellman Distilling Company, warehouse of Distillery No. 18, 2d Dist. Ky., in blank for 5 barrels Sour Mash Whiskey, 243.23 net wine gallons, made May 1, 1905.

ROSENFELD'S CROSS-EXAMINATION EXHIBIT No. 27.

Hellman Distilling Co. Successors to A. M. Hellman & Co.

Distillers and Blenders High Grade Whiskies. Sole Distributors of "Kudros."

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St. Louis, May 4, 1909.

Rock Spring Distilling Co., Owensboro, Kv.

GENTLEMEN: We refer to ours of yesterday and herewith enclose you warehouse receipts No. 21120 and No. 21121, calling for ten barrels Spring '05, Serial No. 87987-96, which we ask you kindly to bottle ten half pints, and as stated yesterday, twenty pints, and fill up whatever quart skeletons you have for us, bottled under the brand Old Crow, of course.

By giving this matter your immediate attention you will oblige,

Yours truly,

HELLMAN DISTILLING CO. F. A. HUGO, Sec'y.

Rosenfeld's Cross-examination Exhibit No. 28.

Warehouse Receipt 21120, issued May 2, 1905, by Hellman Distilling Company, warehouse of Distillery No. 18, 2d Dist. Ky., in blank, for 5 Barrels Sour Mash Whiskey, 241.89 net wine gallons, made May 1, 1905.

ROSENFELD'S CROSS-EXAMINATION EXHIBIT No. 29.

Hellman Distilling Co. Successors to A. M. Hellman & Co.

Distillers and Blenders High Grade Whiskies. Sole Distributors of "Kudros."

St. Louis, May 20, 1909.

Rock Spring Distilling Co., Owensboro, Kv. 302

Gentlemen: Enclosed find warehouse receipt No. 21123 calling for five barrels, Serial No. 88002-06, which we ask you kindly to bottle Old Crow, 15 cases pints; 15 cases half pints; balance quarts. Kindly hurry all goods forward for we need them and need them badly.

Yours truly,

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HELLMAN DISTILLING CO. F. A. HUGO, Sec'y.

[Note.—The receipt No. 21123 describes the whiskey as "Sour Mash Whiskey."]

Rosenfeld's Cross-examination Exhibit No. 30.

Hellman Distilling Co. Successors to A. M. Hellman & Co.

Distillers and Blenders High Grade Whiskies. Sole Distributors of "Kudros."

St. Louis, May 20, 1909.

Rock Spring Distilling Co., Owensboro, Ky.

GENTLEMEN: You are holding warehouse receipt No. 21121 on . which there are as yet to be unbonded, Serial numbers 87993-96, or four barrels.

We enclose you warehouse receipt No. 21109 calling for five barrels, Serial 87932-36; as well as receipt No. 21122 calling for five

barrels Serial No. 87997-88001.

You will please bottle in bond for us under Crow, thirty-one pints, and thirty-one half pints, and balance of these fourteen barrels in quarts. 303

According to our figures, these thirty-one cases of pints and

half pints ought to clean out our lot of cases.

We hope that the carload of cases which Nivison Weiskopf has to ship you have reached you ere this. If, however, the car has not arrived, then unbond and botttle the pints and half pints and let the quarts follow.

By giving this matter your immediate attention you will oblige Yours truly,

HELLMAN DISTILLING CO. F. A. HUGO.

[Note.—The above receipts in each instance describe the gook as "Sour Mash Whiskey." ]

Rosenfeld's Cross-Examination Exhibit No. 31.

Billhead of Rock Spring Distilling Co., Incorporated.

Distillers of Fine Hand Made Sour Mash and Rye Whiskies.

OWENSBORO, KY., April 2/09.

Sold to Hellman Distilling Co., St. Louis, Mo. Terms: —.

## Bottling No. 75561/65.

40	cases	"Old	l Cr	ow"	quarts	a	0					. 74	29.60	
15	6.6		do.		pints	(a)			0			. 90	13.50	
10	6.6	1	do.	1/2	4.4	(11						1.05	10.50	
														\$53.60

304 Due you 3.86 Regauges 103.17 Cased 195.00 Due you 2.03 (Copy.) 5 M. T. bbls. shipped to you.

Rosenfeld's Cross-examination Exhibit No. 32.

Hellman Distilling Co. Successors to A. M. Hellman Co.

Distillers and Blenders High Grade Whiskies. Sole Distributors of "Kudros."

St. Louis, June 2, 1909.

Rock Spring Distilling Co., Owensboro, Ky.

GENTLEMEN: We are sending you today by Express a few labels which we found we had here. We will have some more made and will keep you supplied. Have you a sufficient quantity of corks on hands for the quarts with our name on them?

We handed your Mr. Arthur Rosenfeld a guarantee holding you harmless in case the other people should attempt to bother you. We believe, however, that they have been shown up sufficiently to rest on their oars. We hardly think they want any more of it and we are satisfied if your attorneys could have read all of the testimony that was brought out that they would be of the same opinion.

What we would like to know is, have you any Hill & Hill "tank" whiskey? This is a joke; your Mr. Arthur Rosen-

feld read that part of the testimony.

Yours truly,

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HELLMAN DISTILLING CO. F. Λ. HUGO, Sec'y.

P. S.—Please bottle the 4 bbl-, you have W. H. Receipt for in its old Crow.

H. D. CO. HUGO.

Rosenfeld's Cross-examination Exhibit No. 33.

Moritz Hellman, Pres. A. C. Dingle, Vice-Pres. Chas. Hellman, Treas. Fred A. Hugo, Sec'y.

Established 1852. Incorporated 1905.

Hellman Distilling Co. Successors to A. M. Hellman & Co.

Distillers and Blenders High Grade Whiskies. Sole Distributors of "Kudros."

St. Louis, Mo., Aug. 6, 1909.

Rock Spring Distilling Co., Owensboro, Ky.

GENTLEMEN: We are in receipt of yours of the 4th with two contracts—both of which are signed.

We do not quite understand why you send these for they look very much like the ones we did sign—however, we fear nothing and

have signed these and trust that you now feel safe.

We care nothing about what Gaines & Co. are doing for we feel that there is no use in defending one's rights unless they can exercise those rights—and these rights being granted to us by what may be considered the supreme power in the United States, we will endeavor to prove to these gentlemen that "might" is not always right. They have had a fight before and if they are looking for another one they will get it, but they had better be careful. There are a few passages in the decision of the Court of Appeals which refer to the actions of Messrs. Gaines & Co., and they might find that some one else has used this brand prior to the time that the

Court is willing to allow them to claim that they used it. This, however, is between us.

Yours truly,

HELLMAN DISTILLING CO. F. A. HUGO, Sec'y.

Rosenfeld's Cross-examination Exhibit No. 34.

This contract of indemnity made and entered into between Hellman Distilling Company, a corporation created and doing business udner the laws of the State of Missouri, and trading in the State of Kentucky, party of the first part, and the Rock Spring Distilling Company, a corporation created, organized and doing business under the laws of the State of Kentucky, and Silas Rosenfeld, lessee of the Rock Spring Distilling Company, distiller, parties of the second part, Witnesseth:

That, whereas, the parties of the second part have heretofore sold to the Hellman Distilling Company whiskey manufactured by the parties of the second part at Owensboro, Kentucky, which whiskey the second parties sold to the party of the first part in bond without any brand attached, but — which whiskey the party of the first part had the right to attach its own private brand, and whereas.

the party of the first part has heretofore requested and is 307 now requesting the parties of the second part to bottle in bond some of the whiskey sold to it by the parties of the second part, and to place thereon the label furnished by the party of the first part, which contains among other things the words "Old Crow," and which brand and label is more particularly described in a copy of the label hereto attached and made a part of this agreement; and whereas, W. A. Gaines & Co., a corporation engaged in the manufacture and sale of whiskey in Kentucky, is claiming that the words "Old Crow" is a trade mark which belongs to it and that no one else has the right to use said words and trade mark, (which, however, was decided adversely by the United States Circuit Court of Appeals. Eighth Circuit, Number 2700) and whereas, the parties of the second part are unwilling to place said labels in said bottles of whiskey except as they are indemnified against any and all liability and damages which may result to them from labeling and branding the whiskey in pursuance of the label attached hereto, and being unwilling to place said brand on said whiskey without indemnity and security against all damages that may result to the parties of the second part from placing the labels attached hereto on the whiskey bottled in bond-now, therefore, in consideration of the premises aforesaid, and to indemnify the parties of the second part, the Hellman Distilling Company hereby contract and covenant with parties of the second part that if they will proceed to brand the said whiskey "Old and according to the label hereto attached, they, the Hellman Distilling Company, will indemnify the parties of the second

308 part against any and all loss or damages which may result to them, or either of them, from branding said whiskey according to the label hereto attached, and further that they will defend any and all suits which may be brought against the parties of the second part, or either of them, and satisfy any and all judgments which may be rendered against the parties of the second part, or either of them, may incur, and that they will fully indemnify them against all loss and damage resulting to them from the bottling of whiskey in bond and placing the label or trade mark herein described and hereto attached, and it will defend all suits and fully indemnify them in every particular whatever.

Given under our hands this 6th day of August, 1909.

HELLMAN DIST'G CO. MORITZ HELLMAN, Pdt. 309 Labels Attached to Contract, Rosenfeld's Cross-es amination Exhibit No. 34.





HELLMAN DISTILLING CO.

ST. LOUIS, MO.

310 Label Attached to Contract, Rosenfeld's Cross-examination Exhibit No. 34.



ST. LOUIS, MO.

311

Certificate.

I, A. G. Ronald, Clerk of the District Court of the United States for the Western District of Kentucky, do hereby certify that the foregoing printed pages, being Nos. 267 to 310, inclusive, contain a true and complete copy of the papers named therein in the case of W. A. Gaines & Co., Plaintiffs, against The Rock Spring Distilling Company, et al., Defendants, in Equity No. 237, as appears from the original thereof.

Witness my hand and the seal of said Court this 7th day of Novem-

ber, 1914.

SEAL.

A. G. RONALD, Clerk.

312 PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF AP-PEALS FOR THE SIXTH CIRCUIT.

Appearance of Counsel.

(Filed Dec. 5th, 1913.)

United States Circuit Court of Appeals for the Sixth Circuit.

#2572.

W. A. GAINES & COMPANY

VS.

ROCK SPRING DISTILLING COMPANY et al.

Frank O. Loveland, Clerk of said Court:

Please enter my appearance as counsel for the Appellant.

JAMES LOVE HOPKINS,
DANIEL W. LINDSEY,
EDMUND F. TRABUE.

313 Entry—Cause Argued and Submitted.

(Feb. 12, 1915—Before Warrington, Knappen and Denison, Circuit Judges.)

United States Circuit Court of Appeals for the Sixth Circuit,

#2572.

W. A. GAINES & Co.

ROCK SPRING DISTILLING Co. and SILAS ROSENFELD.

This cause is argued by Mr. Edmund F. Trabue and Mr. James Love Hopkins for the Appellant and by Mr. Luther Ely Smith for the Appellees and is submitted to the Court.

Decree.

(Filed July 20, 1915.)

United States Circuit Court of Appeals for the Sixth Circuit.

#2572.

W. A. Gaines & Co.

VS.

ROCK SPRING DISTILLING Co. and SILAS ROSENFELD.

314 Appeal from the District Court of the United States for the Western District of Kentucky.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of

Kentucky and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be and the same is hereby reversed with costs and the cause is remanded to the said District Court with directions to enter a new decree consistent with the opinion of this court.

Endorsed: United States Circuit Court of Appeals for the Sixth Circuit. Decree. Filed July 20, 1915. Wm. C. Cochran, Clerk.

Opinion.

(Filed July 20, 1915.)

315 Filed Jul- 20, 1915. Wm. C. Cochran, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2572.

W. A. Gaines & Company, Appellant,

ROCK SPRING DISTILLING COMPANY and SILAS ROSENFELD, Appellees.

Appeal from the District Court for the Western District of Kentucky.

Submitted February 12, 1915; Decided July 20, 1915.

Before Warrington, Knappen and Denison, Circuit Judges.

Appellant, Gaines & Co., is a Kentucky corporation. Appellee, Rock Spring Distilling Co., is also a Kentucky corporation, and ap-

pellee, Rosenfeld, is the licensee and operator of its distillery, and is a citizen of Kentucky. The appellant will be referred to as plaintiff, the appellees as defendants. The litigation involves a controversy over the words "Crow" or "Old Crow" as a trade-mark for whiskey. Plaintiff filed its bill in the court below alleging its trade-mark right in these words, and claiming that defendants were infringing. The answer denied the existence of the right claimed, and set up as a bar a decree rendered against plaintiff in the United States District Court at St. Louis, under mandate of the Circuit Court of Appeals for the The answer claimed privity between the Hell-Eighth Circuit. mans,—the defendants in that case,—and these defendants. A plea of former adjudication was held good (179 Fed., 544); after

replication filed, proofs were taken, including, by stipulation, 316 all proofs in the Hellman case; and, on final hearing, the bill

was dismissed (202 Fed., 989).

From the pleadings and proofs, these facts appear, either without dispute or beyond fair question: Woodford County, Kentucky, is not far from Bourbon County, and is in the heart of the limestone formation, "blue grass" country. This general region has always been and is the center of the distilling business for the best known Kentucky whiskies. The water from the limestone springs,—whether or not it is really better than other waters for making whiskey,-in the early days was thought to be of unique purity and essential to the highest grade of the distilled product. Three brands, among those most advertised and so most widely known now for a generation, are made within a few miles of each other, in Woodford County, along Glenn's Creek,—"Taylor," "Pepper" and "Crow." For a long period before 1855, James Crow was a practical distiller in the Glenn's Creek neighborhood. He did not have a distillery of his own, but was employed by various distillers,—for some years before Crow's death in 1855, by Oscar Pepper (except for the last year or two, and even then Crow retained some supervision for Pepper). He was reputed to be the first man in Kentucky to make a sour mash whiskey, and he had a high reputation as a skillful distiller. During his years at the Pepper distillery, he made a large quantity of whiskey; this whiskey came to be called by his name as "Crow" or, as it aged, "Old Crow" whiskey, and it acquired, by that designation, a reputation for good quality. At his death, a considerable quantity was in existence, both where it had been scattered upon the market and where it was aging in the distiller's possession. During the succeeding years, it continued to have a market reputation and represent a high standard, under one or the other of these names. After Crow's death, Oscar Pepper, at the same distillery and with the same formula, continued to make a whiskey, which some witnesses say he continued to call He died about 1865. In 1866 or 1867, the Pepper distillery was bought by Gaines, Berry & Co. They employed, as distiller, a man who had been a foreman for Crow and who knew his formula and methods, and their product, they called "Crow" or "Old Crow." They were succeeded in the business by W. A. Gaines & Co., first a partnership and then the plaintiff corporation.

Since such adoption by Gaines, Berry & Co., these words have 317

been continually used by plaintiff and its predecessors as a trade-mark; vast sums of money have been expended on advertising the brand and the trade-mark, and the brand, under that name, has for many years, been one of the best known in the country. All the other distilleries where Crow worked, and which so might have had special rights in the name, have now, for sixty years or more, not questioned the exclusive rights of the Pepper distillery and its successor; and while, doubtless in the seventies, and perhaps in the eighties, there were some instances of trespassing which were not attacked, plaintiff's right was even then generally observed, and now, for 25 or 30 years, has not been seriously challenged,—save for the Hellman use.

The witness Mida, who conducts the Bureau of Registration for brands and trade-marks regarded as authoritative by all the liquor trade, and who has published, since 1878, "Mida's Criterion," the recognized price list of "all brands and all ages" of liquor, testifies that "Old Crow" has always and everywhere been considered the Gaines brand, and is universally understood to refer to whiskey made at the Gaines Old Crow distillery. This testimony is undisputed,—except-

ing the Hellman use, if that is an exception.

It further appears that Gaines & Co., in 1882, registered, as a trade-mark, "Old Crow," alleging its use as a trade-mark "since 1870." Again, in 1904, plaintiff duly registered as a trade-mark, the words "Old Crow," alleging its continuous use, by plaintiff and its predecessors, since 1835. Again, in 1909, and under the Act of 1905, plaintiff duly registered the same trade-mark, alleging that it had been used since 1835; that the class of merchandise to which it was appropriated was "distilled alcoholic liquors"; and that the particular description of goods comprised in the class upon which the trademark was used is "Straight Bourbon and Rye Whiskey." This last registration is the only one alleged in the bill in this cause; and upon it, jurisdiction depends, since there is no diverse citizenship.

Since it is admitted that defendants are using the name "Celebrated Old Crow" upon whiskey not made by plaintiff, the right to an injunction would be clear, except for the defense and counter-

claims made in the Hellman case, taking effect here either by virtue of the inherent force of the facts there and here appear-318 ing, or through the operation of the rule of adjudication. that case, the defendants Hellman filed a cross-bill alleging their own prior and superior right to the trade-mark "Old Crow," and asking for appropriate relief. By the proofs, it appeared that prior to 1867, and perhaps as early as 1863, the Hellmans had made some shipments of whiskey which they invoiced under the name of "Crow," which were contained in barrels stamped with the picture of a crow, and with the words "P. Crow" or "J. W. Crow"; that they had distributed to their customers signs advertising "Celebrated Old Crow Bourbon"; that they were not distillers, but were wholesalers or jobbers; and that the whiskey which they sold under that name had no connection with the Kentucky "Old Crow," but was a "blend" and made by them on their own premises, while the plaintiff's product was a straight whiskey, and its trade-mark was never applied with its approval, to anything else than its product. Upon this general situation, the District Court, at St. Louis, found the facts and the law in plaintiff's favor, awarded to it the usual injunctional relief and dismissed the cross-bill of defendants Hellman (Gaines v. Kahn, 155 Fed., 639). Both parties appealed, but the Hellmans dropped their appeal from the dismissal of their cross-bill, whereby, whatever adjudication was carried by such dismissal became final. The opinion of the Court of Appeals is reported in Kahn v. Gaines, 161 Fed., 495. Its precise effect, we must hereafter consider. It directed that the decree be reversed and that plaintiff's bill be dismissed; and this was done.

## Denison, Circuit Judge:

1. The first objection which plaintiff's alleged trade-mark rights must meet is that the words are descriptive, and so incapable of becoming a true trade-mark. If nothing were involved except the effect of the 1909 registration, this objection might be passed without decision, since the application for registration indicates use for more than ten years before 1905, thus perfecting rights which might have been imperfect when the use began, and would have so continued except for the statute (Davids Co. v. Davids, 233 U. S., 461; Nashville Co. v. Coca Cola Co., 215 Fed., 527, 529); but it is impossible wholly

to separate the force of this registration from the underlying 319 broader question, because rights prior to this registration are indirectly involved.

During the lifetime of the distiller Crow, it seems clear enough that to call his product by his name could not amount to the adoption of a valid trade-mark; the use of the name was descriptive rather than arbitrary, and a manufacturer cannot thus exclude all others. Such use might give rise to quasi-exclusive rights on the secondary meaning theory; but this theory is not alleged. The same situation, apparently, must continue after Crow's death, and in reference to whiskey which had been manufactured by him during his life. The necessary meaning of the words, as merely describing the article or stating the name of the maker, would seem to merge and destroy any otherwise possible implication that they were an arbitrary symbol of origin. As the making of whiskey after Crow's death, but by the same formula and methods, was continued by Pepper or by Gaines, and as it continued to be called "Old Crow," this appellation would gradually change its character. It at once ceased truly to personify the maker; it did not immediately become merely arbitrary. As the trade lost the sense of Crow's personality, as he became less real and more traditional, as no one else of the same name challenged the growing right, and as with Crow's personality fading there must also fade the vague descriptive effect of using his formula, the words "Old Crow" would become less descriptive and more arbitrary; and after a period of such unchallenged use, they would become dominantly and substantially a mere symbol of Whether this right of exclusive appropriation as a trademark had matured in 1866 or 1867, when Gaines, Berry & Co.

began the use, or matured in 1870, the date named in their first trade-mark registration, or matured at some other date, is not now material; the facts seem to show an unbroken development of the type which the courts had recognized but which had not been effectuated by statute until the law of 1905; words which were at first essentially incapable of exclusive appropriation were continually used as descriptive by the only one who could truthfully make such use, until, by change of circumstances and by long acquiescence, they had come to indicate, and indicate only, a particular product of a particular manufacturer. It might be otherwise, if the words had originally been more purely descriptive of quality or method; and it may be that some person named Crow

would even yet have a measure of right to call his product "Crow." We do not meet either of these questions, and, in what has been said regarding the capability of the name for exclusive appropriation, we have, for the time being, disregarded what-

ever force the St. Louis use by Hellman may have.

2. When we consider the claim that the Hellman decree is a bar to any relief in this suit, we first meet the objection that there is no privity of parties. We must think that privity sufficiently appears. The parties defendant in that case, at the time of its commencement. had been the two Hellmans, who were partners. Pending the suit, one partner died and his administrator, Kahn, was substituted. Later, but still pending the suit, the entire business of the Hellman Bros. was transferred to the just organized corporation, the Hellman Distilling Company, and, by supplemental bill, this corporation was made defendant. The corporation was, therefore, a party to the suit at the time of the final decree. During the existence of the partnership of Hellman Bros., it had leased the distillery of the Rock Springs Distilling Company, near Owensboro, Kentucky, and, as lessee, it had manufactured whiskey there in 1904. The Hellman Distilling Company, as such lessee, continued such manufacturing in 1905, 1906 and 1907. In 1909, all this remained in bond in the distillery warehouse. In 1909, and after the final decree in the Missouri case, the Hellman Distilling Company contracted with the Rock Spring Company, and with Rosenfield, as its lessee, for the further manufacture of whiskey, and for the bottling in bond of the 1904 stock, and for the use upon such bottles of the brand or label "Hellman's Celebrated Old Crow." The Hellman Company gave to defendants a bond of indemnity to protect them against plaintiff's claims; in using this brand or label, defendants are acting for and in behalf of the Hellman Distilling Company; and the right of that company to use this brand on this article is the very thing in controversy. The former decree must be given the same force and effect as if the Hellman Distilling Company were the nominal, as it is the real, defendant here (Kesler v. Eldred, 206 U.S., 285).

3. Plaintiff next urges, by way of escape from the claimed force of the Hellman decree, and even if that decree is to be considered as an adjudication that the plaintiff had no lawful title to the 321 trade-mark, yet, that since the only use there involved was

upon a blended whiskey while the use here involved is upon a straight whiskey, a judgment that plaintiff had no trade-mark valid against a blended whiskey would not be a judgment that plaintiff had no trade-mark valid for a straight whiskey. Disregarding. for the present, such limitations as for the purposes of this suit must be thought to have been imposed on plaintiff's rights by the peculiar form of the 1909 registration, and with reference only to the general question and the general rule, we cannot be satisfied with the theory which would thus interpret and then limit the effect of the Hellman decree. The general rule is clear that a common law trade-mark for one article extends to another article of the same descriptive properties; the difficulties come in applying this limitation, "of the same descriptive properties." The distinctions between a straight whiskey and a blended whiskey have given rise to much controversy in other legal fields, but it seems to us clear that whatever the extended classifications and subclassifications of the Patent Office practice may contemplate, neither the common law nor the registration statute can intend such confusion as must result from recognizing the same trade-mark as belonging to different people for different kinds of the same article. Established trade-marks directly indicate origin; but if they have any value, it is because they indirectly indicate kind and quality; and to say that the seller of a blended whiskey might properly put upon it a mark which was known to stand for a straight whiskey, or vice versa, would be to say that he might deceive the public not only as to the origin but also as to the nature and quality of the article. The decided cases do not permit a trade-mark like this to be thus divided as to its subject-matter (Coffee and cocoa,-Court of Appeals. D. of C.—Baker v. Hanson, 138 O. G., 770; toilet brushes and tooth brushes,—C. C. A. 2—Florence Co. v. Dowd, 178 Fed., 73; soda and baking powder--C. C. A. 8--Layton Co. v. Church, 182 Fed., 35; axes and shovels, Collins v. Ames Co.-Mr. Justice Blatchford-18 Fed., 561; tobacco and cigarettes, American Co. v. Polacsek, (Coxe, C. J.) 170 Fed., 117); and we must think that whatever was adjudicated regarding plaintiff's title to its trade-mark applies to its use on both kinds of whiskey.

4. It is next urged that the Eighth Circuit decree may be reconciled with granting the relief now sought, and upon the theory that trade-mark rights may be limited in territory, and that plaintiff might have the right to this trade-mark for whiskies throughout the country generally, while the Hellmans might have an exclusive

right to the same words as a trade-mark for the same article 322 in St. Louis and the southwest, thus being given the field which they claimed they had first exploited and reduced to possession. This suggestion presents two conflicting theories of trade-mark origin and right,—and we speak now only of marks which are so-called "technical" trade-marks. One theory is that the right arises from adoption,—from a kind of creation or discovery followed by appropriation. Whether the right is perfect at the instant of adoption or whether there first must be sufficient use upon the goods to create for the mark a meaning among that part

of the public which begins to purchase, is a detail which would not usually be important. According to this theory, if the right is once acquired by prior adoption, it is, by its very nature, exclusive of all later similar rights which might otherwise be acquired by similar adoption; and from that theory it would seem to follow that one who first adopts the mark and applies it to his goods in interstate commerce, and who extends his business into new localities until, in regular course, his business may cover the country, may prevent the use of the mark by another later user, even though that other has adopted the mark in good faith, and, in his particular field, has given it identi-y with his How much diligence on this theory the first user must employ in extending his business to get the full benefit of his initial right need not now be considered. The other theory is that no right is perfected until the mark has been used to such an extent that it has come to have a meaning to the particular purchasing public as to which a controversy arises, and that the duty of courts of equity to enforce such rights depends essentially upon the duty of protecting this public against being misled. From this theory, it will follow, or it may follow, that the later adopter, who has brought it about in a given locality that the mark indicates to the public that the goods are of his manufacture, may thereby himself acquire a trade-mark right or its equivalent, affirmatively enforceable in that locality and among that public, even against the first proprietor.

We do not find it necessary to consider or to attempt to decide the question so presented. For the purposes of this case, and without intimating any opinion, we give the first appropriator the benefit of the doubt and assume that his title is prima facie country-

wide and exclusive against all others, and that as against all 323 who have no special and superior equity, he is entitled to carry his trade into the new territory and there to enforce his exclusive right. However, the existence of this general or prima facie exclusive right is not inconsistent with an inability to enforce it against some persons and under some circumstances. Instances may arise where the affirmative conduct or the laches of the first appropriator, and with reference to what he was at first entitled to call an infringement, has been such that on the principles of estoppel or the rule of laches a court of equity cannot tolerate that he should enforce against the later user the right which might have been originally perfect. This subject is more fully discussed and the reasons which lead us to this conclusion pointed out, with some reference to the decided cases, in our opinion in the Rectanus case, this day decided.

Under these considerations and upon reference to the pleadings and the proofs in the Hellman case, we conclude that the latter case is of the class where the refusal to give an injunction to the first appropriator of the mark may be justified upon the ground of his laches or estoppel; and so this ground of support must be consid-

ered in determining what is the true basis of that decree.

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5. Is the Eighth Circuit decree a judgment that the trade-mark in its general, prima facie, affirmative aspect, belonged to the Hellmans prior appropriation? This is the interpretation claimed by The language in the body of the Circuit Court of Appeals' opinion, is consistent with that interpretation, but the last paragraph indicates that the two judges (only two sitting) did not unite in putting the decision on this ground. When we turn to the record for further light, we find, first, that the defendants' cross-bill claiming the trade-mark ownership was dismissed, and that the dismissal became final. If it had been even seriously contended by defendants that their early use of the words was effective to vest a trade-mark right therein, surely there would not have been acquiescence in the dismissal of the cross-bill. It was apparent, then as now, that affirmative title to the trade-mark would have been of great value to defendants, if they could maintain that position. We find, second, that there was in the record practically nothing indicating that the Hellmans ever pretended to adopt or claim

these words as their trade-mark. They stamped some barrels 324 with the words "P. Crow" or "J. W. Crow"; but no person of this surname had ever been connected with the Hellmans. Crow or Old Crow which, in 1863, had been manufactured in Kentucky for 20 years or more, was at least considerably known on the market. No reason has ever been suggested in this litigation, and we can think of none, why they should put this name on their barrels, unless they intended to indicate that the whiskey was that made by Crow of Kentucky. Unless the selection of this name meant that, it meant nothing. Witnesses for the defense frankly stated that in those years it was nothing unusual for jobbers or blenders of whiskey to use well-known brands belonging to others, and that if the initial of a proper name was changed, this was thought sufficient in morals to remove any objection to the appropriation. This may be the genesis of the otherwise unexplained use of "P" and "J. W."\* The Hellmans also used advertising signs "Celebrated Old Crow Bourbon." From the record, we must doubt whether these signs antedated 1870. But if they did reach back to 1863, and if they referred to the blend or mixture which the Hellmans produced, it was neither "Celebrated," nor "Old," nor "Crow," nor, unless by chance, "Bourbon." It was made by mixing colors and flavors with neutral spirits or high wines, or, sometimes, straight whiskey; but, if the latter, it was whatever they happened to have on hand. Defandants' witness says, "any brand would do." Records which seem to be complete show that during the seven years from 1863 to 1870. the Hellmans sold, of this "Crow" whiskey, an average of less than eight barrels per year.

In considering whether their use was of a trade-mark character, the peculiar nature of their business and their markings must not

<sup>\*</sup>One of the stencils was "J. Crow-Bourbon-Paris, Ky.,"—a plain declaration that "Crow" was a maker's name, and not a Hellman trade-mark; and as there never was any "Crow" in "Paris, Ky.," the intent seems clear enough.

never was any "Crow" in "Paris, Ky.," the intent seems clear enough.

†Assuming that, at that date, "Bourbon" fairly meant a corn whiskey from somewhere in Kentucky, even if not from Bourbon County.

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be overlooked. The brands or marks on whiskey are usually those of the original manufacturer. The dealer or jobber may handle many well-known brands and may mark his own name upon the packages or upon the advertisements, but this does not indicate that he claims the brands as his, or that he is acquiring a trade-mark right therein. While the stencils on the barrel and the glass signs carried the name "Hellman & Co.," they did not say "manufactured by," or that Hellman & Co. were manufacturers or distillers, nor were they in any way inconsistent with mere sale

by Hellman as jobber of a well-known brand made by some one else. The thus described nature and character of the Hellman early use might not always be thought sufficient to initiate and support even a defensive right; but they were so regarded in the former decree, and it is immaterial whether we would independently reach that conclusion. It did there appear that the Hellman use thus began and continued for seven years before 1870, or four years before 1867,—the earliest date to which, under the pleadings, plaintiff could then resort,—and that after 1870 it continued, increasing somewhat, although remaining comparatively small, and continuing without challenge from plaintiff until 1904. It may well be that, even if plaintiff did not know of this use and acquiesce, it was legally chargeable with such knowledge and acquiescence for many years, and that in 1904 the use would have matured into a possession of which a court of equity would not deprive defendant. At any rate, we think that is the theory upon which the former decree should be considered to stand; and, accordingly, it adjudicates such defensive right and nothing more. As interpreted by Judge Lacombe in the Baltimore Club Case (Carroll v. McIlvaine—C. C. A. 2—183 Fed., 22, at p. 28), this right does not go beyond what has actually been "reduced to possession" by defendant, and does not extend to any whiskey not mixed or blended so as to be of the same general type as that which defendants had been making, or to trade or territory which they were not selling when that bill was filed. Such difficulties as there may be in drawing the exact line of its effect are not here involved, because the infringement here sought to be enjoined is in another locality and of another character. This limitation. to blended whiskey as distinguished from straight,—thus imposed on defendants, is not inconsistent with our earlier holding that a trade-mark cannot be so divided. This limitation is not of the trade-mark itself, but of the fraction thereof which has been lost.

6. The validity of plaintiff's registration under the Act of 1905 is attacked upon two grounds: first, that the registration was forbidden by Sec. 5, because the mark was identical with a "known trade-mark owned and in use by another and appropriated to merchandise of the same descriptive properties," viz., the Hellman trade-mark; and, second, that it would be invalid under that provision of Sec. 21 which relates to certificates of registration fraudulently obtained.

We pass by the plaintiff's contention that the validity of registration cannot be collaterally attacked, but must be directly reached under the provisions of Sec. 13, which provides for the cancellation of the certificate if it is made to appear that the registration was unlawful; and we do so because we conclude that the registration of a word capable of exclusive appropriation has no effect upon the substantive rights of the parties, excepting its evidential force to make a prima facie case of title. We find nothing in the act purporting to cut off or impair any substantive defense which would have been open to the defendant if there had been no registration,-except in so far as it perhaps may affect the character of registrant's title to a descriptive word of a secondary meaning (Nashville Co. v. Coca Cola Co., 215 Fed., 527, 529), and this effect is not now involved. If, then, the law does not otherwise indicate the intention to cut off or embarrass ordinary defenses by one who has not been heard in the registration proceedings, that intention cannot be inferred merely from the insertion of a provision by which a hostile party can secure the cancellation of a certificate and so destroy even its evidential force and its effect upon questions of jurisdiction as between different courts.

The first objection is that because the trade-mark "Old Crow" belonged to the Hellmans for use upon blended whiskey and because this is an article of the same descriptive qualities as plaintiff's straight whiskey, the registration was forbidden. This objection must fall, when it is found, as we have held, that upon the basis of the former decree the adjudication does not establish the ownership of the trade-mark by the Hellmans, but only a defensive right sufficient to protect them against the remedy then sought, and that if we go behind the adjudication and into the facts, the Hellman right

is not enlarged.

327 It is next said that the registration was "fraudulently obtained" because, before the application was made, the Eighth Circuit litigation had been finished, and yet the application falsely stated two things, the untruth of which had then been judicially established (1) that the trade-mark had been continuously in use by registrant and its predecessors since 1835; (2) that no other person

had the right to use the mark.

The statement that the trade-mark had been in use since 1835 is not shown to be untrue to such extent and with such certainty as would be necessary to fix a fraudulent character on the application,—within the meaning of fraudulent, as used in this connection. The proof does not carry the use of the word back to a definite beginning. At Crow's death, in 1855, the name had been long used. No one undertakes to say how long. It was not important for plaintiff to prove that the use did extend back of, say 1850, and defendant did not undertake to prove that the use did not go as far as 1835. The period between 1835 and 1850 was not important either for the purpose of registration or for the purpose of this suit. It is true that the use was of a character analogous to a descriptive use rather than a strictly trade-mark use for a period which did not expire until an indefinite date, perhaps 1870, perhaps earlier; but this fact, with these surroundings, is plainly insufficient to make

"fraudulent" the statement that the trade-mark had been continu-

ously used since an earlier period.

The application says "that no other person \* \* \* has the right to use the trade-mark." It had then been decided that as against plaintiff's claimed exclusive right, the Hellmans could continue to use the words as they had been doing, viz., in their trade and territory and upon their blended product. The registrant thought to avoid this apparent conflict by limiting the registration to straight whiskey only, and undoubtedly the application, when read together, is only a statement that no one else has the right to use the words upon straight whiskey. We have expressed our opinion that a trademark cannot be so limited; but we see no reason why an applicant may not, if he wishes, confine his registration and its effect to such

classes or sub-classes of the article "of the same descriptive 328 properties" as he may select,\* or why he thereby necessarily abandons such rights as he may have to the use of the mark upon other sub-classes of the same article. It is true that the jurisdiction in this case depends upon this registration; but the decree sought is confined strictly within the limitations of the registration, viz., it affects straight whiskey only; and it is no concern of defend-

ants if the registration might have been broader.

The application, obviously, did not state the whole truth regarding the mark, but as far as it stated anything in this respect, it was carefully accurate. It claimed only that exclusive right of use which

remained unimpaired by the Hellman decree.

It is also said that the registration was fraudulent because the Hellmans' well known interests were, by silence, concealed, whereby they were not summoned as adverse claimants, and lost their chance to be heard. The registration statute contemplates that adverse daimants, when known, shall have notice and an opportunity to There is little reason to doubt that this application was carefully so shaped as to avoid any necessity for such specific notice; and if the effect of the registration was to take away any right of use which the Hellmans actually owned, it might well be that any intentional failure to disclose facts which might give another the right to be heard, would be fatal to the proceeding; but with due regard for the limited effect of the registration, there is no occasion for so strict a rule in determining "when the certificate is fraudulently obtained." Whatever new rights, of evidence or of forum, plaintiff was getting were confined to its trade-mark used upon straight whiskey; in that use, the Hellmans had no concern. Their failure to receive notice impaired no right of theirs; and it follows that the deliberate limitation and shaping of the registration so as to avoid conflict with their claims was not fraudulent, as against them or as against the public.

We think the plaintiff was entitled to an injunction against the continuance of what defendants were doing, viz., using the names "Crow" or "Old Crow" in connection with straight whiskey not

<sup>\*</sup>Koehler v. Beeshore, 59 Fed., 572; Richter v. Reynolds, 59 Fed., 577; and Pittsburg Co. v. Diamond Co., 85 Fed., 637, pertain to the word itself, not to its use,

made by plaintiff. Extending the injunction in the broad terms of the prayer of the bill might not only cause confusion with rights secured by the Eighth Circuit decree, but might go beyond our invisibilities in this case. That invisibilities is a final confusion of the confusi

jurisdiction in this case. That jurisdiction is confined to protecting the class of Merchandise specified in the certificate 329 of registration, "straight Bourbon or rye whiskey"; and, if upon the principles herein declared, plaintiff would be entitled to any broader measure of relief, this limitation of the injunction will not prejudice proceedings therefor in a court whose jurisdiction does not depend solely upon the registration." The difficulty of distinguishing between the results of defendants' wrongful use of these names as compared with the results of a rightful use make the case inappropriate for an accounting (Ludington Co. v. Leonard-C. C. A. 2-127 Fed., 155, 157). The decree below is reversed, with costs, and the case is remanded for the entry of a new decree consistent with this opinion.

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Petition for Rehearing.

(Filed Aug. 18, 1915.)

331 United States Circuit Court of Appeals, Sixth Circuit.

No. 2572.

W. A. Gaines & Company, Appellant,

ROCK SPRING DISTILLING COMPANY and SILAS ROSENFELD, Appellees.

Appeal from the District Court of the United States for the Western District of Kentucky, Owensboro Division.

Motion for Rehearing.

Appellees respectfully move the Court to grant a rehearing in this

cause for the following reasons:

The record in the case is very great. The new volume covering proceedings in the Kentucky case is considerable. The volume covering the Eighth Circuit proceedings is of great magnitude. Since the Eighth Circuit litigation ended a decision was rendered by President Taft settling many points of dispute in the history of the whisky trade.

We were under the impression that your Honors were familiar with the full force and effect of that decision and the facts 332 therein established. Appellees also rested under the belief that even though your Honors examined the record in the Missouri case to ascertain what the Eighth Circuit Court of Appeals decided, your Honors would not go so far as to make a new finding of facts on the same evidence, in many essential respects opposite to that found by the Eighth Circuit Court of Appeals, and unsupported

by any competent evidence. Appellees are firmly convinced that this Court would not knowingly make a finding of facts which is not only unsupported in the record but is impossible under the history of the whiskey trade as established by President Taft; and that this Court would not with a full realization of the facts, while affirming the doctrine of res adjudicata, so apply it as to emasculate it completely and in effect deny it.

Having unwittingly done these things and thereby in effect overruled leading authorities, it is highly important that the Court should grant a rehearing of this cause for reasons more particularly set

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I.

The Court not having clearly in mind the facts as found by President Taft in his decision, labored under an incorrect conception of the history and development of the art of making whisky, the method of marketing whisky and particularly the situation as it existed between 1850 and 1860, during the Civil War, and in the succeeding decade.

(a) Up to the Civil War whisky as it came from the still was raw whisky, not generally regarded as palatable or potable until

"smoothed," refined or purified by an additional process.

(b) Raw whisky was purified and rendered palatable and 333 potable, not by distillers, but by rectifiers who took the raw product of the distiller and passed it through charcoal in leaching tubs. Coloring was added. It was compounded or blended and whisky made in this manner reached the general public through

a general market.

(c) Some time during the Civil War the discovery was made that

raw whiskey, if stored for some years in charred oak barrels, lost its raw taste, acquired color from the tannic acid thus extracted from the char and became palatable and potable; it came to be known as "straight whisky."

(d) There was no market with the general public for "raw"

whisky as it came from the distiller.

The public, outside of a small local neighborhood trade ("you hauled down a load of corn and brought back a barrel of whisky"; or "you sent down and got a jug full"), knew nothing of raw whisky. Distillers who had more than a local or grist mill trade capacity disposed of their product to rectifiers who purified it and compounded or blended it and made it ready for the public.

Except to rectifiers, there was no "market" for raw whisky as it came from the still, and this continued until the "straight" whisky process of aging the distiller's product for some years in charred barrels was discovered some time during the Civil War, and put into practice. (See President Taft's Opinion in Statement supporting this

motion, post.)

II.

The Court overlooked the fact that whisky made under the supervision of "the Old Crow" (as James Crow was familiarly

334 called) was "raw" whisky, unrefined, unrectified and unpurified; that while it had a local vogue in the neighborhood of the various small log distilleries where he worked, among the sturdy farmers and workmen of that immediate locality, it did not have a general market, and under the state of the trade at that time it could not be said to have a market at all.

The distilleries in which Crow worked were small affairs made of logs, of very limited capacity (20 to 25 bushels a day), had only seasonal runs, and were not calculated to supply more than a local neighborhood jug or barrel trade (like country grist mills where you carried your grain to the mill and brought home the flour). But even if there were a surplus over and above the local needs, the only market for it was with the rectifiers and compounders who were equipped with charcoal and leaching tubs to purify and refine it and make it into a palatable whisky, blended or compounded, the only ones then making and selling whisky to the general consuming public.

There was no market for raw whisky. There is no evidence in the record of a market for whisky made in Kentucky and branded Old Crow other than Gaines' Old Crow, which did not appear in the market until 1870 or thereabout; and witnesses who referred to Kentucky Old Crow other than Gaines' Old Crow were speaking of sales in Woodford County, Kentucky, only.

# III.

# Res Adjudicata.

The Court overlooked the fact that in examining the decree in the Eighth Circuit Court of Appeals it was not permissible to 335 make a new finding of facts inconsistent with and antagonistic to the facts found by that court. To recognize that decree in form, and then to review the record in that case by way of finding facts thoroughly different from the facts there found, is to destroy that decree. Res adjudicate means that the facts have been adjudicated. Yet this Court in effect now holds that the facts may be entirely readjudicated and found to be just the opposite in substance and in legal effect to those there found.

A distinct issue in that case was the good or bad faith of the Hellmans in adopting and using the trade-mark. That Court found good faith as a fact. This Court finds bad faith.

A distinct issue in that case was priority of adoption. That Court found that the Hellmans were the first appropriators. This Court finds complainant as the first appropriator. That Court found 1870 as the date when complainant first conceived and adopted its trademark. This Court finds either 1835 or some very early date, prior to 1850 (presumably 1843).

Other marked differences will be noted in the statement following this motion.

Of what value is a decree if the facts found and determined by the

Court in reaching its decision be adjudged by another court to be enirely different?

We are confident that upon a reconsideration this Court will agree hat the only safe and fair rule to follow is that laid down by Mr. Jus-

ice Harlan, as follows:
"The general principle announced in numerous cases is that a ight or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their 336 privies; and even if the second suit is for a different cause of action, the right, question or fact once determined must, as between he same parties or their privies, be taken as conclusively established.

o long as the judgment in the first suit remains unmodified.

"This general rule is demanded by the very object for which civil ourts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determinaion. Its enforcement is essential to the maintenance of social order; or the aid of judicial tribunals would not be invoked for the vinlication of rights of person and property, if, as between parties and heir privies, conclusiveness did not attend the judgments of such triounals in respect of all matters properly put in issue and actually deermined by them."

Southern Pacific Ry. v. U. S., 168 U. S., l. c. 48, 49.

If findings of fact upon which courts base their conclusions in reaching final decrees are not themselves final, then a final decree might well be said to amount to little more than a scrap of paper. We know that this Court has no intention of establishing either in form or effect any such doctrine, and to the end that it may not be regarded as having done so, we urge a reconsideration of this case.

# IV.

Not only do we urge that the facts found in the former case are binding here, but we submit that the necessity of adhering to that rule is strikingly shown in this case, for in re-examining this 337 vast record this court has inadvertently found facts that are

without support in the evidence.

(a) The Court overlooked the fact (Opinion, p. 2) that the expression "Old Crow" when (as was sometimes the case) it was applied in the lifetime of James Crow to whisky made under his supervision, had no reference to age; that the process of aging and marketing whisky stored in charred barrels was not discovered until some time during the Civil War (several years after Crow's death); that Crow himself was colloquially and familiarly known as "the Old Crow" or "old Crow" or "Old man Crow," as indicated by numerous expressions spontaneously volunteered by witnesses who knew him, and the phrase "Old Crow" when used in connection with his whisky was applied to raw whisky as it ran from the still, and had no reference to age at all.

(b) The Court overlooked the fact that the J. Crow, Paris, Ky., stencil (Opinion, p. 10; footnote 1) was not and never had been a Hellman stencil, but on the contrary belonged to Samuel McCartney & Company. Any "intent" deduced from its use clearly is not chargeable against the Hellmans.

(c) Other instances where the Court has inadvertently made important statements not founded on fact will be noted in the statement

supporting this motion.

We are confident that this Court desires to apprehend this case correctly, and to the end that it may do so and that the misapprehensions which, in despite of the Court's vigilance, have crowded into the opinion, may be corrected, we respectfully urge a reconsideration of the case.

338 V.

The Court overlooked the fact that in adjudging complainant entitled to a trade-mark upon straight whisky as against the Hellmans, the Court drew a distinction between straight whisky and blends which is not valid in the law of trade-marks. Complainant's predecessors in business were not the first appropriators of the words "Old Crow" as a trade-mark for whisky. Complainant never possessed an exclusive right as against the Hellmans to the words "Old Crow" upon whisky straight or otherwise, and could not therefore lose a fraction of what it never had. Priority of adoption and continuous use in good faith by the Hellmans were adjudged in the Eighth Circuit Court of Appeals decision, and on that ground the decree went in their favor. The distinction between straight whisky and blends was urged in that case and denied.

It might well be thought that since complainant claims to trace the origin of its mark to a use upon raw whisky made of corn as indicating whisky made by that particular method in vogue in 1850, it would be doubtful if complainant under its latest registration could apply that same mark to an entirely different kind of whisky made by a different method, namely, straight whisky aged in charred barrels—not to mention rye whisky and blended whisky, all of which complainant has been doing and is now doing. Raw whisky was not then regarded as palatable or potable by the public and there was no market for it with the public. Rectified or blended whisky always had a market with the public as palatable and potable whisky, as straight whisky came to have later. The Hellmans in applying their

mark to straight whisky applied their mark which had been 339 used on one kind of palatable, potable whisky (blends) to another variety of palatable, potable, marketable whisky. Their right to use their trade-mark "ad libitum" cannot be interfered with by Gaines, under the Eighth Circuit Court of Appeals finding and decision.

The benefit of priority of adoption and continuous use adjudged in that case are available to the Hellmans upon all kinds of whisky.

To narrow the finding and decree in the Eighth Circuit as is here done is to set aside in all respects except the barest outline, and in effect overrule the principles established by Mr. Justice Blatchford in Collins v. Ames, 18 Fed. 561, and ever since recognized.

## VI.

The Court overlooked the fact that in holding complainant's 1909 registration valid and the affidavit in support of it true, they have in effect gone very far toward rendering ineffective the protective por-

tions of that statute.

If an unsuccessful litigant can by successive registrations restate its claims in the light of adverse decrees and thereby escape their effect, interesting possibilities are raised under the Act of 1905. Barren of resource indeed would be the claimant who could not make a paper case for himself before the Patent Office, and tender indeed would be his conscience if he could not make the affidavit required by the statute, if he felt that that statute and that affidavit would not be construed with virility in a court of equity. We cannot believe that this Court fully realized the far-reaching consequences of

its decision when it in effect gave a clean bill of health to an 340 affiant who deliberately framed his statement so as to suppress the facts which would irreparably injure his case and thereby, in legal effect, stated what was not the fact and could not in

any fair or ordinary use of language be said to be true.

### VII.

The Court is in error in stating (Opinion, p. 4):

"Both parties appealed (in St. Louis), but the Hellmans dropped their appeal from the dismissal of the cross-bill, whereby whatever adjudication was carried by such dismissal became final."

(a) Both parties did not appeal. There was but one decree and it was in favor of Gaines and against the Hellmans. The Hellmans

appealed from that decree. Gaines did not.

(b) The Hellmans did not dismiss their appeal. At the hearing in the Appellate Court they declined to insist upon the affirmative relief, which by reason of the then equity rules could not be (but now would be required to be) asked in the answer. The practice then obtaining required another pleading denominated a cross-bill (in legal effect a second answering re-averring the allegations of the answer with prayer for affirmative relief). There was no dismissal and no adjudication therewith. (The facts are given in the statement following.)

# VIII.

The Rectanus, Baltimore Club and Tea Rose Flour cases are not controlling or persuasive, for the situation is different. If the Hellmans were seeking by suit in Kentucky to enjoin the use of Old

Crow by Gaines there, something might be said of those cases.

Here defendants in Owensboro are placing upon whisky owned by the Hellmans the Hellmans' labels and shipping it all to the Hellmans in St. Louis.

# IX.

The Court, while apparently impressed with the fact that only two judges heard the case in the Eighth Circuit Court of Appeals, overlooked the fact that complainant itself had agreed in open court that the hearing should be before the court composed of the two judges who heard the case, and that if the court deemed it necessary, the cause be submitted to a third judge upon the printed record and briefs (Vol. II, p. 969). Under the law of the land the findings, order and decrees of a Court of Appeals composed of two judges are as binding as when composed of three judges. 26 Stat. 18, Sec. 2; Loveland Fed. Courts, Sec. 5, p. 18.

Courts so composed have been constantly held throughout the twenty-four years since the act went into effect establishing the Cir-

cuit Court of Appeals.

We respectfully urge and submit that a rehearing should be granted for the reasons hereinbefore enumerated.

W. T. ELLIS, LUTHER ELY SMITH, Solicitors for Appellees.

We certify that in our opinion this motion is well founded in point of law and is not interposed for vexation or delay.

W. T. ELLIS, LUTHER ELY SMITH, Solicitors for Appellees.

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Statement.

The grounds upon which a rehearing and reconsideration should be had are so broad and far-reaching that it has been deemed proper and necessary to amplify and urge same in this statement.

I.

The Court should have a correct conception of the history and development of the art of making whisky and the three principal kinds: (1) "raw" whisky; (2) "refined" or "rectified" or "blended" whisky; and (3) "straight" whisky (aged in charred barrels), and

the reasons that led to this development.

There was much confusion in the public mind in regard to the use of the term "whisky" and the history of whisky-making until the decision rendered by President Taft December 27, 1909. President Taft in the now famous controversy that had arisen in the administration of the Federal Food and Drugs Act and the Internal Revenue Law, carefully reviewed all the evidence and on December 27, 1909, rendered a decision which modified that of Solicitor-General Bowers and overruled the former conclusions of President Roosevelt.

Said President Taft:

The Solicitor-General has rendered an opinion to justify his findings of great ability and acumen; and I reach a somewhat different conclusion from him with much reluctance. But I am led to do so by a very clear conviction as to what the evidence shows.

Whiskey for more than one hundred years has been the 343 most general and comprehensive term applied to liquor distilled from grain. It is derived from the Irish word "Usquebaugh," and for more than a century has been used in Ireland, Scotland. England, and in this country to mean ardent spirits distilled from grain reduced to potable strength. Its flavor and color have varied with the changes in the process of its manufacture in the United States, Ireland, Scotland, and England, and have been varied by the introduction into it of fruit juice and burnt sugar and other substances. It was manufactured originally in what was called a "pot still" by the distillation of wort or beer fermented from grain. It was composed of about equal parts of water and ethyl alcohol and certain substances now called congeneric substances which united were known as fusel oil; and when the distillate was first produced the so-called fusel oil gave to the liquor a very disagreeable odor and a very raw taste. The efforts of those engaged in the manufacture were directed toward the reduction of the amount of fusel oil in the product and toward the elimination of the disagreeable odor and This was effected for a great many years by taste produced by it. passing the distilled spirit through leaching tubs of charcoal, which tended to purify it and reduce the amount of fusel oil, and subsequently rectification was followed by another step-i, e., redistillation—and at all times by the introduction of fruit essences or burnt Burnt sugar is used in Scotch whisky as well as in American whisky, though not to the same extent or in the same proportion. Between 1850 and 1860 in this country a very large and profitable business began in certain well-known brands of whisky, which were purified by leaching tubs and were colored and flavored by the use of caramel or burnt sugar. Though there was some

American white whisky, the conventional amber or brown color and whisky flavor in America was that produced by a mixture of the raw whisky with its fusel oil reduced as much as possible,

and of burnt sugar or caramel.

Some time during the Civil War it was discovered that if raw whisky as it came from the still, unrectified and without redistillation, and thus containing from one-half to one-sixth of 1 per cent of fusel oil, was kept in oak barrels, the inside of the staves of which were charred, the tannic acid of the charred oak which found its way from the wood into the distilled spirits would color the raw white whisky to the conventional color of American whisky, and after some years would eliminate altogether the raw taste and the bad odor given the liquor by the fusel oil and would leave a smooth, delicate aroma, making the whisky exceedingly palatable without the use of any additional flavoring or coloring. The whisky thus made by one distillation and by aging in charred oak barrels came

to be known as "straight" whisky, and to those who were good judges

came to be regarded as the best and purest whisky.

Meantime the other and shorter method of making whisky grew greatly in its use, and the amount of distilled spirits made from grain either by rectifying or by redistilling, which were reduced to potable strength and given a conventional flavor of whiskey by the use of burnt sugar and other essences, far exceeded that of the so-called "straight whiskies;" and as according to this method a potable, pleasant beverage could be made in a short time without the aging in wood and without the loss of interest on the capital involved in

holding the product for two or three years while it acquired color and flavor, it could be sold, of course, much cheaper.

It was made originally by distilling a product at a proof of from 140° to 160°, called "high wines," by taking these high wines to a rectifying house and there passing them through leaching tubs to reduce as far as possible the fusel oil, and then coloring and flavoring the whisky with burnt sugar; or by another step of purification, which was a redistillation of the high wines, reducing the fusel oil still further, and then the coloring and flavoring by caramei. The product of this system was known as "finished whisky;" whereas the

raw spirits delivered were known as "high wines."

Subsequently, about 1872 or a little later, a patent still came into use by which it was possible through one process of continuous disallation to clarify the spirits somewhat more completely of the fusel oil than the old system of rectifying by leaching tubs, or even by redistiliation as a separate step; and the result of this continuous distillation was the production of what was known, and is known now, as "neutral spirits," at a proof varying from 160° to 188°. They still had a small trace of the congeneric substances that go to make up what is known as "fusel oil," but not enough substantially The rectifiers, who pay a tax as such under the to affect the flavor. internal revenue law, then began to use neutral spirits as they had used high wines before, to color them with burnt sugar, and to offer them as whisky. The difference between the whisky made from high wines and the whisky made from neutral spirits was the difference in the traces of fusel oil, being less in the latter than in the former, but, so far as I am able to determine from the evidence, there was only a difference in slight degree. The importance of the fusel

oil in the product ready for the drinker can be judged by
the fact that it varies in straight whisky from one-half of 1
per cent to one-sixth of 1 per cent, but that in rectified and
redistilled whisky it is considerably less, and in the presence of

burnt sugar it can hardly be perceptible to the taste.

All these products—straight whisky, rectified spirits whisky, redistilled spirits whisky, and neutral spirits whisky—when reduced by water to a hundred proof or less and sold upon the market as beverages were known to the trade and to the customers as "whiskies;" the difference between straight whisky and the neutral spirits whisky, which now constitutes and for thirty years last passed has constituted, perhaps 75 per cent of all the whisky sold, was well

understood, and the difference between the two was seen in the differ-

ence in price which each commanded in the market.

It was supposed for a long time that by the aging of straight whisky in the charred wood a chemical change took place which rid the liquor of fusel oil and thus destroyed the unpleasant taste and odor. It now appears by chemical analysis that this is untrue; that the effect of the aging is only to dissipate the odor, and to modify the raw, unpleasant flavor, but to leave the fusel oil still in the str-ight whisky. Fusel oil is known to be poisonous and injurious. In the small quantity in the straight whisky it probably does no harm. But however this may be, it is certain that in the whisky made of neutral spirits there is less fusel oil and less of the poison arising therefrom than there is in the straight whisky. The question, therefore, is not here one of health. It is only one of correct branding to prevent deceit of the public as to what it is buying.

After an examination of all the evidence it seems to me overwhelmingly established that for a hundred years the term "whisky" in the trade and among the customers has included ail potable liquor distilled from grain; that the straight whisky is, as compared with the whisky made by rectification or redistillation and flavoring and coloring matter, a subsequent improvement, and that therefore it is a perversion of the Pure Food Act to attempt now to limit the meaning of the term "whisky" to that which modern manufacture and taste have made the most desirable

variety.

It thus appears from President Taft's finding that the earliest kind of whisky produced in this country, as it came from the still, was "raw" whisky, and it contained fusel oil which gave it a raw taste. The fusel oil in it was not reduced. Then between 1850 and 1860 the business of purifying the raw whisky by passing it through charcoal in leaching tubs, and adding coloring and flavoring, grew to large and profitable proportions.

Not until some time during the Civil War was the discovery made that whisky could be colored and "smoothed" by storing it for some years in charred oak barrels. In 1872 or later the continuous-

process method of distillation-rectification was adopted.

James Crow (or "the Old Crow" or "the Old Scotchman" or "Old Man Crow" or "Old Jim Crow" or "Old Crow" as he was familiarly called) belonged to the first period producing in small log distilleries of limited capacity during a short seasonal run this "raw" whisky.

The entire output seems to have been small and to have been con-

sumed in the neighborhood.

The Hellman business belongs to the second stage noted by President Taft, that of purifying, rectifying and blending.

Mr. Haeussler, a leading member of the St. Louis bar, testified as to the business of I. & L. M. Hellman as early as 1862 (Vol. II, p. 467), and it appears in evidence that I. & L. M. Hellman were successors in business to Klyman Meyers & Co. (Isaac Hellman being the "company" in that firm (Vol. II, p. 467). They were rectifiers and compounders. They employed their own rectifiers and they rectified and blended whiskies.

The term "rectifying" in those days meant purifying and refining and did not then include merely mixing as it later came to do under the definition in the internal revenue law passed some years later. The record indicates that Hellmans' business was active as early as and prior to the discovery of the barrel-charring method of smoothing and coloring whisky by means of the tannic acid extracted from the charred oak when stored therein for some years. The storing of whisky for a period of years in charred barrels, as President Taft's opinion finds, was not discovered until some time during the Civil War, and no whisky aged and treated by that process appeared or could have appeared on the market until long after the dates when the Hellman business was well established.

The prevailing method of making and marketing whisky at that time was to rectify it to remove the impurities, to "smooth" it, to remove the raw taste and make it palatable, and also very frequently to blend one whisky so rectified with another or with refined or rectified spirits (also known as neutral spirits) with whisky (President Taft's decision, Dec. 27, 1909; Rec., Vol. II, pp. 385, 389).

Up to the time when the whisky aged in charred barrels (or straight whisky, as it was called) began to appear (after the

Civii War, for it required storage in the charred barrels some years to eliminate the raw taste and extract the color furnished by the tannic acid in the char, and the discovery of this method didn't occur until some time during the Civil War), up to 1866 or 1867 or thereabouts, "the conventional amber or brown color and whisky flavor in America was produced by a mixture of the raw whisky with its fusel oil reduced as much as possible (by rectifiers such as the Hellmans were) and of burnt sugar or caramel" (President Taft). But even when the charred-barrel or straight whisky began to be made "the other and shorter method of making whisky grew greatly in its use" and the output "far exceeded that of the so-called "straight whiskies" (aged in charred barrels).

Gaines, Berry & Company, who were organized in 1867, may have employed this charred-barrel method from the beginning of their business. If so, then in so doing they undertook what was then the less common and less popular method of making whisky; but a generation of persistent reiteration and campaigning by the straight whisky advocates has gone so far that by the beginning of the present century the distillers were asserting that "straight" whisky aged in charred barrels was and always had been the only true whisky, the only distilled spirits to which the name whisky ever had been correctly applied. So aggressive were the distillers and so far reaching and confusing were the conceptions that they engendered, that President Roosevelt in considering the question of what is whisky (perhaps less judicially than President Taft) was misled into rendering

an erroneous decision. This was set right only after a thorough rehearing by the careful and judicial analysis and finding of President Taft.

"The earlier and shorter method of making whisky," as President Taft pointed out, was well established long before the method of making "straight" whisky by aging it for several years in charred barrels

was discovered some time during the Civil War, and the method of making whisky by purifying it through rectification and blending was a great advance over the crude method of producing raw whisky as it came from the distillery, without any purification or process of

There was no market for raw whisky. Appellant's reiterated assertions as to "straight" whisky have tended to obscure the actual facts from the Court, and to lead the Court to believe that "straight" whisky, as we now understand that term, has always been on the market, and particularly from 1850 to 1867. The facts in this respect are just the opposite of those which, through appellant's urgency, the Court was induced to find as true.

# II.

The Court in effect finds that whisky made under the supervision of the old Scotch distiller Crow and called by his name (for when he worked at some distilleries it was called by his name and at others it was not) had a considerable market, and that, too, as far back as 1843. The Court is in error in this. Whisky made under Old Crow's supervision or by him was limited in quantity. It was consumed in the vicinity. The various distilleries where he worked, including the

Oscar Pepper distillery, were small concerns, log houses, their equipment was crude, the consumption was local. There were 351 no brands in those days and there is no evidence that any whisky made under his supervision and called by his name ever was shipped out of Central Kentucky. There was no general market for It could not be said to be on the market as that phrase is now The general consuming public (outside of the immediate neighborhood of the distilleries) did not drink raw whisky. Raw whisky had to be refined, smoothed out, made palatable, and to that end, if any raw whisky was shipped away, it went to rectifiers.

This was long before the U. S. Internal Revenue law went into ef-

There was no tax on distilled spirits. There was no charredbarrel process to smooth out and color raw whisky. There were no distillers' brands. There was a local, neighborhood distillery trade, a good deal on the order of country grist-mill trade in flour and grain. The farmer brought a load of corn to the still and carried away his In some instances there was a neighborhood jug trade. whisky. "You would haul a load of corn down and take the whisky home" (Cotton, Vol. II, p. 125). "I am certain I got it for particular friends in jugs" (Dean, Vol. II, p. 188).

The evidence fails to show any wide or general market, or any market at all in any proper sense of that term for raw whisky, nor could there have been any in the condition of the business at that time, for, as President Taft finds, it was the rectifiers who were rectifying and blending who reached the general public with their

product in those years.

The capacity of the distilleries where Old Crow worked was from 20 to 25 bushels of grain per day and the yield 1½ to 2 gal-352 lons per bushel (the Oscar Pepper distillery was a small con-

cern made of logs), and far from running all the year round they had a distilling season (possibly a few days in the fall). Sometimes a negro or two helped. Every detail of the process and method was given in the record. While yeast was spoken of, still the whisky was sometimes called sour mash. Either yeast was not used to any material extent or the whisky wasn't sour mash. It was not a unique or peculiar or secret method or formula, but the old-fashioned method which, notwithstanding the avid taste of the hardy farmers of the neighborhood quite justifies Mr. Bradley's summary that the methods were cruder the farther back you went; the general public view of such whisky is well indicated by the term "raw" whisky as pointed out in President Taft's finding. The process and method was utterly unlike the later straight whisky method or that now employed by complainant. There was no market outside of the neighborhood unless possibly some surplus went to rectifiers (as to which there is no evidence in the record).

#### III.

The Court recognized the existence of the doctrine of res adjudicata, but in applying it overlooked the fundamental principle that each disputed fact established by the previous judgment must be taken as true.

While it was permissible to refer to the record in the Eighth Circuit Court of Appeals to see what that court decided, it was not permissible to make a different finding of facts. Nor was it permissible to sequester the concluding paragraph of the Eighth Circuit Court of Appeals' opinion and say that this is to be recognized, and at the same

time decline to recognize as true the facts found by the Court upon which the conclusions in the last paragraph are based. 353

Those conclusions have force and vitality by reason of the facts found, and those facts may not be questioned in this case, unless we are to emasculate the doctrine of res adjudicata beyond recognition.

Compare these findings:

Eighth Circuit Court of Appeals. Sixth Circuit Court of Appeals.

Good Faith.—The Court found that the Hellmans had used their trade-mark in good faith throughout.

"The evidence fails to show that the Hellmans prior to this controversy ever heard of Glenn's Creek in Woodford County, Ky."

"There is not a particle of evidence in this record to warrant the imputation that at any time or place the defendants ever represented that their whisky was manufactured on Glenn's Creek

Bad Faith.—"No reason has ever been suggested in this litigation and we can think of none why they should put this name on their barrels, unless they intended to indicate that the whiskey was that made by Crow of Kentucky. Unless the selection of this name meant that, it meant nothing."

or that it was the manufacture of

the complainant."

"\* \* that the said predecessors and the defendants so continued to use the same to a limited extent, up to the time of the institution of this suit, in good faith, they are not guilty of infringing the complainant's claimed trade-mark."

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"The evidence further shows that as early as 1865 they had signs in frame prepared, displayed in the window of their store-house, like Exhibit No. 6, represented by the following cut, large numbers of which were used in connection with their whiskey trade."

"We must doubt whether these signs antedated 1870."

The use of the name "I. & L. M. Hellman" indicates the maker.

Eighth Circuit Court of Appeals.

"The whisky sold by them carried with it plainly marked on the packages the fact that it was the whisky of I. & L. M. Hellman of St. Louis, Missouri, the name of the firm at the time in business" (Vol II, pp. 975-6).

1. & L. M. Hellman does not indicate the maker.

Sixth Circuit Court of Appeals.

"While the stencils on the barrel and the glass signs carried the name Hellman & Co., they did not say 'manufactured by' nor that Hellman & Co. were manufacturers or distillers, nor were they in any way inconsistent with mere sale by Hellman as jobber of a well-known brand made by someone else" (page 11).

"The evidence tended to show that a man named James Crow, usually called 'Jim Crow' and sometimes known as Crow or Old Crow, began the manufacture of whisky in Woodford County, Kentucky, about 1850" (Vol. II, p. 972).

"The Crow or Old Crow which in 1863 had been manufactured in Kentucky for 20 years or more was at least considerably known on the market" (page 10).

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"The process employed by Crow is what is known as handmade whisky, but there was no secrecy about his process nor did it differ materially from that employed by other distilleries of the period in the neighborhood" (Vol. II, p. 972).

"As the making of whisky after Crow's death, but by the same formula and methods, was continued by Pepper or by Gaines, and as it continued to be called 'Old Crow,' this appellation would gradually change its character" (page 5).

"There was no secret about the process of distillation employed by James Crow, which the complainant assumed to follow as band-made whisky (and there was some evidence that the complainant now employs machinery in some material respects in the process of manufacture \* \* \* \*") (Vol. II, p. 978).

"After Crow's death, Oscar Pepper, at the same distillery and with the same formula, continued to make a whisky which some witnesses say he continued He died about to call Crow. 1865. In 1866 or 1867 the Pepper distillery was bought by Gaines, Berry & Co. They employed as distiller a man who had been foreman for Crow and who knew his formula and methods. and their product they called 'Crow' or 'Old Crow' " (page 2).

"Whisky made by Crow was called 'Crow' or 'Old Crow,' as stated by one of the witnesses, just as whisky made by Taylor was called 'Old Taylor,' " (Vol. H, p. 972).

"This whisky came to be called 'Crow' or, as it aged, 'Old Crow' (page 2).

That the evidence of sales testified to by Haeussler, Schaeffer, 356

Charropin, Heron and others was

worthy of credence and not to be ignored in estimating the Hellman trade (Vol. II, pp. 974-5).

"Records which seem to be complete show that during the seven years from 1863 to 1870 the Hellmans sold of this 'Crow' whisky an average of less than eight barrels per year" (page 10) thereby necessarily ignoring Hauessler, Schaeffer, Charropin and others.

The testimony of Mida and all the other witnesses who testified to the effect that complainant had built up a large and sucess-

Mida and the latter-day straight whisky dealers and makers, testifying to the effect of the campaign of the straight whisky

ful business in the manufacture of whisky which has extended throughout the country, and that their whisky under the designation "Old Crow" attained wide celebrity, was before the Court which found that:

"Neither can their right to use it ad libitum be destroyed by the overshadowing importance of the complainant's sales under the designation 'Old Crow Whisky, nor by the asserted superiority of its product" (Vol. II, p. 976).

people seem to have impressed the Court.

"Since such adoption by Gaines, Berry & Co. these words have been continually used by plaintiff and its predecessors as a trade-mark. Vast sums of money have been expended in advertising the brand and the trademark" (page 3).

MER !

That the Hellmans adopted the words prior to complainant (Vol. II, pp. 976-8).

"No unprejudiced mind can read the evidence in this case without the impression that the conception of a trade-mark in the

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words 'Old Crow' did not enter the mind of Gaines, Berry & Co. prior to 1870" (Vol. II, p. 973).

That complainant was the first appropriator of the trade-mark (pages 5, 8, 9, 13).

The affidavit reading:

"Said trade-mark has been continuously used in the business of ourselves and our predecessors since, to-wit, January 1, 1835," is found by the Court to be true, although "our predecessors" prior to 1867 were predecessors in time only, with no "business" succession or connection with Gaines whatever (pages 12-14).

"Every matter and question of fact and of law that was necessarily involved in the consideration and determination of the former issues shall be conclusive upon the present."

Nalle v. Oyster, 230 U. S. 164.

If the Eighth Circuit Court of Appeals had found the facts to be as this Court has found them, it might well be that that Court would never have reversed the case. But that Court found certain facts to exist and those facts are binding and must be taken as true in To find an entirely different state of facts to support that decree is to emasculate that decree. It is in effect to say that facts found by the District Court in the Eighth Circuit are right and those by the Court of Appeals are wrong.

To find bad faith on the part of the Hellmans where that Court found good faith, and to find as free from fraud a sworn statement that "said trade-mark has been continuously used in the business of ourselves and our predecessors since, to-wit, January 1, A. D. 1835," when that Court found that the conception of said trademark did not enter the mind of Gaines, Berry & Co. prior to 1870. is to undermine that decree so effectually that it practically collapses. It in effect repudiates the doctrine of res adjudicata.

We are certain this Court would not wish to overturn that salutary

principle.

358 IV.

The Court in considering this vast record overlooked the fact that matters found by the Court as facts, upon which the decision is based, are without evidence to support them, and are opposed to the established history of the business.

(a) The Court finds as to whisky made by Old James Crow

(page 2 of the Opinion):

"This whisky came to be called by his name—Crow, or as it

aged, 'Old Crow' whisky."

The record clearly shows that in so far as whisky made under the supervision of the old distiller James Crow was called "Old 'this phrase, including the word "old," had no reference to age whatever. The record abounds in expressions spontaneously and naturally applied to him by witnesses, clearly indicating that the familiar and colloquial name for James Crow was "Old Crow" or some other term including the word "old."

Richard Whittington (Vol. II, p. 183, X Q. 28):

"I know they had those negroes, Albert and Dick, working in the distillery then with Old Crow."

Wm. Boyette (Vol. II, p. 177, X Q. 6):

"I was going to school there near the distillery and I would go in and see old man Crow there giving orders."

And numerous other references (Richard Whittington, Vol. II, pp. 181-4, X Qs. 3, 41; John C. Hawkins, Vol. II, pp. 139, 141, X Qs. 90, 113; William Henry Mastin, Vol. II, p. 172, 359 X Q. 2; William W. Darnell, Vol. II, p. 202, X Qs. 19, 21;

William R. Dean, Vol. II, p. 189, X Q. 1; Wm. Boyette,

Vol. II, p. 178, X Qs. 8, 9, 11).

The terms "Old Crow" and "Crow" are used indifferently by the witnesses as applied to whisky distilled by or under Crow's supervision immediately upon its distillation, just as he himself was spoken of as "the Old Crow" or "Old Crow" or "Crow." Furthermore, the storage in charred barrels or aging process was not discovered until some time during the Civil War several years after Crow's death.

We submit that upon reconsideration the Court would find that the use of the words "old" in the phrase "Old Crow" never at any

time had any reference to age.

(b) J. W. Crow, Parity Ky. The opinion in footnote 1, page 10,

says:

"One of the stencils was 'J. Crow—Bourbon—Paris, Ky.,' a plain declaration that 'Crow' was a maker's name, not a Hellman trademark; and as there never was any 'Crow' in Paris, Ky., the intent seems clear enough."

The Court overlooked the fact that the stencil mentioned was not

at any time a Hellman stencil, but, on the contrary, was used by Samuel McCartney & Co., which firm was succeeded in business by Wm. H. Lee & Company (Vol. II, pp. 440-2); that the Hellmans never at any time used that stencil or had any connection with the firm that did.

(c) The Court has found that Old James Crow used a secret process or formula and that complainant in 1867 began to use that formula and has continued to use it ever since. The Court 360 overlooked the fact that the process was not unique, was not

secret and was unlike that now used by complainant.

Storage in charred barrels for a reasonable length of time (estimated at three or four years) is an essential part of complainant's present process (four years is the minimum under the bottled-inbond process). The charred barrel method was not discovered until several years after Crow's death (some time during the Civil War—Pres. Taft's decision). They mash (stir) by machinery now in metal tubs as large as a law office (Whittington, Vol. II, p. 185; Mayse, Vol. II, pp. 511-5; Bradley, Vol. II, pp. 597-601); Darnell, who had been a distiller, testified that complainant's present Old Crow was not made in the old-fashioned way (Vol. II, p. 204).

Each detail of Old Crow's process was testified to by various witnesses: Darnell (Vol. II, p. 201), Whittington (Vol. II, pp. 183-5), Hawkins (Vol. II, pp. 131-2, 140). The Old Scotchman made his own yeast, malt yeast; the distilleries in that part of Kentucky "all run it on the same principle at that time" (Vol. II, p. 201).

Not only does the testimony fail to establish a secret process or special or unique process or formula, but the evidence clearly indicates that the raw whisky, unrectified and unrefined, produced at small neighborhood log distilleries by "Old Jim Crow" in the early fifties and relished by the sturdy farmers and artisans of those days, was entirely unlike in process and product the finished goods turned out by complainant to day after from four to ten years' storage in charred barrels. If this were at all doubtful, reference to the careful history and finding by President Taft as to the method of producing whisky would dispet the doubt.

Mitchell, Hawkins, Darnell, the negroes, Albert and Dick—they all had the same method, that every one else had who worked in a distillery. It was not secret, it was not unusual or special; it was the old-fashioned method, not the modern

method, but radically different from it.

The speciousness of the special or secret process or formula theory becomes apparent when it is recalled that complainant's present registration is also upon "rye whisky." Crow never made a gallon of rye whisky (Taylor, Vol. II, p. 164, X Q. 29; Miles, Vol. II, p. 195, X Q. 195; Whittington, Vol. II, p. 184, X Qs. 31-2). Complainant also now (as heretofore) uses the words Old Crow on blended whisky.

(d) The Court is in error in doubting that the glass signs bearing the figure of a crow and the words "Celebrated Crow Bourbon" ante-dated 1870, and in so doing overlooked the testimony in the case.

White the date 1870 appears in the sworn statement of complainant's 1882 Patent Office registration as the date from which the use of complainant's Old Crow began, that date nowhere appears as the date when the Hellmans' glass signs were first used. On the contrary, Liemke testified that he made them for the Hellmans from the time when he went to work for Buegel in the fall of 1866 and Buegel had been making them before that, and Liemke continued to make them from that date on, both before he went into business for himself in November, 1866, and thereafter up to 1884 or 1885 (Vol. II, pp. 399, et seq.). Martin Heron went to work for the Hellmans on September 17, 1865, and the glass sign was hanging there then (Vol. II, pp. 423, 387, 396-7). Urner went to work with the Hellmans on July 3, 1865, and recalls seeing the sign hanging in the office back in the '60's, some time in the latter '60's (Vol.

II, pp. 415, 360), saw them langing there in the office. 362 liam Brennan (son of Edward Brennan, who was the rectifier and compounder when Heron went there as assistant) was born in the month of June, 1857, and as a boy nine or ten years old he carried dinner to his father at the Hellmans' place of business. He recalls on those occasions seeing a glass sign with the words Crow Bourbon on it. This would be in 1866 or 1867. At the taking of his deposition he testified he had not seen the sign for seventeen years. Later in his deposition when shown Hellmans' Exhibit 5. he recognized it as the same sign or one similar to it that he re-

ferred to (Vol. II, pp. 483, et seq.).

The Court finds that "Hellmans' Celebrated Old Crow Bourbon" was neither "celebrated" nor "old" nor "Crow." The Hellmans had the right to apply as their trade-mark the words "Old Crow" and the figure of a crow to whisky made by them by rectifying and blending. So designated, it was truly their Old Crow whisky of their make. There was no false statement as to age, any more than if they had called their whisky "Old Glory" or "Old Hickory" or "Old Ironsides" or "Old Harrison" or "Old Putnam." There was no more implication of age in applying "Old Crow" to the Hellmans' blended whisky than there had been in applying "Old Crow" to raw whisky as it ran from the stills in the early '50's in the log distilleries of Woodford County. The word "Old" in the phrase "Old Crow" never had any age significance when used by Gaines or Hellman or any one else.

Was it not "Celebrated"? It was certainly well known and well liked in St. Louis where Mr. Haeussler, testifying to as far back as 1862, recollects drinking it—"the boys called for that brand

363 of liquor" (Vol. II, pp. 469, 471); and in Mississippi, Schaeffer, a leading merchant of Yazoo City, testifying of as early as 1866 and possibly 1865, says that his customers wanted fine whisky; the finest whisky he handled was Hellmans' Old Crow and people who were judges of liquor pronounced it good; the Hellmans' reputation was excellent and Schaeffer always got the goods he asked for; almost every shipment he got some of Hellmans' Old Crow and other houses in Yazoo City handled it, too (Rec., Vol. II, pp. 459, 466); in Louisiana, Tennessee, Mississippi, Arkansas and the other states where Charropin traveled and made sales from 1866 on, selling it right and left in Plaquemine, Donaldsonville, St. Joseph,

Raton Rouge, Helena, as well as Port Gibson, Jackson, Natchez, Woodville and Yazoo City, in Mississippi (Vol. II, pp. 522, 526). Patrons in those cities and many others doubtless were as enthu-

siastic as Schaeffer.

On reconsideration might it not be found that it was no very great exaggeration under the circumstances for the Hellmans to call their whisky "celebrated"? It would seem fairly to come within the definition of that term in the Century Dictionary: "Having celebrity; distinguished; mentioned with praise and honor; famous; well known."

(e) The Court evidently had in mind present conditions when it stated (Opinion, p. 10) that the marks on whisky are usually those of the original manufacturer. This was not the case in 1850 or 1855 or in the years following. Three steps in succession brought distillers' brands into being and importance. The first step was the discovery of the charred-barrel process some time during the Civil War, under which whisky might be stored some years in charred

barrels, thereby coloring it, smoothing it, making it palatable 364 and fit to be placed on the market for the general consuming Prior to that time the distillery product was raw whisky, and outside of small local trade did not reach the consumer in its original state, but went to the rectifier to be purified, refined, made palatable. The product of the aging-for-some-years-in-charred-barrel process became known, as President Taft points out, as "straight whisky." It began to be sold to the public in the neigh-

borhood of 1870 or the latter sixties.

The second step was the Internal Revenue Stamp Act of 1868, which went into effect November 2, 1868 (15 Stat. 125) with its intricate system of markings under which distillery brands on the

commercial head came to be used.

The third step was the Bottled-in-Bond Act of 1897, under which the distiller was able for the first time to put up his product on his own premises in the exact form in which the drinker could take it (prior to that the distiller could not sell in less than twenty-gallon packages). While the distiller began to exploit his brands to some extent in the seventies and more in the eighties, it was not until after the Bottled-in-Bond Act was projected and finally passed that he went out aggressively to establish and exploit brands (Jones, Vol. I, pp. 2, 4, 6, 8). In 1896 Homan, a salesman of complainant's Old Crow, visited the Hellmans' store and protested their use of "Old Crow" (Vol. II, pp. 426-7, 431-2).

We give herewith the cross-examination of the witness James D. Shortell, which we find was not included in appellant's abstract (Vol. I, p. 241), which appellees, not apprehending that there would

be any new finding of facts in this court as to the matters 365 found and determined in the Eighth Circuit Court of Ap-

peals, omitted to include in their pracipe.

The witness Shortell had been for thirty years connected with the distillery business, and in the early seventies was in the United States Internal Revenue service. He was thirteen or fourteen years chief deputy of the Fourth Kentucky District and ten years connected with

the Second Kentucky District (Vol. I, p. 239). His cross-examination, which was included in the submission before the court below, is as follows (we give it in full):

Cross-examination, by Mr. Hopkins:

 During your experience as deputy collector in the Fourth Internal Revenue District were you acquainted with the "Old Crow"

whisky of W. A. Gaines & Company?

A. I was very well acquainted with Gaines, Berry & Taylor, the old firm, but at that time there was very little about brands; it was just whisky and the distiller's name to it. Brands became in general use after '68, along in '70, some time after that. Gaines, Berry & Taylor handled the whisky from the distilleries up in Woodford County and Anderson County, but they did not give any special brand except the distiller's name.

2. When did you first know of the "Old Crow" produced in Wood-

ford County?

A. I couldn't tell; I have been familiar with the "Old Crow" brand for many years, and I suppose I have heard of it since they began using brands. Somewhere along in '70, I was in the service up to '74, and I did not hear of anybody's brand up to '74; it went by the name of the distiller. Gaines, Berry & Taylor used to get a lot of

whisky from our district (that is the Fourth) and sent it to New York, but it was not designated by any special brand. 3. How long have you been familiar with W. A. Gaines &

Company's bond bottling of "Old Crow" whisky?

A. I can't say I am familiar with it at all. I suppose they have been bottling in bond ever since the Bottling-in-Bond Act, about twenty years ago. I know the first bottling in bond was done while I was at the Mattingly distillery about a year after the act was passed.

4. Up to the time the Rock Spring Distillery began to bottle the whisky you have referred to for the Hellman Distilling Company had you ever known or heard of any "Old Crow" bottled in bond except that of W. A. Gaines & Company?

A. I had not.

The Court's statement on pages 10 and 11 as to the marks of the original manufacturers speaks as of 1915; it is incorrect as of dates

up to 1870, or thereabouts.

It is true that in those early days whisky was called for by certain names, which were sometimes incorrectly spoken of as brands, such as "Robinson County," often "Bourbon County"—but these were not strictly speaking brands, but names of localities. Later, Bourbon came to mean corn whisky.

The marks and brands of those early dates were rectifiers' brands

and blenders' brands and compounders' brands.

(f) The Court (page 11) states:

"While the stencils on the barrel and the glass signs carried the name 'Hellman & Co.,' they did not say 'manufactured by,' or that Hellman & Co. were manufacturers or distillers, nor were they

Hellman & Co. were manufacturers or distillers, nor were they in any way inconsistent with mere sale by Hellman as jobber of a well-known brand made by some one else." The Court overlooked the fact that then as now a firm name on a package unmodified, in law and in fact, means that the firm is the

maker of the goods.

The Government so construes firm names in administering the Federal food law. In an able opinion rendered to the Secretary of Agriculture, the Attorney-General (Hon. Philander C. Knox), held:

"The words 'Birkenwald's Daisy Sugar Company, S. Birkenwald Company, Milwaukee, Wisconsin,' clearly imply that the goods referred to are manufactured or prepared by that company in Wiscon-

sin" (24 Op. Atty. Gen. 697).

"I. and L. M. Hellman" on the package, then as now, means that I. & L. M. Hellman made the whisky (which in truth and in fact they did, for as rectifiers and blenders they made a raw and unpalatable article, palatable and ready for the consumer. See President

Taft's Opinion).

The Court when considering the MaCartney brand (J. W. Crow, Paris, Ky.) as the name of a maker instead of a brand appearing upon MaCartney's goods, sought to apply the rule correctly upon the facts as the Court (though incorrectly) conceived them. The very presence of name "I. & L. M. Hellman" on the package and the sign; unmodified, indicated the fact that the whisky had been made by that firm.

We call attention to 42 labels filed herein by complainant (Vol. I, pp. 14-15, 37-66; Vol. II, pp. 649-654); all of them have W. A.

Gaines & Company's name.

It would have been untrue for the Hellmans in 1862 or subsequent thereto to indicate that the whisky sold by them under the name "Old Crow" was made by anyone else. The prevailing method of making whisky then was to make it by rectifying and coloring raw whisky and to sell it thus rectified or to blend rectified or refined distilled spirits with raw whisky (sometimes called "straight goods"), such as Bourbon County whisky. They were making their Old Crow whisky then, and have been making it ever since, just as truly as W. A. Gaines & Company is making its Old Crow whisky now.

(g) The Court inadvertently errs in stating (Opinion, p. 10): "The Crow or Old Crow which in 1863 had been manufactured in Kentucky for twenty years or more was at least considerably

known on the market.

The only references to 1835 are found in the various bills filed in court by complainant, in complainant's 1904 and 1909 registrations, and in affidavits by complainant's vice-president, Edson Bradley, whose personal knowledge dates only to 1872 (Vol I, p. 21—he said 1875 in the other case, Vol. II, pp. 58, 59) and complainant's secretary, George F. Berry, who was not born until after Crow died (Vol. I, pp. 34, 242).

The assertion of the date 1870 in the registrations of Mida in 1889 and the United States Patent Office in 1882, together with the facts found by President Taft as to the whisky business in general (including the discovery, some time during the Civil War, of the process of storing whisky for some years in charred barrels), as well as the date

when they began business (1867) and the ordinary time required to age in charred barrels, conclusively point to this date. In their 1882 registration they had every motive in the world to make their claim of adoption as early as in truth and in fact it honestly could be put, and they swore it was "1870." And that's the plain truth as to when the use began, and the "considerable market" in Kentucky Old Crow came thereafter.

If there was any rectifier, dealer or consumer who during those early days ever received a single barrel of Kentucky whisky marked "Old Crow" or "Crow" complainant did not discover him, or at least did not produce him. If any rectifier, dealer or consumer living outside of Woodford County ever at any time purchased a barrel of Pepper Old Crow or any other Kentucky Old Crow until the advent of Gaines' Old Crow in or about 1870, complainant failed to produce him. And their detective service extended from Lakes to Gulf and from ocean to ocean (Vol. II, p. 323 et seq.).

Far from there being a considerable market during the period of twenty years prior to 1863 for "Old Crow" made in Kentucky (outside of the limited local Woodford County sales of log-distillery whisky), there was no market at all for it in so far as this record

shows.

(h) The Court inadvertently followed complainant's figures and statements as to the earlier Hellman sales (less than eight barrels per year for seven years). It is not a fact that the books were complete as produced. Book entries are secondary evidence and will aid direct evidence when that is obtainable. Schaeffer of Yazoo City bought Hellmans' Old Crow as early as 1865 and certainly from 1866 on; scarcely a shipment when he didn't have some of it; and Hellman's salesman Charropin came to him every sixty days (Vol. II, p.

370 Schaeffer's evidence is direct and convincing, even though there is no book entry in the books discovered showing a charge to Schaeffer or any one else in Yazoo City, and he testified three other men in Yazoo City handled it (Vol. II, p. 462). Charropin from '66 to '70 sold Hellmans' Old Crow in Plaquemine. Donaldsonville, Baton Rouge, St. Joseph, La., Helena, Ark., Woodville, Port Gibson, Natchez, Yazoo City, Jackson, Miss., and many other cities (Vol. II, pp. 539 et seq.). And yet only two of these cities (Baton Rouge and Port Gibson) appear in the book entries quoted by appellant, and although he recalls three customers of Hellmans' Old Crow in Baton Rouge (Maurin, Gaudran and Kline). their names do not appear in the book entries, but three others do (Waldkirch, Mendelsohn and Bower). Charropin was testifying of the period from 1866 to 1870, for he left the Hellmans' employ in December, 1870, and he covered many other places (Vol. II, p. 533).

But in addition is the testimony of Mr. Haeussler that Hellmans' Old Crow whisky was regularly called for in St. Louis from 1862 on, indicating that it was a well-known and popular make of whisky at that date in a city which had 160,000 inhabitants by the census of 1860. Heron and Urner both testify from 1865 on that it was regularly made and sold by the Hellmans. Other witnesses establish

continuous sales and trade to date. Unfortunately the Hellmans were deprived of the testimony of the late A. M. Hellman, who died suddenly without any previous illness, on December 14, 1904, during the taking of depositions, barely a month after the Missouri suit was filed. His evidence would have been a valuable aid and his deposi-

tion would have been taken first had there been humanly perceptible any reason to believe that he would not live for many

vears.

On the other hand, Gaines had not only established no sales by book entries at any time, but has not located any sales in those early days outside of Woodford County and possibly a few other counties in Central Kentucky. If our trade is open to complaint as local to the Southwestern states and not celebrated, what must be said of that upon which they depend, which is local to Woodford and possibly a few other counties?

(i) The Court inadvertently found that the Old Crow exercised a supervision over the Oscar Pepper Distillery the last two years of his life. The record fails to support that finding. He was down at Johnson & Yancev's during those years (or possibly during his last illness

went back to Oscar Pepper's).

# V.

Upon the authority of Justice Blatchford's shovel case (Collins v. Ames) and other cases, the Court finds that whatever was adjudicated in the Eighth Circuit Court of Appeals' decree regarding complainant's title to its trade-mark applies to its use on both kinds of whisky.

The Eighth Circuit Court of Appeals' decision is against complainant on the issue of priority of adoption. It adjudicated no right at all in favor of complainant. It did adjudicate that regardless of the kind of whisky upon which it was used, the Hellmans, by reason of their priority of adoption, had the right to use the words "Old Crow" free from interference by W. A. Gaines & Company. The English Circuit Court of Appeals' opinion held that the kind of whisky cut no

figure, and complainant itself so interpreted that opinion and asserted before the United States Supreme Court (petition for certiorari was denied) that the judgment of the Circuit Court had been reversed on the sole ground that the respondents (Hellmans) had used the words "Crow" and "Old Crow" before the petitioner had adopted the words "Old Crow" as a trade-mark (Vol. I, p.

263).

The Eighth Circuit Court of Appeals said: "Neither can their right to use it ad libitum be destroyed by the overshadowing importance of the complainant's sales nor by the asserted superiority of its product" (Vol. II, p. 976). It is clear that the Court used the expression "ad libitum" deliberately. Its meaning is plain. Should this Court disregard that significant declaration of the views and findings of the Eighth Circuit Court of Appeals?

If pleadings are binding and decrees are entitled to full faith and credit, it might well seem that complainant was not entitled to claim any benefit from any name applied to whisky made either at the

Oscar Pepper or any other distillery prior to 1867, regardless of what it might have been called. The amended bill in the Missouri case, deliberately prepared after demurrer sustained to the original bill, claimed adoption in 1867, averred the words "Old Crow" were then open to adoption and had been left open to adoption by the death of James Crow in 1855, and that no whisky was made in Woodford County or elsewhere under the name "Old Crow" between 1855 and 1867. There is ample testimony in the record to support the averment that no whisky was made called "Old Crow" in those years. Complainant cannot be heard to claim rights based on evidence di-

rectly in the teeth of the averments of its bill. If there was 373 whisky made at Pepper's after old Crow's death, under the supervision of Hawkins or the negroes Albert or Dick, and called "Old Crow" it does not help Gaines. Issue was joined and the decree went on complainant's amended bill containing those solemn averments that no whisky was made under that name from 1855 to 1867 on Glenn's Creek or elsewhere. The finding of fact and of law made final by the Eighth Circuit Court of Appeals' decision that the Hellmans did adopt and use those words in that period, is binding in this case. The kind of whisky cut no figure in the Eighth Circuit Court of Appeals' decision, and so far as interference by Gaines is concerned, the priority of adoption there found will protect the Hellmans in the use of their mark on all kinds of whisky, if Collins v. Ames is to be followed.

# VI.

It has been held that the decisions of the Federal courts involving the same facts will be followed by the Commissioner of Patents in passing upon trade-mark applications.

Scriven v. Towles, 32 App. D. C. 321.

Said the Court of Appeals of the District of Columbia (a court especially charged with the consideration of matters arising under the Act of 1905):

"The intent of the statute is to protect the rightful owners of trademarks in their valuable property rights; and it seems to tax the court to the utmost to protect those rights against the ingenuity of coursel and the designs of sharp competitors. A mark should be denied not

only when used upon goods of the same descriptive properties as a similar registered trade-mark, but when used on goods belonging to the same general class."

Walter Baker & Co. v. Harrison, 32 App. D. C. 272, 273.

The "ingenuity" there spoken of is no less aggressive in invoking the aid of the statute against unregistered common-law trade-marks, and it should be just as unavailing to overturn an adjudicated though unregistered trade-mark, as in the case of a registered trade-mark.

This Court seems first to approve the doctrine of Justice Blatchford's shovel case (Collins v. Ames) on the theory that the Eighth Circuit Court of Appeals' finding of facts established priority of appropriation in Gaines and prima facie ownership as against the world, and then to distinguish Collins v. Ames on the theory that Gaines had lost a fraction of their trade, namely, that in blends in the Southwest, to the Hellmans, "Neither can their right to use it ad libitum be

destroyed \* \* \* \*" (Vol. II, p. 976).

But we submit that a reconsideration will clearly show that the Eighth Circuit Court of Appeals' finding established priority of appropriation in the Hellmans, and this Court should, and upon a reconsideration we believe will, apply the Shovel case doctrine, as indeed it should be, to both phases of the case, namely, (1) that the Hellmans by reason of their priority of adoption upon blended whisky had the right to use the mark upon all kinds of whisky free from interference by Gaines, and (2) having that right, when they apply their mark to their own straight whisky, Gaines may not successfully complain.

We fail to find any language in the Act of 1905 which will permit an applicant by limiting the kind of articles to which he apblies his mark thereby to escape the operation of the doctrine

plies his mark thereby to escape the operation of the doctrine laid down in Collins v. Ames. We believe that upon a reconsideration the Court will conclude that the act does not permit of any mental reservation on behalf of the affiant or applicant by way of lost fractions or geographical subdivision, both of which contentions were urged before and denied by Justice Blatchford in the shovel case, and that registration must be refused or regarded as null where an outstanding use, whose priority has been adjudicated, is known to the applicant upon merchandise so unquestionably of the same descriptive qualities as blended whisky and straight whisky.

And particularly where an applicant's alleged earlier use was by parties preceding him in time only, but in no legal or proper sense predecessors in business. The proviso of section 5, the affidavit of section 2, the prohibitions of section 21, all are protective pro-

visions designed to insure against this very thing.

# VII.

The Court is in error in stating on page 4 of the opinion, in speaking of the decree entered by the trial court in the St. Louis case:

"Both parties appealed; but the Hellmans dropped their appeal from the dismissal of the cross-bill, whereby whatever adjudication was carried by such dismissal became final,"

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g s, h (a) Both parties did not appeal—only the Hellmans appealed (the decree having been in favor of complainant).

(b) The Hellmans had filed an answer to the amended

bill setting up fully the facts as to their adoption and use of the figure of a crow and the words "Old Crow" from 1862 on, claiming priority of adoption; and they also filed a cross-bill, setting up the same facts and asking affirmative relief against complainant (which under the then equity rules could not be asked in the answer).

At the hearing in the Eighth Circuit Court of Appeals, during counsel's statement of the case, Presiding Judge Sanborn said: "I see there is a cross-bill here; what about that?" Counsel for appellants (the Hellmans) thereupon consulted and announced that they would not insist upon affirmative relief. And thereupon the argument proceeded. The Eighth Circuit Court of Appeals' opinion correctly recites:

"The defendants filed a cross-bill claiming the trade-mark in question and asking for an injunction. This need not be considered as at the hearing the defendants' counsel declined to insist upon affirma-

tive relief" (Vol. II, p. 971).

The defendants had filed a very complete answer and in it had claimed the trade-mark upon the ground of priority of adoption. The only new element in the cross-bill was the prayer for affirmative relief (which, under present equity rules, would be included in the answer). This affirmative relief defendants did not insist upon. They forbore to ask affirmative relief; they did not dismiss the appeal in whole or in part. There is no order or entry to that effect, nor any other reference than that noted in the Court's opinion. A single decree had been entered by the trial court upon the consideration of the area on its require dismissing the cross-kill and

eration of the case on its merits, dismissing the cross-bill and granting an injunction and accounting (Vol. II, p. 610).

This decree was appealed from in its entirety, was reversed in its entirety (Vol. II, pp. 978-9) and the new decree entered upon the coming down of the mandate recited such reversal and superseded the original decree in its entirety (Vol. I, pp. 154-6). Neither the Eighth Circuit Court of Appeals nor the Hellmans (nor, for that matter, Gaines) at the time understood for a moment that the Hellmans' rights against Gaines were in any way injured or imperied by this forbearance of the Hellmans, or that Gaines acquired any affirmative rights against the Hellmans, nor would the Hellmans for one minute have consented to the entry of any order of dismissal of appeal or other order which would have prejudiced their rights, nor, as we believe, would the Eighth Circuit Court of Appeals have directed an order having that effect.

A rehearing will tend to remove misapprehensions from the Court's mind as to the Hellmans' position. When attacked, as they were in 1904, eight years after complainant began to object to Hellmans' Old Crow (and after the Hellmans, in an effort to avoid litigation, had submitted affidavits showing long and prior use) the Hellmans proceeded to defend their rights as against Gaines' attack, and later, when the answer was filed setting up priority of adoption and continuous use, also filed a cross-bill asking affirmative relief against Gaines. The first step was vigorously followed throughout. The second step at the hearing in the Eighth Circuit Court of Appeals was halted. It was then conceived, and we think correctly, that forbearance to press the prayer for affirmative relief against

Gaines at that time would not in any way prejudice the right 378 to ask it in the future. It was then resolved first to assert vigorously and seeking to establish the right to use upon whisky the trade-mark consisting of the figure of the bird and the words "Old Crow" free from any interference whatever by Gaines. The Hellmans claim, as they did in the Eighth Circuit Court of Appeals, and as that Court found, that they began to use and continued to apply the words Old Crow to packages containing whisky prior to the time when Gaines began it, and as against them they have the right to continue the trade-mark use free from interference by Gaines, "ad libitum."

The Hellmans' whisky made in Owensboro is there labeled "Hellmans' Old Crow" and is shipped to them in St. Louis—all of it

(Vol. I, p. 237).

Regardless of what might be done in the future or what the Hellmans forbore to do in the Eighth Circuit Court of Appeals, defendants in this suit are not asking affirmative relief against complainant.

# VIII.

The Rectanus, Tea Rose, and Baltimore Club Cases.

If we had filed suit in Frankfort to enjoin Gaines, it might be contended that the Rectanus, the Tea Rose and the Baltimore Club

cases were persuasive.

The Baltimore makers of Baltimore Club established a trade in New York and tried (unsuccessfully) to restrain the New York makers of Baltimore Club. The case does not show that the New York makers did or could restrain the Baltimore makers from selling their product under their own name and mark in New York. The Tea Rose Flour case does not show or hold that the Illinois

millers did or could restrain the Ohio millers from selling their Tea Rose flour in Alabama. The Rectanus case does not hold that the United Drug Company could not sell its

Rexall pills under its own name in Louisville.

This Court has taken the farther step in this case by holding that appellees may not even put upon the Hellmans' whisky made at Owensboro the Hellmans' Old Crow label, although every drop of it is shipped by appellees to the Hellman Distilling Company in St. Louis.

Nor do we think that the ten-year clause or the Davids case are at all applicable, for complainant's use was not shown to be exclusive

during the ten-year period.

# IX.

We do not recall having heard the binding effect or authority of decisions or decrees of Circuit Courts of Appeals questioned or minimized on the ground that only two judges sat, until we read complainant's petition for certiorari and brief to the U. S. Supreme Court in the Eighth Circuit litigation. This point, though urged before the U. S. Supreme Court, did not sufficiently impress that Court to induce them to grant the petition.

Complainant has again urged the same consideration in this court and with a persuasion that has impressed the Court. We do not un-

derstand that any question is raised in the Court's mind as to the judges who sat (Presiding Judge Sanborn, appointed by President Harrison in March, 1892, at the same time that Judge Taft was appointed to this court, when the Circuit Courts of Appeal- were organized: Judge John F. Philips, appointed by President

380 Cleveland District Judge for Western Missouri in 1888, after years of service as Judge of the Kansas City Court of Appeals and Commissioner of the Supreme Court of Missouri), but only as

to their number.

The framers of the Act of 1891, it would seem, had just such a situation in mind as that under which Judge Adams was obliged to disqualify himself in this case. Even if complainant had not entered into the agreement noted on page 969 (Vol. II), the established practice in the various circuits of the country would seem to preclude the raising of any question or doubt based upon the composition of the court.

For the reasons herein noted, we respectfully urge a reconsidera-

tion and rehearing of the case.

W. T. ELLIS, LUTHER ELY SMITH, Solicitors for Appellees.

381 Entry—Order Denying Petition for Rehearing.

(Nov. 2, 1915.)

United States Circuit Court of Appeals for the Sixth Circuit.

# 2572.

W. A. GAINES & COMPANY

VS.

ROCK SPRING DISTILLING Co. and SILAS ROSENFIELD.

The petition for rehearing filed in this cause is hereby denied.

Opinion Denying Petition for Rehearing.

(Nov. 2, 19-5.)

382 Filed Nov. 2, 1915. Wm. C. Cochran, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2572.

W. A. Gaines & Company, Appellant,

VS.

ROCK SPRING DISTILLING COMPANY and SILAS ROSENFIELD, Appellees,

On Petition for Rehearing, November 2, 1915.

Per Curiam :

An application for rehearing points out certain supposed errors in the opinion, and their existence and effect should be considered:

(a) We assumed that the distinctions between straight whiskey and blended whiskey and their attendant market conditions had existed, substantially as at present, from the commencement of the period under consideration. Undoubtedly, this assumption somewhat colors the discussion in the opinion. This assumption is now said to be wrong, and our attention is directed to the decision of President Taft in the controversy arising under the Pure Food Law, and to its recital of facts in the trade history. This recital shows that prior to the Civil War, the greater part of all whiskey sold in the usual retail methods had been, in different ways, purified and refined after leaving the original distiller, and had also been artificially colored and flavored.—all by the methods then or later known

as rectifying and blending. Only at about the time of the Civil War was it discovered that whiskey, by aging in charred barrels, could be satisfactorily refined and colored, and, in a sense, flavored, without any secondary treatment. Thus and then, what is

now called "straight" whiskey first came into existence.

Upon a review of the opinion, we cannot see that its conclusions are seriously affected by this correction of our misapprehension. The sales of "Old Crow" whiskey made before 1865 by the predecessors of Gaines & Company would have been more largely to rectifiers and less to the consumer than we had assumed would be natural, and so much reputation as the name had would be more among rectifiers and less among the users; but this is only a matter of degree; it comes to saving that the standing and reputation which grew up with the name were more local and less wide-spread than would have resulted under present day conditions; and correcting this matter of degree according to the fact will bring no different result. Even if up to a given date, say 1867, rectifiers had been the sole purchasers of the distillery product and had been the only class to whom the product was known as "Crow" or "Old Crow," this would not subject the growth and development of the trademark right to any different principles.

(b) The opinion, in a note, refers to the use by the Hellmans of the brand "J. Crow, Paris, Ky." This particular brand was in fact not used by the Hellmans, but by another rectifier in St. Louis. It may be noted, also, that at the same time (in the sixties) a Cincinnati

house was marking some of its output, "Crow."

This correction, and its resulting inferences, do not help the Hellman case. If it is improbable that such a name as "Crow" was adopted by one rectifier merely by chance, it is rather incredible that each of three rectifiers, in communities where Kentucky whiskies came to market, fortuitously hit on the same unusual trade-mark; and to find that in 1865 three dealers were using a name which had become at least somewhat known in a near-by center of original pro-

duction many years before, confirms the conviction that the name must have acquired reputation enought to make it worth taking, or else that it had become at that time indicative of a 384 class or type of product.\*

(c) It is said we were in error in assuming that "Old Crow" had anything to do with the age of the whiskey, but that, in fact, this word refers only to the age of the man, Crow. This may be so; but the same mistake would have been natural in the sixties to those who heard the name but did not know of the man; and as to its effect on the trade-mark development discussed in the opinion, it would not be important whether the natural inference that "Old Crow" implied age in the whiskey was the right or the wrong inference.

The petition assures us that there was no "implication of age in applying 'Old Crow' to the Hellmans' blended whiskey," and that it was used as "Old Hickory" might have been. If so, the reference was to an individual; and as no man of this name or so-called appears ever to have been known, except the Gaines Creek James Crow, it

would follow the Hellman use must have been fraudulent.

(d) The opinion is criticised because we hesitated to accept, at its face value, the Hellman testimony regarding the extent of their Old Crow sales, the use of their advertising signs, etc., before 1867. There is a considerable volume of this testimony, but it consists almost wholly of unaided recollections of dates forty years old,-and it is that class of testimony which, by decisions familiar in patent cases, the Supreme Court has refused to accept. True, there is in a trade-mark case no initial presumption of validity to be overcome, but the principles for determining the evidential value of testimony cannot differ according to the subject-matter of the case.

(e) The petition points out that the opinion, after stating that the Hellmans appealed from the St. Louis decree dismissing their crossbill asking affirmative relief, then erroneously states that they dropped this appeal "whereby, whatever adjudication was carried by such dismissal, became final." The facts are that the decree below directed an injunction against the Hellmans on the original bill and

the dismissal of their cross-bill; that they appealed from each 385 portion of the decree; that in the Court of Appeals, their counsel announced that they would not ask affirmative relief, and the Court of Appeals did not consider that subject; and that the decree below was reversed and a new decree was entered below simply dismissing the bill. It is not of controlling importance in what technical situation this final dismissal left the rights claimed by the The persuasive thing is that the Hellmans abandoned any claim to relief on the theory that they had any trade-mark; and it is this conduct that helps to interpret the Eighth Circuit litigation and tends to support our conclusion that such litigation should not be taken as an adjudication that the Hellmans had adopted and had become the owners of the trade-mark.

<sup>\*</sup>The latter seems to be the interpretation expressly adopted by the Eighth Circuit opinion in saying that the Hellmans at this period "employed these words as descriptive terms." (161 Fed., at p. 502.)

(f) The petition assumes that this court has made a new finding of facts inconsistent with the finding made by the Court of Appeals in the Eighth Circuit. Of course, if this assumption were true, our opinion would be wrong. We intended only to determine what was the real thing decided in the former suit, and so what was the thing adjudicated; and it became necessary to separate, as best we could, those conclusions of the court upon which its action was based, from those recitals of the judge writing the opinion, in some of which, at least, the other judge sitting apparently did not concur. Further than this, we had neither the right nor the disposition to go.

The other criticisms which the petition makes on the opinion, we have considered, and we think they are either based upon misapprehension or else are sufficiently covered by the opinion itself. The ap-

plication for rehearing is denied.

386 Motion to Stay Mandate.

(Filed Nov. 4, 1915.)

387 In the United States Circuit Court of Appeals, Sixth Circuit.

No. 2572.

W. A. Gaines & Company, Appellant,

ROCK SPRING DISTILLING COMPANY and SILAS ROSENFELD, Appellees.

Appeal from the District Court of the United States for the Western District of Kentucky, Owensboro Division.

Motion of Rock Spring Distilling Company and Silas Rosenfeld to Stay the Mandate of this Court.

Now at this day come the Rock Spring Distilling Company and Silas Rosenfeld, appellees herein, and respectfully move the Court to stay its mandate herein, pending the disposition by the Supreme Court of the United States of the petition of these appellees for certiorari, which petition has been prepared and is about to be filed in the Supreme Court of the United States by these appellees, and will be noticed for hearing at the earliest date possible at the

present October Term, 1915, of said Supreme Court of the United States after the record in this case has been completed and certified by the Clerk of this Court to the said Supreme

Court of the United States.

This motion is made for the following reasons, to-wit:

1. Because this case is peculiarly one for the exercise of the power of certiorari by the Supreme Court of the United States, and pending the application to that court and the determination by that court of the question as to whether that court will grant the petition and order up the record, the rights of the parties should

remain in statu quo as they have continued throughout the pendency of this case. The continuance of that status will work no hardship at all upon complainant, but the disturbance of that status

will unnecessarily embarrass appellees.

2. Because appellees have shown the utmost diligence at every point throughout the trial of this cause, both in the court below and in this court, to expedite the final determination of this cause, and have filed their motion for rehearing within the time allowed by the rules of this court and have prepared petition to the Supreme Court of the United States for certiorari and brief in support of same, and will present same to that court with the utmost speed.

3. Because the finding and decision of this Court herein is in direct conflict with the finding and decision of the Circuit Court of Appeals for the Eighth Circuit in the case of Kahn v. Gaines (161 Fed. 495, 88 C. C. A. 437), which controversy in the Eighth Circuit was between the same complainant and the Hellman Distilling

Company and others, privies of the defendants herein.

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4. Because the finding and decision of this Court herein in view of its direct conflict with the said finding and decision of the Eighth Circuit Court of Appeals, in effect renders nugatory the doctrine of res adjudicata.

5. Because the finding and decision of this Court is unsupported

by competent or substantial evidence in the record.

6. Because the finding and decision of this Court upon the question of dividing up the use of a trade-mark into fractional parts among users employing it upon various articles of merdise having the same descriptive qualities, is in direct conflict with the leading case of Collins v. Ames, decided by Mr. Justice Blatchford and reported in the 18th Fed. 561, and the following decisions of other Circuit Courts of Appeal:

Florence Mfg. Co. v. J. C. Dowd Co., 178 Fed. 73, 101 C.

C. A. 565;

Layton Pure Food Co. v. Church, 182 Fed. 35, 104 C. C. A. 464.

7. Because this Court in its decision has so construed the provisions of the Trade-Mark Act of 1905 as to deny appellees and their privies substantial rights under said Act, and have so construed

said act as practically to nullify its protective features.

8. Because the finding and decision of this Court is in direct conflict with the decision of President Taft, rendered December 22, 1909, after careful consideration and patient examination of the whole question, "What is whisky?" including the history and development of the art of making whisky for the past 100 years.

For all of which reasons these appellees respectfully submit that in equity this motion should be granted and the issuance of the mandate suspended until the disposition of the said petition for certiorari by the order of the Supreme Court of the United States.

Respectfully submitted,

W. T. ELLIS, LUTHER ELY SMITH, Solicitors for Appellees.

We certify that this motion is well founded in law and is not interposed for vexation or delay.

W. T. ELLIS, LUTHER ELY SMITH, Solicitors for Appellees.

# Notice of Motion.

To Messrs. Jas. L. Hopkins, Daniel W. Lindsey and E. F. Trabue, Solicitors and of Counsel for Appellant:

Please take notice that we will present the foregoing motion to stay the mandate of this Court, of which copy is herewith delivered to you, to the United States Circuit Court of Appeals for the Sixth Circuit, at the City of Cincinnati, Ohio, at the opening of said court, or as soon thereafter as counsel can be heard, on Thursday, November 4, 1915.

W. T. ELLIS, LUTHER ELY SMITH, Solicitors for Appellees.

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Order Staying Mandate.

(Filed Nov. 12, 1915.)

United States Circuit Court of Appeals for the Sixth Circuit.

#2572.

GAINES & COMPANY

ROCK SPRING DISTILLING COMPANY et al.

It is hereby ordered that the mandate be stayed until January 1st, 1916, pending application to the Supreme Court for writ of certiorari.

392 United States Circuit Court of Appeals for the Sixth Circuit.

I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing three volumes is a true and correct copy of record and proceedings in the case of W. A. Gaines & Company vs. Rock Spring Distilling Company et al., No. 2572, as the same remains upon the

files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 15th day of November, A. D. 1915.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,
Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.

by ARTHUR B. MUSSMAN, Deputy.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 1/15/15, A. B. M.]

393 United States of America, 88:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which W. A. Gaines & Company is appellant, and Rock Spring Distilling Company and Silas Rosenfeld are appellees, No. 2572, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Western District of Kentucky, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed

into the Supreme Court of the United States, do hereby com-394 mand you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and ac-

cording to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-first day of December, in the year of our Lord one thousand nine hundred and fifteen.

> JAMES D. MAHER, Clerk of the Supreme Court of the United States.

United States Circuit Court of Appeals for the Sixth Circuit, 88:

I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the transcript of the record of the proceedings in this court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States, was correct and complete as the same then appeared in this court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 4th day of January A. D. 1916, there

was filed in my office a stipulation in the above entitled case in the following words:

"In the United States Circuit Court of Appeals for the Sixth Circuit.

No. 2572.

W. A. Gaines & Company, Appellant.

v.

ROCK SPRING DISTILLING COMPANY and SILAS ROSENFIELD, Appellee-.

It is hereby stipulated and agreed by and between the parties to the above entitled cause that the certified copy of the transcript of the record in this cause now on file in the office of the Clerk of the Supreme Court shall be taken as a return to the writ of certiorari heretofore issued by the Supreme Court of the United States directed to this Court in the above case, and that a certified copy of this stipulation may be sent up by the Clerk of this court as his return to said writ.

D. W. LINDSEY,
E. T. TRABUE AND
JAMES L. HOPKINS,
Attorneys for Appellant.
W. E. ELLIS AND
LUTHER ELY SMITH,
Attorneys for Appellees."

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

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In witness whereof, I hereby set my hand and the seal of said Court at the City of Cincinnati in said Circuit this 4th day of January, 1916.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN, Clerk U. S. Circuit Court of Appeals for the Sixth Circuit.

395 [Endorsed:] File No. 25,030. Supreme Court of the United States, October Term, 1915. No. 747. Rock Spring Distilling Company and Silas Rosenfeld vs. W. A. Gaines & Company. Writ of Certiorari. Filed Jan. 4, 1916. Wm. C. Cochran, clerk.

396 [Endorsed:] File No. 25,030. Supreme Court U. S., October term, 1915. Term No. 747. Rock Spring Distilling Company et al., Petitioners, vs. W. A. Gaines & Company. Writ of certiorari and return. Filed January 5, 1916. 397 In the Supreme Court of the United States, October Term. 1916.

In Equity. No. 311.

ROCK SPRING DISTILLING COMPANY and SILAS ROSENFELD, Petitioners.

W. A. Gaines & Company (a Corporation), Respondent.

It is stipulated between the parties to the above entitled cause that

in making up the record in this cause

(1) Exhibit 6, which appears at pages 942 and 974, Volume II. may be printed from the full page plate used to print the same exhibit at page 44 of petitioners' brief in support of their petition for writ of certiorari to the Sixth Circuit Court of Appeals in this cause

(No. 747, October 1915 Term).

(2) David Nicholson & Company's present Old Crow White Label may be inserted on page 654, Volume II, notwithstanding the fact that it differs from the label appearing in the original record in the following respect—(A) Has colored seal, leaf, and acorns in centre of label and also (B) Bears the phrase "Reg. U. S. Patent Office."

W. E. ELLIS & LUTHER ELY SMITH, Solicitors and of Counsel for Petitioners. JAMES L. HOPKINS & E. F. TRABUE. Solicitors and of Counsel for Appellee.

398 [Endorsed:] 311/25030. In Equity. No. 311. Rock Spring Distilling Co. and Silas Rosenfeld, Petitioners, v. W. A. Gaines & Company, a Corporation, Respondent. Stipulation. [Endorsed:] File No. 25,030. Supreme Court U. S., Octo-399 ber term, 1916. Term No. 311. Rock Spring Distilling Company et al., Petitioners, vs. W. A. Gaines & Company. Stipulation as to printing exhibits. Filed September 29, 1916.

## ON CONFLICT OF DECISION IN ACTION FOR TRADE-MARK INFRINGEMENT.

I.

The Eighth Circuit Court of Appeals, in a suit wherein W. A. Gaines & Company (the present complainant) alleged it had adopted the words Old Crow as a trade-mark for whisky in 1867, and that those words then were, and since 1855 had been, open for adoption, found that the defendants in that case ("The Hellmans") had adopted the words in good faith in 1863, and had used same in good faith ever since.

In the present suit, brought by W. A. Gaines & Company against petitioners, who are in privity with the Hellmans, the Sixth Circuit Court of Appeals reexamined the Eighth Circuit record with a view to "interpreting" the former decision, and on the very same evidence found that W. A. Gaines & Company and not the Hellmans were the prior appropriators, and that the Hellmans' adoption in 1863 was in bad faith.

To "interpret" the former decision by making an entirely different finding of the material facts in issue, and directly determined in the former record, and then reading the former decision and decree in the light of such new facts so found, is to substitute a new judgment for the old, and in effect to overrule the former decision.

#### II.

The Sixth Circuit Court of Appeals adjudged that the Eighth Circuit Court of Appeals' decision meant that through the laches of W. A. Gaines & Company as prior appropriators, the Hellmans, as subsequent adopters, had acquired a certain defensive right to a fractional part of

the trade-mark, namely, the use upon blended whisky sold in the Southwest.

This fractional theory of trade-marks is in conflict with the rule laid down by Mr. Justice Blatchford in the leading case of Collins v. Ames (18 Fed. 561) and the decisions of other Courts of Appeal cited. Under the Collins case, the mere fact that the Hellmans, who had been found by the Eighth Circuit Court of Appeals to be the prior adopters, had not used the mark on straight whisky, does not warrant the conclusion that it was not a part of their trade in respect to straight whisky.

#### III.

The present suit is based upon registration under the Trade-Mark Act of 1905, upon application filed several months after the termination of the Eighth Circuit litigation. The verified statement supporting the application recites that no other person, firm or corporation had the right to use said trade-mark in the same identical form or in any such near resemblance thereto as might be calculated to deceive. Complainant had actual as well as constructive knowledge of the Eighth Circuit proceedings, including the final adverse opinion and decree. Affiant, Edson Bradley (complainant's vice-president) was twice a witness in the Eighth Circuit case.

The Sixth Circuit Court of Appeals held complainant's registration thus obtained in ex parte proceedings to be valid and free from fraud. This is in conflict with the decisions cited of the Court of Appeals of the District of Columbia (a court of last resort in registration proceedings under the Act of 1905), which deny registration under similar circumstances, even where the applicant has no actual knowledge of the similar mark.

#### IN THE

### SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

ROCK SPRING DISTILLING COMPANY and SILAS ROSENFELD,

Petitioners.

VS.

In Equity.

W. A. GAINES & COMPANY (a Corporation),

Respondent.

# PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Rock Spring Distilling Company, a corporation, and Silas Rosenfeld, respectfully represent:

That W. A. Gaines & Company, a corporation engaged in the distilling business in Frankfort, Kentucky, on November 11, 1904, instituted a suit in equity in the United States Circuit Court for the Eastern District of Missouri against Abraham M. and Morris Hellman (Rec., Vol. II, p. 1), claiming ownership of the trade-mark Old Crow as applied to whiskey. The bill further averred (Rec., Vol. II, pp. 7-9) that the predecessors in business of W. A. Gaines & Company had adopted the words Old Crow as a trade-mark for whiskey in 1867; that from 1835 to 1855 whiskey made by one James Crow on Glenn's Creek, Woodford County, Kentucky, had been designated by the words Old Crow; that James Crow died in 1855 and "that from the time of the death of said James Crow in 1855 until the year A. D. 1867 no whiskey was produced on the said Glenn's Creek or elsewhere to which the said words 'Crow' or 'Old Crow' were applied as a trademark; that the said words 'Crow' or 'Old Crow' had been left open for adoption by the death of the said James Crow and the cessation of the distillation of the whiskey designated by the said words in 1855, so that the same were lawfully appropriated and used by your orator's predecessors in 1867". The bill charged the Hellmans with infringement of said trade-mark in that they applied the words to a spurious compound liquor not the product of W. A. Gaines & Company.

The Hellmans in their answer, and also in a cross-bill, claimed priority of adoption in 1863 and continuous use of the words Old Crow in connection with the figure of a crow upon whiskey refined and blended by them and marked with their name (Rec., Vol. II, pp. 16, 32).

A trial was had on the bill and cross-bill and the respective answers and replications thereto and all the evidence, but the Court (Judge D. P. Dyer), overlooking the fact that under the averments in the bill, the trade-mark was open to adoption from 1855 to 1867, and if open to adoption by complainant in 1867, it was equally open to

adoption by the Hellmans in 1862, found against the Hellmans upon the issue of good faith in the adoption of the trade-mark, and entered a decree in favor of W. A. Gaines & Co. upon the bill and directed the dismissal of the crossbill (155 Fed. 495; Rec., Vol. II, p. 625). The Hellmans appealed from this decree to the Eighth Circuit Court of Appeals, but pending the appeal the Hellman Distilling Company, as vendee of the Hellman business, was brought in by supplemental bill, and upon stipulation an injunction was entered against said Hellman Distilling Company, conditioned upon the outcome of said appeal (Rec., Vol. I, pp. 151-2).

When the case was called for hearing in the Eighth Circuit Court of Appeals Judge Elmer B. Adams, who had passed upon demurrers below, withdrew, leaving the court composed of Circuit Judge Sanborn and District Judge Philips. Upon inquiry by the Court both sides agreed that the case should be heard before the court composed of the two Judges mentioned, and if the Court deemed it necessary the case should be submitted to a third Judge upon the printed record and briefs (Rec., Vol. II, p. 969). The decision, which was by Judge Philips, Judge Sanborn concurring (Rec., Vol. II, pp. 970-8; Rec., Vol. I, pp. 134-143; 161 Fed. 495; 88 C. C. A. 437) found all the material facts directly and squarely in favor of the Hellmans and against W. A. Gaines & Company, finding that under the evidence there was no secret about the process employed by Crow; that W. A. Gaines & Company's predecessors began using the words Old Crow in 1870 and that under the pleadings they could not claim use prior to 1867; that the Hellmans had adopted the words Old Crow in good faith as early as 1862 or 1863 and from that time had continuously used same without any knowledge of Glenn's Creek or complainant's predecessors or their claims. The Court found that the Hellmans' trade had been chiefly in the southern and western states and the mark had been applied to whiskey blended and rectified by them on their own premises, but that this cut no figure in the case.

The Eighth Circuit Court of Appeals therefore adjudicated that the Hellmans had in good faith adopted and used the words Old Crow prior to any appropriation thereof by the complainant's predecessors and had continued to use the same to a limited extent up to the time suit was filed and that their right to use the words Old Crow ad libitum in connection with their business could not be destroyed by the over-shadowing comparative amount of complainant's sales nor by the asserted superiority of its product.

At the hearing in the Eighth Circuit Court of Appeals the Hellmans upon inquiry by the court as to the crossbill, announced that they would not then insist upon affirmative relief, which fact is noted in the Court's opinion, as follows:

"The defendants filed a cross-bill claiming the trade-mark in question and asking for an injunction. This need not be considered, as at the hearing the defendants' counsel declined to insist upon any affirmative relief" (161 Fed. 497, 88 C. C. A. 439; Rec., Vol. II, p. 971).

The cross-bill is not thereafter referred to in the Eighth Circuit litigation.

The case was reversed with directions to dismiss the bill, which in due course was accordingly done by final decree entered in the U. S. Circuit (now District) Court for the Eastern District of Missouri on July 10, 1908

(Rec., Vol. I, pp. 153-5). The said final decree which at all times since has remained in full force and effect, unmodified and unreversed, disposed of the case as follows (Rec., Vol. I, pp. 154-5):

"Now, therefore, in conformity with and in obedience to the said mandate it is considered, adjudged and decreed by the Court that the injunction granted by this court in and by said interlocutory decree, be, and the same is hereby dissolved and for naught held, and that the said interlocutory decree against the said respondents and in favor of the complainant, be and the same is now set aside, annulled and for naught held.

"And it is further ordered, adjudged and decreed by the Court that the complainant's bill and supplemental bill be, and the same are hereby, dismissed for want of equity, and the said respondents recover of and against the complainant, W. A. Gaines & Company, a corporation, the said sum of \$920.20. adjudged in their favor by the said Circuit Court of Appeals, and that they also recover from said complainant all the costs of this court taxable in their favor or incurred in their behalf and in favor of their solicitors and counsel, and that they have execution therefor."

The said W. A. Gaines & Company on October 13, 1908, presented its petition to this court for certiorari to the Eighth Circuit Court of Appeals, asserting therein that "the judgment of the Circuit Court was reversed on the sole ground that the respondent had used the words 'Crow' or 'Old Crow' before the petitioner had adopted the words 'Old Crow' as a trade-mark'' (Petition for certiorari, p. 15; Gaines v. Kalın, case No. 455, October Term, 1908; Pearcy's Exhibit E, Rec., Vol. I, p. 119).

Said petition supported by able brief (Pearcy's Exhibit D, Vol. I, p. 119) was by this Court overruled on October 19, 1908 (212 U. S. 572).

Complainant or its predecessors had registered their claimed trade-mark in 1870, 1882 and 1904 (Rec., Vol. II, pp. 904, 928, 655).

On February 26, 1909, said W. A. Gaines & Company filed in the U. S. Patent Office application for registration of the words Old Crow as a trade-mark for *straight rye and bourbon whiskey*. Said application (duly verified on February 13, 1909) contained the statements that

"said trade-mark has been used in business by ourselves and our predecessors since, to-wit, January 1, 1835";

and also that no other person, firm or corporation, to the best of affiant's (Edson Bradley, vice-president of W. A. Gaines & Company, who was a witness in the Eighth Circuit Court) knowledge and belief has the right to use said trade-mark either in the identical form or in any such near resemblance thereto as might be calculated to deceive (Rec., Vol. I, p. 10). The evidence showed actual knowledge on the part of Bradley and complainant's other officers, of the Eighth Circuit Court of Appeals' decision and all proceedings subsequent, as well as prior thereto (Rec., Vol. I, p. 244).

Petitioners in February, 1909, under contract of agency with the Hellman Distilling Company began bottling in bond under and in compliance with the provisions of the Act of March 3, 1897, whiskey owned and produced by the Hellman Distilling Company at Owensboro, Kentucky. Petitioner applied to said whiskey labels fur-

nished by the Hellman Distilling Company bearing the figure of a crow, as follows;



HELLMAN DISTILLING CO.

ST. LOUIS. MO.

Petitioners shipped all of said whiskey so bottled and labeled to the Hellman Distilling Company at St. Louis. Petitioners on May 24, 1909, and again on June 7, 1909,

wrote W. A. Gaines & Co. at Frankfort, Kentucky, that they had heard a rumor that said Gaines had some objection to their bottling Hellmans' whiskey under the said Hellman Old Crow label. Petitioners stated that they were acting for the Hellmans in reliance upon the Eighth Circuit Court of Appeals' decision and asked what complainant's objections were (Rec., Vol. I, pp. 115-16). Complainant received both letters, but under advice of counsel, ignored them both (Rec., Vol. I, p. 243).

Complainant's registration proceedings were *ex parte* throughout. On July 20, 1909, there issued from the U. S. Patent Office to W. A. Gaines & Co. certificate of registration No. 74,537 upon which jurisdiction in the present suit depends (Rec., Vol. I, p. 9) since all parties are residents of Kentucky.

On September 28, 1909, the present suit was filed by said W. A. Gaines & Co. against petitioners as defendants in the U. S. Circuit (now District Court) at Owensboro in the Western District of Kentucky (Rec., Vol. I, pp. 18). W. A. Gaines & Co. in its present bill avers ownership of said trade-mark upon straight rye and bourbon whiskey and charges petitioners with infringement since July 21, 1909 (the day succeeding issuance of certificate of registration).

Preliminary injunction was denied (Rec., Vol. I, p. 157). Petitioners interposed a plea of res adjudicata based upon the Eighth Circuit decision and decree and their privity with the defendants in that case, which plea was sustained as sufficient in law (Rec., Vol. I, p. 171, 179 Fed. 544). Issue was joined, proofs were taken and answer was filed in aid of the plea, directly attacking the registration of July 20, 1909, as illegal and void under the Trade-Mark Act of 1905, in that the mark at the time application was filed did resemble and was identical with an existing trade-mark in use by another, namely, the Hellman Distilling Company. The answer further at-

tacked the certificate as fraudulent in that W. A. Gaines & Co. and its vice-president, who made the affidavit in support of the application at the time same was made and filed, well knew the foregoing facts to be true.

The trial court, Judge Evans, upon final hearing, determined all the issues thus raised in favor of petitioners and against W. A. Gaines & Co. and dismissed the bill, the Court rendering an opinion fully sustaining every contention of petitioners (202 Fed. 989; Rec., Vol. I, pp. 216-224).

In that opinion the Court in its findings, in part, said:

"Many years ago, probably in 1835, one James Crow, in Woodford County, Kentucky, began the use of the trade-mark Crow or Old Crow in connection with bourbon whiskey of his own make. He continued the use of his trade-mark until his death in 1855, at which time its use was discontinued. 1867 one Mitchell, a former employe of Crow's, in the same or in a contiguous locality in Kentucky, began the use of the same trade-mark on whiskey. He did this on his own initiative and without having in any way inherited or purchased the right to use the trademark from Crow or his heirs or representatives. It is therefore only from Mitchell's use of the trademark begun in 1867 that complainants' claim can come. But four years previously to the beginning of its use by Mitchell, namely, in 1863, the use of a similar trade-mark was begun in reference to whiskey in St. Louis, Mo., by persons who have transmitted their rights to the defendants. It was out of this general state of fact that the controversy arose, which was adjudicated finally in the Circuit Court of the United States for the Eastern District of Missouri. Whatever may have been the merits of the controversy which that court determined in that case

we are not to inquire, nor are we to inquire into the merits of the whiskey made or sold by either party thereto. The question we are to determine on this phase of the case is whether, in its essential elements, the title adjudicated in that case was the same as the one again attempted to be litigated in this action, When we attentively examine the record, the pleadings and the final decree in the former cause, we cannot doubt that the essential question in dispute there was the same as that involved here. This being -o, and the defendants and the Hellman Distilling Company having in due course succeeded to the rights of A. M. Hellman & Co., we hold that the plea has been established and that it is a bar to the relief now sought as to the infringement of the alleged trademark.

"But the defendants in that cause were denied an injunction upon their cross-bill asking that relief and it is insisted that that shows that neither themselves nor their successors have any rights in the trademark, inasmuch as the record shows that they dismissed their cross-appeal from that part of the judgment in that case. We have not been able to see how that affects the question here involved, because whatever effect may be given the denial to defendants of the relief they sought in that action, it is certain that in the most impressive way it was adjudged that the complainant had no equity to the relief it there prayed. At most it might be said that the result of that litigation was to leave both parties to it. each of whom had used the trade-mark for about forty years, free to use the trade-mark as each pleased in connection with whiskey,"

From that decree complainant appealed to the Sixth Circuit Court of Appeals, where the decree below was reversed in an opinion (Rec., Vol. I, Supp., pp. 316-335), which re-examines the evidence in the record in the Eighth Circuit and makes a new finding of the very facts found by the Eighth Circuit Court of Appeals.

This new finding of facts is in all essential respects directly opposite to the facts found by the Eighth Circuit Court of Appeals. The Sixth Circuit Court of Appeals finds that the Hellmans were NOT the first appropriators of the words Old Crow in connection with whiskey, but that the predecessors in business of W. A. Gaines & Company were the first appropriators; that the Hellmans had not exercised good faith in adopting and using the words as a trade-mark upon whiskey, but had been guilty of bad faith in adopting them, in order to "indicate that their whiskey was made by Crow of Kentucky." The Court decided many other material facts opposite to the finding of the Eighth Circuit Court of Appeals.

Many of the facts assumed and found by the Sixth Circuit Court of Appeals are not only not supported by the record, but are impossible under the facts established in the able decision rendered, since the conclusion of the Eighth Circuit litigation, by President Taft December 27, 1909, on "What is Whiskey?" a decision which has received general acquiescence by courts, litigants and the administrative departments of the Government (Decision President Taft, Dec. 29, 1909, "What is Whiskey?" pp. 3-6; Rec., Vol. I, Supp., pp. 348-353).

In the light of these and other findings, either directly or by necessary inference, conflicting with the findings of the Eighth Circuit Court of Appeals, the Sixth Circuit Court of Appeals, though ostensibly recognizing the decision and decree of the Eighth Circuit Court of Appeals, "interpreted" that decision and decree as giving to the Hellmans merely a defensive right, holding that the decision of the Eighth Circuit Court of Appeals "is of the class where the refusal to give an injunction to the first appropriator (evidently meaning by that phrase W. A. Gaines & Co., and not the Hellmans) may be justified upon the ground of his laches and estoppel." The Eighth Circuit Court of Appeals had found that the Hellmans were the first appropriators, having adopted the words in good faith in 1863, seven years prior to their adoption by W. A. Gaines & Co.'s predecessors, and had continuously used same in good faith ever since.

The Hellmans in 1863 prepared whiskey for the market by the only method then known, namely, by rectifying and blending, and they continued to use that process even after the method of making straight whiskey grew up.

W. A. Gaines & Co.'s 1909 registration was upheld by the Sixth Circuit Court of Appeals as free from fraud and illegality under the Trade-Mark Statute of 1905 on the ground that the entire sum and substance of what the Eighth Circuit Court of Appeals meant by its decision was that W. A. Gaines & Co. had lost a fraction of the use of the trade-mark of which its predecessors in business were the prior appropriators, namely, the fractional part represented by the use of the mark upon a particular make of whiskey, namely, blends, and in a particular territory, namely, the Southern and Southwestern territory. The Sixth Circuit Court of Appeals further held that the registrant might legally avoid the adverse effect of the decision of the Eighth Circuit Court of Appeals by limiting in the application the use of the trade-mark to "straight rye and bourbon whiskey" notwithstanding the fact that the Act of 1905 forbade the registration of any trade-mark identical with a known trade-mark owned and in use by another and appropriated to merchandise of the same descriptive properties, and not-withstanding the further fact that the statute also required an affidavit that no other person, firm or corporation, to the best of applicant's knowledge and belief, had the right to use such trade-mark in the United States, either in the identical form or such near resemblance as might be calculated to deceive (33 Stat., at L. p. 724; U. S. Comp. Stat. 1913, Sec. 9487).

The Eighth Circuit Court of Appeals had found that the right of the Hellmans to use their mark ad libitum could not be destroyed by complainant, either by reason of the greater volume of its business or the alleged superiority of its product.

The Sixth Circuit Court of Appeals directed a decree enjoining petitioners, but denied an accounting. Timely motion for rehearing interposed August 18, 1915 (Rec., Vol. I, Supp., p. 337), was overruled November 2, 1915, in an opinion (Rec., Vol. I, Supp., p. 387) wherein the Court, noting and conceding certain errors of statement of fact, pointed out in the motion for rehearing, held that such errors of statement did not affect the result. The Sixth Circuit Court of Appeals disposed of petitioner's complaint that it had made a new finding of the very facts determined by the Eighth Circuit Court of Appeals inconsistent with the former adjudication as follows:

"The petition assumes that this Court has made a new finding of facts inconsistent with the finding made by the Court of Appeals in the Eighth Circuit. Of course, if this assumption were true, our opinion would be wrong. We intended only to determine what was the real thing decided in the former suit, and so what was the thing adjudicated; and it became necessary to separate, as best we could, those conclusions of the Court upon which its action was based, from those recitals of the Judge writing the opinion, in some of which, at least, the other Judge sitting apparently did not concur. Further than this, we had neither the right nor the disposition to go."

The "other Judge sitting", Circuit Judge Walter II. Sanborn, filed no dissenting or separate opinion and the first intimation that he did not concur fully and heartily in the opinion rendered for the Court by Judge Philips is contained in the foregoing statement which, insofar as petitioners are advised, is without support in the record or otherwise.

Upon timely motion the mandate was stayed till January 1, 1916.

#### I.

Petitioners show that the decision of the Sixth Circuit Court of Appeals herein has created a direct conflict of decision between the decision of the Eighth Circuit Court of Appeals and the decision of the Sixth Circuit Court of Appeals upon questions both of law and of fact with reference to the same subject-matter, and between the same parties or their privies; that the very purpose of complainant in instituting the suit in the Sixth Circuit, as complainant has frankly disclosed, was to endeavor to secure from the Court of Appeals in that circuit a reversal of the Eighth Circuit Court of Appeals' decision.

This cannot be done under the decisions of this Court:

"The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies. This is the elemental rule stated in the text-books and enforced in many decisions of this Court."

City of New Orleans v. Citizens Bank of La., 167 U. S. 371.

"The general principle announced in numerous cases is that a right or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once determined, must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified."

Southern Pacific Ry. v. U. S., 168 U. S. 1, 48, 49.

"The established rule is that if the parties in the former action be the same as in the present, then every matter and question of fact and of law that was necessarily involved in the consideration of the former issue shall be conclusive upon the present."

Nalle v. Oyster, 230 U. S. 165, 180-1.

"This judgment (the former judgment), whether it proceeds on good reasons or upon bad reasons, whether it was right or wrong, settled finally and everywhere, and so far as Eldred by virtue of his ownership of the Chambers patent was concerned, that Kessler had the right to use and sell the electric cigar lighter before the Court.''

Petitioners further show that the Sixth Circuit Court of Appeals erred in holding that the doctrine of res adjudicata could be upheld by making an entirely new finding of facts, unlike and inconsistent with the facts found by the Eighth Circuit Court of Appeals in the body of its decision, and then interpreting the conclusions of the Eighth Circuit Court of Appeals in the light of the new facts thus found. Said new facts thus found by the Sixth Circuit Court of Appeals manifestly were not before the mind of the Eighth Circuit Court of Appeals when it wrote its conclusions in the final paragraph of its decision. To read those conclusions in the opinion and the final decree subsequently entered in the light of the new facts now found by the Sixth Circuit Court of Appeals is to cancel the old judgment and enter a new judgment in lieu thereof inconsistent with the old indgment.

Petitioners further show to the Court that if the decision of the Sixth Circuit Court of Appeals, which in effect overrules the decision of the Eighth Circuit Court of Appeals, is permitted to stand, it will create great confusion not only in this class of cases, but in every case where the doctrine of res adjudicata, one of the most salutary in our jurisprudence, is invoked or might be thought to apply.

#### II.

Under the decision of Mr. Justice Blatchford in the leading case of Collins v. Ames (18 Fed. 561, 571) the prior adopter of a trade-mark upon a class of goods such as edge tools has the right at all times to use that mark upon all articles in that class and the fact that he has not actually applied the mark to a particular article of the class, such as shovels, does not warrant the conclusion that the mark is not the mark of the prior adopter's trade in respect to shovels.

The Eighth Circuit Court of Appeals adjudicated that as against Gaines, the Hellmans were the prior adopters of the words Old Crow as applied to whiskey and had the right to use same ad libitum free from inference by Gaines. The mere fact that the Hellmans had not used the words upon bottled-in-bond whiskey does not warrant the conclusion that as against Gaines such mark was not a part of the Hellmans' trade in respect to bottled-in-bond whiskey.

In this case the Sixth Circuit Court of Appeals fell into the error of adjudicating W. A. Gaines & Company to be the prior appropriator, directly contrary to the decision of the Eighth Circuit Court of Appeals and then adjudging that the Eighth Circuit Court of Appeals' decision in favor of the Hellmans merely meant that Gaines, as **prior appropriator**, had been guilty of laches in respect to the Hellman trade and had lost a fraction (and no more) of the entire trade-mark, namely, that upon blended whiskey sold in the Southwest, where the Sixth Circuit Court of Appeals considered the Hellmans' trade had chiefly been.

Petitioners show that such fractional theory of trademark rights is directly contrary to the rule laid down by Mr. Justice Blatchford in Collins v. Ames and to the

decisions in other circuits. We refer to the decisions of the Second Circuit Court of Appeals in Florence Mfg. Co. v. J. C. Dowd & Co., 178 Fed. 73, 75-6, 101 C. C. A. 565; the Eighth Circuit Court of Appeals in Layton Pure Food Co. v. Church, 182 Fed. 35, 38, 104 C. C. A. 464; in the Court of Appeals of the District of Columbia in Anglo-American Incand. L. Co. v. General El. Co., 43 App. D. C. 385, 386-7; Simplex Elec. Heating Co. v. Gold Car. H. & L. Co., 43 App. D. C. 28, 30-2.

Petitioners respectfully submit that the doctrine of fractional trade-mark uses as announced and applied by the Sixth Circuit Court of Appeals in this case raises novel questions of far-reaching influence in trade-mark law. This new theory should be carefully weighed by this court before it is permitted to stand and unsettle rights already acquired upon the faith of a long line of well-considered decisions.

#### III.

The Sixth Circuit Court of Appeals was further in error when it upheld complainant's 1909 registration as legal and valid under the circumstances herein related, thereby in effect writing into the Trade-mark Act of 1905 provisions and exceptions which Congress by its failure to adopt plainly indicated did not exist and should not be invoked. The effect would be practically to repeal the salutary protective features of sections 2 and 5 of said act (33 Stat. at L., p. 724).

Said decision is in conflict with the decisions of the Court of Appeals of the District of Columbia, which court under the present trade-mark statute is the court of last resort in appeals arising out of registration proceedings, and since the said act went into effect has been constantly engaged in construing said act. That court has repeat-

edly held that an applicant is not entitled to register a mark bearing such close resemblance to another mark in use upon any article of the same general class as to cause confusion. The rule has been applied even though the applicant may not have known of the other mark, or the owner of the other mark may not have used the mark upon the particular article in the class to which the applicant's commodity belongs.

As illustrating the correct application of the statute, we refer to the recent decision of the Court of Appeals of the District of Columbia in Simplex Elec. Heating Co. v. Gold Car H. & L. Co., 43 App. D. C. 30, 31, 32, where the Court said:

"It is no excuse that appellant's officers testified that they were not aware that appellant applied the mark to steam heaters. They conceded they knew of the existence of appellant company. In fact, they were competitors to the extent of both having furnished car-heating systems for the New Haven Railroad Company. Appellee knew of the general use of the mark by appellant and it should have advised itself fully before appropriating the mark. It is hard, even in the absence of evidence to the contrary, to attribute good faith to one who knowingly appropriates the mark of another to be used upon the same general class of goods (*l. c.* 31-2) \* \* \*

"The case here presents no great difficulty. Appellee is using the mark in question upon an appliance which belongs to a class in use by appellant. The general system of appellee, to which the appliance belongs, possesses the same descriptive properties of the system which bears the mark of appellant. That such a condition would in all probability lead to confusion in trade is evident. A situation

therefore exists which is forbidden by the statute (l, c, 32)."

Petitioners show that the decision of the Sixth Circuit Court of Appeals is in direct conflict with the decisions of the Court of Appeals of the District of Columbia and with the provisions of the statute itself.

Petitioners further urge that the far-reaching effect of the interpretation of the doctrine of res adjudicata by the Sixth Circuit Court of Appeals raises a question of the greatest public importance, that the preservation of rights adjudicated not only in trade-mark litigation, but in controversies of every character, is of the utmost gravity and affects property and personal interests of vast value.

· In the interest of uniformity of decision and to avoid conflict between the courts of appeals in the various circuits, this case should be certified to this Court for decision.

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said Court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record of all proceedings of the said Circuit Court of Appeals in said case therein entitled "W. A. Gaines & Company, Appellant, v. Rock Spring Distilling Company and Silas Rosenfeld, Appellees", No. 2572, to the end that the said cause may be certified and determined by this Court as provided in Section 240 of the Act of Congress, entitled "An Act to Codify, Revise and Amend the Laws Relating to the Judiciary", approved March 3,

1911, and that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in said case, and every part thereof, may be reversed by this Honorable Court, and your petitioners will ever pray.

W. T. Ellis, Luther Ely Smith, Solicitors for Petitioners.

We certify that in our opinion the above petition is well grounded in matter of law and proper to be heard.

> W. T. Ellis, Luther Ely Smith,

State of Missouri, City of St. Louis. } ss.

Luther Ely Smith, being duly sworn, says that he is solicitor and of counsel for the petitioners, Rock Spring Distilling Company and Silas Rosenfeld; that he prepared the foregoing petition and that the allegations contained therein are true, as he verily believes.

LUTHER ELY SMITH.

Subscribed and sworn to before me this 29th day of November, 1915.

My commission expires June 16, 1917.

RENA HUBER, Notary Public.

(SEAL)

In the Supreme Court of the United States. October Term, 1915.

Rock Spring Distilling Company and Silas Rosenfeld,

Petitioners.

VS.

W. A. Gaines & Company (a corporation),

Respondents.

#### NOTICE.

To James L. Hopkins, Edmund F. Trabue and Daniel W. Lindsey, Solicitors and of Counsel for Respondents: You are hereby notified that the petitioners, Rock Spring Distilling Company and Silas Rosenfeld, will on Monday, the 13th day of December, 1915, or as soon thereafter as the motion can be heard, present to the Supreme Court of the United States the foregoing petition and move the said Court to grant the writ of certiorari as prayed for therein.

W. T. Ellis, Luther Ely Smith, Solicitors for Petitioners.

Office Survive Court, U. S.
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JAMES D. MAHER

IN THE

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

ROCK SPRING DISTILLING COMPANY and SILAS ROSENFELD.

Petitioners.

V8.

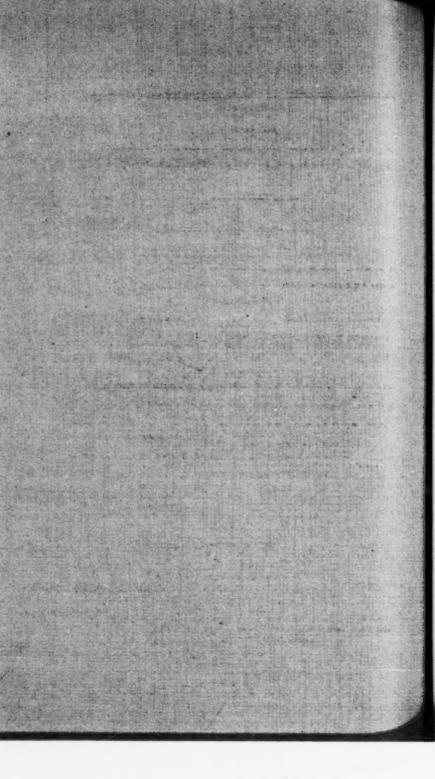
W. A. GAINES & COMPANY (a Corporation).

Respondent.

In Equity.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

> W. T. ELLIS and LUTHER ELY SMITH, Solicitors and of Counsel for Petitioners, Rock Spring Distilling Company and Silas Rosenfeld.



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# ON CONFLICT OF DECISION IN ACTION FOR TRADE-MARK INFRINGEMENT.

I.

The Eighth Circuit Court of Appeals, in a suit wherein W. A. Gaines & Company (the present complainant) alleged it had adopted the words Old Crow as a trade-mark for whisky in 1867, and that those words then were, and since 1855 had been, open for adoption, found that the defendants in that case ("The Hellmans") had adopted the words in good faith in 1863, and had used same in good faith ever since.

In the present suit, brought by W. A. Gaines & Company against petitioners, who are in privity with the Hellmans, the Sixth Circuit Court of Appeals reexamined the Eighth Circuit record with a view to "interpreting" the former decision, and on the very same evidence found that W. A. Gaines & Company and not the Hellmans were the prior appropriators, and that the Hellmans' adoption in 1863 was in bad faith.

To "interpret" the former decision by making an entirely different finding of the material facts in issue, and directly determined in the former record, and then reading the former decision and decree in the light of such new facts so found, is to substitute a new judgment for the old, and in effect to overrule the former decision.

#### II.

The Sixth Circuit Court of Appeals adjudged that the Eighth Circuit Court of Appeals' decision meant that through the laches of W. A. Gaines & Company as prior appropriators, the Hellmans, as subsequent adopters, had acquired a certain defensive right to a fractional part of

the trade-mark, namely, the use upon blended whisky sold in the Southwest.

This fractional theory of trade-marks is in conflict with the rule laid down by Mr. Justice Blatchford in the leading case of Collins v. Ames (18 Fed. 561) and the decisions of other Courts of Appeal cited. Under the Collins case, the mere fact that the Hellmans, who had been found by the Eighth Circuit Court of Appeals to be the prior adopters, had not used the mark on straight whisky, does not warrant the conclusion that it was not a part of their trade in respect to straight whisky.

#### III.

The present suit is based upon registration under the Trade-Mark Act of 1905, upon application filed several months after the termination of the Eighth Circuit litigation. The verified statement supporting the application recites that no other person, firm or corporation had the right to use said trade-mark in the same identical form or in any such near resemblance thereto as might be calculated to deceive. Complainant had actual as well as constructive knowledge of the Eighth Circuit proceedings, including the final adverse opinion and decree. Affiant, Edson Bradley (complainant's vice-president) was twice a witness in the Eighth Circuit case.

The Sixth Circuit Court of Appeals held complainant's registration thus obtained in ex parte proceedings to be valid and free from fraud. This is in conflict with the decisions cited of the Court of Appeals of the District of Columbia (a court of last resort in registration proceedings under the Act of 1905), which deny registration under similar circumstances, even where the applicant has no actual knowledge of the similar mark.

#### IN THE

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

ROCK SPRING DISTILLING COMPANY and SILAS ROSENFELD,

Petitioners,

vs.

In Equity.

W. A. GAINES & COMPANY (a Corporation),

Respondent.

### BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The complainant, W. A. Gaines & Company, a corporation engaged in the manufacture of whiskey at Frankfort, Kentucky, instituted suit on November 11, 1904, in the U. S. Circuit Court for the Eastern District of Missouri against A. M. Hellman and Moritz Hellman (privies of these petitioners), members of a co-partnership which since 1862 had been engaged at St. Louis in the sale of whiskey and in the business of preparing whiskey for the market by the only method at that time known, blend-

ing and rectifying it. They continued to produce whiskey by that process long after the present method of producing straight whiskey came into use (Rec., Vol. I, Supp., pp. 348-353).

In its bill in said suit said W. A. Gaines & Company claimed that it was the owner of a trade-mark in the words Old Crow for whiskey by reason of priority of appropriation, resulting from the adoption in 1867 of said words as a trade-mark for whiskey by Gaines, Berry & Company, predecessors in business of W. A. Gaines & Company, a co-partnership, which firm was in turn succeeded in business by complainant, a corporation; that the words Old Crow had been applied to whiskey made by James Crow on Glenn's Creek, Woodford County, Kentucky, from 1835 until his death in 1855, and said words were then left open to adoption by the death of said Crow and remained open until 1867, when Gaines, Berry & Company adopted them. The bill charged the Hellmans with trade-mark infringement and unfair competition in the use of said words Old Crow upon a spurious compound or liquor.

A demurrer interposed to the bill was sustained and an amended bill was filed. The Hellmans (A. M. Hellman having died in the meantime, his administrator Kahn entered his appearance to the suit) answered specifically denying each allegation of the bill and pleading affirmatively that their predecessors in business had adopted the words as a trade-mark upon whiskey in 1862, prior in time to the adoption claimed by complainant (1867), and were the lawful owners of the mark. The Hellmans also filed a cross-bill averring the same facts as the answer and praying injunctive relief against complainant. Upon hearing upon bill, answer, cross-bill, replications and evidence, the cross-bill was dismissed and

complainant's prayer for injunction and accounting were granted. The trial court at St. Louis, overlooking complainant's averment that the words were open to adoption from 1855 to 1867, when they were adopted by Gaines, and hence if open to adoption by Gaines, were open to adoption by the Hellmans, rendered an opinion (155 Fed. 689, Rec., Vol. II, pp. 625, 632) finding that the predecessors of the Hellmans had adopted and used the trade-mark prior in time to complainant, but that their adoption and use was fraudulent and in bad faith. A decree was entered granting an injunction and accounting and dismissing the cross-bill.

From that decree thus entered the Hellmans appealed to the Eighth Circuit Court of Appeals where the case was called for hearing before a court composed of Judges Walter H. Sanborn, Elmer B. Adams and John F. Philips. Judge Adams, having heard the demurrers in the court below; withdrew and the hearing proceeded before Judges Sanborn and Philips upon agreement entered into between counsel in open court that if the court deemed it necessary the cause should be submitted to a third judge upon the printed record and briefs (Rec., Vol. II, p. 969).

During the course of the statement of the case presiding Judge Sanborn inquired as to the cross-bill and counsel for the Hellmans, after conference, then stated that affirmative relief would not be insisted upon at this time. The opinion handed down April 27, 1908, after stating the substance of the bill and answer, recites:

"The defendants filed a cross-bill claiming the trade-mark in question and asking for an injunction. This need not be considered as at the hearing, defendants' counsel declined to insist upon any affirmative relief" (161 Fed. 497; Rec., Vol. II, p. 971).

The Eighth Circuit Court of Appeals by its decision (161 Fed. 495; 88 C. C. A. 437; Rec., Vol. II, p. 970) found all the material facts and issues in favor of the Hellmans. It found that

"No unprejudiced mind could read the evidence in this case without the impression that the conception of a trade mark did not enter the mind of Gaines, Berry & Company prior to 1870, and under the pleadings they could not lay claim thereto anterior to 1867."

The opinion further found that the Hellmans from 1862 on had used the words Old Crow as a trade-mark on their whiskey and that their adoption and use was in good faith without any knowledge that complainant was claiming the mark. On the ground of their priority of adoption and continued use in good faith of the words Old Crow as a trade-mark upon whiskey, the Eighth Circuit Court of Appeals held that the right of the Hellmans to use the trade-mark ad libitum could not be destroyed by the overshadowing comparative amount of complainant's sales under the designation of Old Crow whiskey nor by the alleged superiority of its product. The Court directed that the decree of the Circuit Court be reversed and the case be remanded with directions to the Circuit Court to dismiss the bill of complaint. This mandate was carried out by the Circuit Court in a decree which dismissed the bill for want of equity and taxed all costs in favor of the Hellmans (Rec., Vol. I, p. 154).

Complainant filed no motion for rehearing in that case, but thereafter presented to the Eighth Circuit Court of Appeals its motion to stay the issuance of mandate, which that Court denied (Rec., Vol. I, p. 148). Thereupon complainant filed in this court its petition for *certiorari* 

(Petition Gaines v. Kahn, No. 455, Oct. Term, 1908, U. S. Supreme Court) in nine paragraphs as follows:

I-II. The error of the Eighth Circuit Court of Appeals in reversing the Circuit Court's opinion and decision (which were set out in full). Said petition on its page 15 contained the following statement:

"On the hearing in that court at the March Term, 1908, before Judge Philips and Judge Sanborn, counsel for respondent, abandoned the claim for affirmative relief on the cross-bill. The judgment of the Circuit Court was reversed on the sole ground that the respondents had used the words 'Crow' and 'Old Crow' before the petitioner had adopted the words 'Old Crow' as a trade-mark.

"The Circuit Court of Appeals found that the liquor prepared and sold by the respondents with the labels and brands herein described was a blended whiskey, but attached no importance to that fact, merely saying: 'Whether this' (blending) 'made it better or worse than that manufactured by the complainant does not affect this case.'"

III-VI. That the protection of truthful trade-marks is a matter of utmost public importance; that the decision of the Eighth Circuit Court of Appeals is in conflict with two state decisions (107 Mo. App. 507 and 54 N. Y. Supp. 421); that complainant had spent \$250,000 in advertising its trade-mark worth \$500,000, which will be injured or destroyed if the decision is to stand; that several thousand suits for the infringement of this trademark already brought had all resulted favorably to complainant except the Hellman suit, and "until the question is finally settled by this Court the litigation will continue and diverse decisions will be rendered in the state courts as well as in the courts of the United States".

VII-IX. That the Hellmans, by reason of their misrepresentations, "could not acquire the right to use the words Old Crow as a trade-mark, and that therefore up to 1867, when these words were adopted by petitioner's predecessors, they had not been lawfully appropriated by anybody and were open to adoption by petitioner's predecessors who, honestly and in good faith, applied them to their goods"; that the Hellmans had been guilty of unfair competition; and that the writ should issue.

Complainant in its brief in this court in support of said petition in the Eighth Circuit litigation earnestly urged that the decision of the Eighth Circuit Court of Appeals adjudging priority of adoption in favor of the Hellmans was erroneous, contending that the undisputed evidence showed that the use by the Hellmans had been fraudulent and their trade prior to 1867 too trifling to create any rights against complainant (brief in support of petition, Gaines v. Kahn, No. 455, Oct. Term, 1908, U. S. Supreme Court, Pearcy's Exhibit D, Rec., Vol. I, p. 119).

Said petition to this court for *certiorari* was on October 19, 1908, denied (212 U. S. 572; Rec., Vol. I, p. 144).

Thereafter, in the spring of 1909, the Hellmans, who owned whiskey of the requisite age, made by them under the U.S. internal revenue regulations at the Rock Spring Distillery in Owensboro, under lease from petitioner Rosenfeld, lessee, arranged for the bottling of same in bond by the petitioners under the Hellman Old Crow label, containing the figure of a crow and the words "Old Crow Whiskey", together with the firm name "Hellman Distilling Company, Proprietors, St. Louis, Mo.," and the words "Hellman's Celebrated Old Crow Bottled in Bond Whiskey" (Rec., Vol. I, Supp., p. 308).

Upon a rumor that complainant had some objection to

the form of label, which petitioners were using upon Hellman's bottled-in-bond Old Crow, petitioners on May 24, 1909, wrote complainant, making a full statement of all the facts in regard to their bottling of said whiskey under said label, referred to the decision in the Eighth Circuit Court of Appeals, and asked complainant to state the objections, if any, which it had to the label (Rec., Vol. I, pp. 115-6). Again, on June 7, 1909, petitioners wrote complainant, inclosing a copy of the former letter. Complainant received both letters, but under advice of counsel ignored them both (Rec., Vol. I, p. 243).

On September 29, 1909, complainant filed its bill in this suit against petitioners in the U.S. Circuit (now District) Court for the Western District of Kentucky at Owensboro, alleging the ownership of the words "Old Crow" as a trade-mark upon straight rye and bourbon whiskey, and the issuance on July 20, 1909, by the U.S. Patent Office to complainant of certificate of registration of said trademark. A copy of said registration filed with the bill showed that the application for registration had been filed February 20, 1909, supported by affidavit made February 13, 1909, several months after the termination of the Eighth Circuit litigation and the refusal of complainant's petition for certiorari in that case by this Court. The verified statement supporting the application for registration claimed ownership of the words "Old Crow" as a trade-mark upon straight rve and bourbon whiskey; its use in business by complainant and its predecessors since 1835, and further averred that no other person, firm or corporation had the right to use said trade-mark either in the identical form or in any such near resemblance thereto as might be calculated to deceive.

Complainant applied to the District Court at Owensboro for a preliminary injunction, which was denied (Vol. I, p. 158). Petitioners (defendants) pleaded in bar of complainant's present suit the proceedings, findings, decision and decree in the Eighth Circuit litigation, and facts showing petitioners' privity with the Hellmans (Rec., Vol. I, p. 167). This plea was sustained as sufficient in law (Rec., Vol. I, p. 172; 179 Fed. 544). Replication to the plea was filed and proofs were taken. Thereafter, under leave of Court, an answer in aid of the plea was filed directly attacking the validity of complainant's 1909 registration on the ground that it was fraudulently obtained and contravened the provisions of the Act of 1905 (Vol. I, p. 182).

The District Court (Judge Evans) in an able and well-considered opinion (Vol. I, pp. 218-224, 202 Fed. 989—printed in full at the end of this brief) directed a decree in favor of petitioners. In that opinion the Court, upon final hearing, in making its findings determined the facts and issues in part as follows:

"Many years ago, probably in 1835, one James Crow, in Woodford County, Kentucky, began the use of the trade-mark Crow or Old Crow in connection with bourbon whiskey of his own make. continued the use of his trade-mark until his death in 1855, at which time its use was discontinued. In 1867 one Mitchell, a former employe of Crow's, in the same or in a contiguous locality in Kentucky, began the use of the same trade-mark on whiskey. He did this on his own initiative and without having in any way inherited or purchased the right to use the trade-mark from Crow or his heirs or representatives. It is therefore only from Mitchell's use of the trade-mark begun in 1867 that complainants' claim can come. But four years previously to the beginning of its use by Mitchell, namely, in 1863, the use

of a similar trade-mark was begun in reference to whiskey in St. Louis, Mo., by persons who have transmitted their rights to the defendants. It was out of this general state of fact that the controversy arose which was adjudicated finally in the Circuit Court of the United States for the Eastern District of Missouri. Whatever may have been the merits of the controversy which that court determined in that case we are not to inquire, nor are we to inquire into the merits of the whiskey made or sold by either party thereto. The question we are to determine on this phase of the case is whether, in its essential elements, the title adjudicated in that case was the same as the one again attempted to be litigated in this action. When we attentively examine the record, the pleadings and the final decree in the former cause, we cannot doubt that the essential question in dispute there was the same as that involved here. This being so, and the defendants and the Hellman Distilling Company having in due course succeeded to the rights of A. M. Hellman & Co., we hold that the plea has been established and that it is a bar to the relief now sought as to the infringement of the alleged trade-mark.

"But the defendants in that cause were denied an injunction upon their cross-bill asking that relief and it is insisted that that shows that neither themselves nor their successors have any rights in the trademark inasmuch as the record shows that they dismissed their cross-appeal from that part of the judgment in that case. We have not been able to see how that affects the question here involved, because whatever effect may be given the denial to defendants of the relief they sought in that action, it is certain that in the most impressive way it was adjudged that the complainant had no equity to the relief it

there prayed. At most it might be said that the result of that litigation was to leave both parties to it, each of whom had used the trade-mark for about forty years, free to use the trade-mark as each pleased in connection with whiskey \* \* \*.''

"Again, it is insisted by the complainant that it uses the trade-mark in connection with 'straight' whiskey, while the defendants have heretofore used it in connection with 'blends'. The bill of complaint, as we shall see, charges a broader use. The general doctrine, we apprehend, is that a trade-mark used in connection with any class of things must apply to the various species or grades of that class. It would be an endless task to differentiate the various grades or qualities of whiskey or any other article of merchandise and say to which one or more of them a trade-mark was appropriated or applicable. Especially, we apprehend, would this be so in reference to whiskey, which has as great a variety of grades (extending from the very best to the very worst) as probably any article in commerce. Some of the authorities illustrating this view are Layton Pure Food Co. v. Church & Dwight Co., 182 Fed. 35, 38, and authorities therein cited, and Collins Co. v. Oliver Ames & Sons Corporation, 18 Fed. 561, 570." \* \* \*

"As we have seen, it is altogether incorrect to say that the complainant and its predecessors had used the trade-mark since January 1, 1835, because the complainant and its predecessors did not begin its use until 1867, nor then, in any legal sense, as the successors of James Crow. Besides, from the testimony and developments in the suit in St. Louis, the complainant certainly knew that its opponents in that suit had been adjudged the right to use and that they in fact had used the trade-mark Old Crow ever since 1863, though probably not as energetically or

as extensively as complainant. Yet upon these statements registration was obtained. \* \* \* \*''

"While under the Act of 1905 the registration, even when thus made, affords a prima facie presumption of ownership of the trade-mark in complainant. is not that presumption entirely overcome by the indoment which had been rendered against the complainant in the suit in St. Louis, long before the application was made, and of which litigation and judgment no information was given by the complainant to the Patent Office? To ask the question is to answer it in the negative unless such ex parte registration. obtained under such circumstances, and in the way indicated, is to override the previous judgment directed by the Circuit Court of Appeals in a litigation between the opposing claimants of that trade-mark and in which all were fully heard. That such a result is impossible is, in our view, too plain for argument. Nor can we conceive that Congress ever contemplated such a result when enacting the legislation of 1905."

From that decree complainant appealed to the Sixth Circuit Court of Appeals, where the decree below was reversed in an opinion which purports to recognize the decision in the Eighth Circuit Court of Appeals, but by way of interpreting that decision, re-examines the entire record in the Eighth Circuit litigation and makes a new finding of facts, in many respects wholly without support in the record. In the most essential particulars it is directly opposite to the finding of the Eighth Circuit Court of Appeals. In the main features of the art of making whiskey and the history of the trade, said findings of fact by the Sixth Circuit Court of Appeals are inconsistent with and impossible under the decision of President Taft, who reviewed the history of the whiskey business in passing

upon the correct labeling of whiskey, rendered December 27, 1909, after the termination of the Eighth Circuit litigation (Decision President Taft, Dec. 27, 1909, Rec., Vol. I, Supp., pp. 348-353).

Upon the vital issues of good faith in the adoption and use and priority of appropriation by the Hellmans of the words Old Crow as a trade-mark upon whisky, the finding of facts made by the Sixth Circuit Court of Appeals is diametrically opposite to the decision of the Eighth Circuit Court of Appeals. The Sixth Circuit Court of Appeals, in the light of this new finding of the facts, made on the record in the Eighth Circuit case, interpreted the Eighth Circuit Court of Appeals' decision as giving the Hellmans merely a defensive right to a fractional use of their Old Crow trade-mark, namely, upon blended whisky and in the Southwest, holding that Gaines as prior appropriators had lost the fractional part of its mark represented by such use. The Sixth Circuit Court of Appeals also held that complainant's affidavit and statement in support of its 1909 application for registration, though studiously drawn with a view to avoid the effect of the Eighth Circuit Court of Appeals' decision, was not fraudulent and did not contravene the provisions of the Trademark Act of 1905. The Court directed that an injunction be granted against the use by petitioners of Old Crow labels upon straight whisky not made by complainant, but refused an accounting.

It is true that the Sixth Circuit Court of Appeals' decision does not in terms state that it reversed the adjudication of facts found by the Eighth Circuit Court of Appeals, nor does it contain categorical denials of the truth of the various facts found by the Eighth Circuit Court of Appeals, but in every material respect its findings of facts, which were in litigation in the Eighth Circuit, are

inconsistent with the findings made by the Eighth Circuit Court of Appeals. It is readily apparent that the Sixth Circuit Court of Appeals finds bad faith on the part of the Hellmans in the adoption and use of the mark. It is not so readily apparent upon first reading that the Sixth Circuit Court of Appeals intends to designate, and by the use of the term "first appropriator" does designate complainant and its predecessors in business as the first appropriators of the mark, and intends to hold, and does hold, that the Eighth Circuit Court of Appeals' decision established title to the trade-mark in complainant, based upon priority of appropriation by complainant. Not only that, but the Sixth Circuit Court of Appeals deduces corrupt motives and fraudulent intent on the part of the Hellmans and their predecessors in business (without any legal basis for so doing) from facts which the Eighth Circuit Court of Appeals found to evidence good faith and fair dealing. A comparison of certain points in the two opinions is noted in the statement supporting the motion for rehearing (R., Vol. I, Supp., pp. 359-361).

Timely motion for rehearing, pointing out errors of law and of fact, was overruled in an opinion which conceded certain errors of fact, but held them immaterial. The Court further conceded that if the effect of its opinion on the merits were to make a new finding of facts, inconsistent with the finding made by the Eighth Circuit Court of Appeals, its opinion would be wrong.

"We intended only", said the Court, "to determine what was the real thing decided in the former suit, and so, what was the thing adjudicated, and it became necessary to separate, as best we could, those conclusions of the Court upon which its action was based, from those recitals of the Judge writing the opinion, in some of which, at least, the other

Judge sitting, apparently did not concur. Further than this we had neither the right nor the disposition to go." (R., Vol. I, Supp. p. 391.)

"The other Judge sitting" was Judge Walter II. Sanborn. If he did not concur fully and heartily in all that was said in the Court's opinion, written by Judge Philips, he failed to indicate it by separate opinion, dissent or otherwise. Petitioners are not now advised as to the basis of the foregoing statement indicating a dissent by Judge Sanborn.

The foregoing observation of the Sixth Circuit Court of Appeals in its opinion denying the motion for rehearing about "the other Judge apparently not concurring", has not tended to remove petitioners' fear that the Sixth Circuit Court of Appeals inadvertently fell into error as to matters of much greater moment, and failed to apprehend material facts actually decided by the Eighth Circuit Court of Appeals and the full scope and effect of that Court's decision and the proceedings leading up to it.

I.

#### DIRECT CONFLICT OF DECISION.

Petitioners respectfully submit that the effect of the decision below is to overrule the final decree of another court of equal dignity.

Complainant with the greatest frankness claimed in its brief before the Sixth Circuit Court of Appeals that the Eighth Circuit Court of Appeals' decision was clearly wrong, inequitable, and opposed to sound public morals. In that brief complainant quoted in full and relied upon the decision and finding of the trial court in the Eighth Circuit. That decision and finding of the trial court was reversed by the Eighth Circuit Court of Appeals in its

decision adjudicating the material facts in issue in all essential respects different from those found by said trial court in that circuit. Complainant before the Sixth Circuit Court of Appeals openly urged that the decision in the Eighth Circuit Court of Appeals be disregarded, stating its contention as follows (Complainant's Brief before the Sixth Circuit Court of Appeals, pp. 7-8):

"There is necessarily involved the investigation of the former adjudication pleaded, as to what it determined as to the facts and whether upon the determined and admitted facts the Eighth Circuit Court of Appeals correctly applied the law. As to this we contend that the decision of the Circuit Court (the trial court) was so clearly right, and the Court of Appeals so manifestly wrong in applying the law to the undisputed facts of the case in the Eighth Circuit that the adjudication should be disregarded in this or any other circuit under any circumstances, in a subsequent suit in equity, and that this court now has the right and the duty to so decree. That even if the present and former suits were so related as to parties and subject-matter that the former adjudication could properly be pleaded, it is for this court, on inspection of the former decree and at least the undisputed facts in the former case, to direct the lower court in this circuit to disregard the opinion and decree of the Eighth Circuit Court of Appeals altogether, if the opinion is found to be clearly inequitable and opposed to sound public morals. That in this regard the duty of this court is to the public first and then to the litigants."

That complainant's effort in the Sixth Circuit Court of Appeals was to reverse the decision of the Eighth Circuit Court of Appeals by disregarding that decision is impressively emphasized by the fact that complainant in its brief below copied bodily, in haec verba, the statement of facts and argument of complainant's brief before the Eighth Circuit Court of Appeals (in some instances without pausing to make the changes necessary to fit the Sixth Circuit case). Much of this same statement and argument was included in complainant's brief in support of petition to this court for certiorari in the Eighth Circuit case, cause No. 455, October Term, 1908, which this court denied (212 U. S. 572).

Complainant, in the most emphatic manner, deliberately sought to persuade the Sixth Circuit Court of Appeals to disregard completely the facts adjudicated by the Eighth Circuit Court of Appeals and the questions decided by that court, which adjudication and decision this court, notwithstanding able arguments briefed by eminent counsel, declined to review by *certiorari* (Gaines v. Kahn, 212 U. S. 572).

The Sixth Circuit Court of Appeals, though apparently not persuaded to the lengths urged by complainant, has nevertheless really gone farther than complainant asked. While asserting that it recognized the Eighth Circuit Court of Appeals' decision, the Sixth Circuit Court of Appeals proceeds to make an entirely new finding of facts, completely different from those adjudicated by the Eighth Circuit Court of Appeals. It thereupon interprets the Eighth Circuit Court of Appeals' decision in the light of such new finding of facts. Thus, the Sixth Circuit Court of Appeals, in its opinion, determined that the Eighth Circuit Court of Appeals' decision had established that the Hellmans had adopted and used the words Old Crow in bad faith, and that they were not the prior appropriators of the mark as compared with W. A. Gaines

& Co., but that W. A. Gaines & Co., through its predecessors in business, possessed title as prior appropriators of the mark Old Crow. The Sixth Circuit Court of Appeals found that this title was complete save only for a fractional use lost through laches to the Hellmans, namely, that upon blended whiskey sold in the Southwest. This finding and judgment is tantamount to a direct reversal of the Eighth Circuit Court of Appeals' decision by the Sixth Circuit Court of Appeals. In fact, the Sixth Circuit Court of Appeals strongly intimates that it disapproves the Eighth Circuit Court of Appeals' decision as an entirety.

Reference to the decisions of this court reveals that the Sixth Circuit Court of Appeals has created a direct conflict with the adjudication of the Eighth Circuit Court of Appeals of a character which this court has frequently disapproved.

This Court, speaking through Mr. Justice Strong, in Case v. Beauregard, 101 U. S. 688, 692, said:

"Nothing that can now be done in another suit can take away the legal effect of that decree. Even were we of the opinion that the case was erroneously decided, it would still be res adjudicata, a bar to the complainant, a protection to the defendants."

In the case of Hubbell v. U. S., 171 U. S. 203, 208-9, this Court, speaking through Mr. Justice Brown, said:

"Whether the reasons given by the Court of Claims for dismissal of the petition are correct or not; whether, indeed, the judgment were right or wrong upon the facts presented, is of no importance here." This Court said in Kessler v. Eldred, 206 U. S. 285 (opinion by Mr. Justice Moody):

"If rights between litigants are once established by the final judgment of a court of competent jurisdiction, these rights must be recognized in every way and wherever the judgment is entitled to respect by those who are bound by it."

And in Nalle v. Oyster, 230 U. S. 165 (opinion by Mr. Justice Pitney), it was said:

"The established rule is that if the parties in the former action are the same as in the present, then every matter and question of fact and of law that was necessarily involved in the consideration and determination of the former issue shall be conclusive upon the present."

The decisions of this Court do not sanction such a course as that pursued in the court below.

Mr. Chief Justice White, in U. S. v. B. & O. R. R. Co. (229 U. S. 244), delivering the opinion of this court, in a case involving the doctrine of res adjudicata, by way of comparison between the case under consideration and the former case, examined the assignment of errors in the appeal from the former decree to the Court of Appeals, and found that an issue plainly presented in the equity case was whether the bridge in question was subject to the Act of 1899 and within the jurisdiction of the Secretary of War. This Court found that the determination of that fact in the former case was res adjudicata in the criminal proceeding.

In the present case, an examination of the grounds of the petition by W. A. Gaines for *certiorari* to this Court in the Eighth Circuit case (given *ante* p. 5) clearly shows that the same issues of fact and law were there involved and determined as are presented here and are decisive in this case.

Nor under the decisions of this Court is the action of the Sixth Circuit Court of Appeals in ignoring the adjudication of material facts by the Eighth Circuit Court of Appeals to be justified upon the ground that complainant in the Sixth Circuit was proceeding upon a different theory, namely, infringement of the same trade-mark subsequently registered for use upon two limited kinds of whiskey (straight rve and bourbon) instead of infringement of a common-law trade-mark upon whiskey, with jurisdiction dependent upon diversity of citizenship, Priority of adoption by the Hellmans was a material fact not less fatal to complainant's case in the Sixth Circuit than in the Eighth Circuit. All the evidence relating to priority of adoption was before the Eighth Circuit Court of Appeals and that Court, by its decision, adjudicated those facts. This Court, in Hubbell v. U. S., 171 U. S. 203 (opinion by Mr. Justice Brown), in applying the rule in a patent case, said:

"But even if a somewhat different theory or state of facts were developed upon the trial of the second case, the former judgment would not operate the less as an estoppel, since the patentee cannot bring suit against an infringer upon a certain state of facts, and after a dismissal of his action bring another suit against the same party upon the same facts, and recover upon a different theory. The judgment in the first action is a complete estoppel in favor of the successful party in a subsequent action upon the same state of facts."

In an opinion by Mr. Justice Holmes, U. S. v. Calif. and Ore. Land Co., 192 U. S. 355, reversing a decision

which had held the plea of former adjudication bad, this Court said:

"It is said, to be sure, that the United States now is suing in a different character from that in which it brought the former suit. There it sued for itself; here it sues on behalf of the Indians. But this is not true in any sense having legal significance. " " " Here the plaintiff is the same person that brought the former bill, whatever the difference of the interest intended to be asserted. " " Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means; that is to say, by evidence that the lands originally were excepted from the grant. But in this, as in the former, it seeks to establish its own title to the fee."

The Sixth Circuit Court of Appeals has now decided what even the complainant had not dared urge, namely, that the Eighth Circuit Court of Appeals adjudicated title to the trade-mark in complainant based upon priority of appropriation by complainant. If complainant had really believed that the Eighth Circuit Court of Appeals had adjudicated any such right or title to it, would not this suit have been filed in the Eighth Circuit, where the benefit of such adjudication, if it existed, could have been directly invoked? All of the whiskey bottled and labeled by petitioners with the Hellmans' Old Crow label was so bottled and labeled at the special direction of the Hellman Distilling Company, full notice of which fact was brought directly home to complainant by petitioners in their letters to complainant of May 24th and June 7th, 1909 (Rec., Vol. I, pp. 115-16), which letters complainant, under advice of counsel, ignored (Rec., Vol. I, p. 243). This suit was not filed until September 28, 1909 (Rec., Vol.

I, p. 1). Petitioners shipped all the whiskey so bottled to the Hellmans in St. Louis. The Hellman Distilling Company then was and at all times since its incorporation in 1905 has been a resident of St. Louis within the jurisdiction of the Eighth Circuit Court of Appeals. Complainant's chief counsel in trade-mark causes lives in St. Louis. Personal convenience united with legal expediency in favor of filing suit in St. Louis, if in point of fact complainant believed the Eighth Circuit Court of Appeals had adjudicated affimative rights in favor of complainant as to the use of the mark upon straight whiskey. The natural course would have been to have asked the Eighth Circuit Court of Appeals to interpret its own opinion unless complainant wished to overturn that decision. If, on the other hand, complainant felt that every question of fact and of law affecting the claim of title to the trademark had been adjudicated against it by the decision of the Eighth Circuit Court of Appeals which this Court had declined to review on certiorari, then might complainant well feel cogent reasons for trying to induce another court of appeals to disregard the Eighth Circuit Court of Appeals' adjudication of facts and retry the issues which complainant had already lost. And this was the very course which complainant pursued, even though in so doing it was unable to get service on the Hellman Distilling Company, but only on your petitioners, who were known to complainant to be the mere agents performing a particular service under a special contract of limited scope with the Hellman Distilling Company.

The course pursued by complainant was in line with the purpose which it avowed in its petition to this Court that

<sup>&</sup>quot;until the question is settled by this Court the liti-

gation will continue and diverse decisions will be rendered in state courts as well as in the courts of the United States' (Petition for *Certiorari*, Gaines v. Kahn, No. 455, Oct. Term, 1905, U. S. Supreme Court, p. 18).

Not only did the Sixth Circuit Court of Appeals find the material facts contrary to those found by the Eighth Circuit Court of Appeals, but it found facts for which there was no support in the record, facts which were directly contrary to the undisputed evidence in the record, and facts which in the history and development of the art of making whiskey and of the whiskey and distillery business did not and could not exist. (Decision of President Taft upon the meaning of the term "whiskey", rendered December 29, 1969, subsequent to the termination of the Eighth Circuit litigation [Rec., Vol. I, Supp., pp. 348-353]).

Under the decisions of this Court the doctrine of res adjudicata includes not merely the conclusion reached by the Court, but each material fact in issue and directly determined in the case.

In Southern Pacific R. R. v. U. S., 168 U. S. 48, 49 (opinion by Mr. Justice Harlan), this Court said:

"A right or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right or question once determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

"This general rule is demanded by the very object

for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

In the case of City of New Orleans v. Citizens Bank of La., 167 U. S. 371, 379, this Court said (Opinion by Mr. Justice White):

"The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies. This is the elemental rule stated in the text-books and enforced in many decisions of this court."

The manner in which the Sixth Circuit Court of Appeals assumed to apply the rule was to make a new finding of facts and then to interpret the former decree in the light of such new facts. This not only nullifies the rule, but opens the way for a diversity of judgments and a variety of conflicting decisions equal at least to the number of Circuit Courts of Appeals.

From the earliest days the rulings of this court have denied the existence of such a power as has been here exercised. In Bank of U. S. v. Beverly, 1 How. 134, 149 (Opinion by Mr. Justice Baldwin), this Court said:

"Whatever, therefore, our opinion might now be as to the facts adjudicated in the former case, the judicial power is incompetent to revise the evidence on which the decree was rendered, on any ground now set up in the answer of the defendants or apparent in the present record, and they must be taken to be beyond all controversy in this or any future case between the same parties."

In Aurora City v. West, 7 Wall, 82, 103 (Opinion by Mr. Justice Clifford), it was said:

"The better opinion is that estoppel, where the judgment was rendered upon the merits, whether on demurrer, agreed statement or verdict, extends to every material allegation or statement, which, having been made on one side and denied on the other, was at issue in the cause and was determined in the course of the proceedings."

In Hopkins v. Lee, 6 Wheat, 109, 113-4 (Opinion by Mr. Justice Livingston), this Court held:

"It is not denied, as a general rule, that a fact which has been directly tried and decided by a court of competent jurisdiction cannot be contested again between the same parties in the same or any other court. Hence a verdict and judgment of a court of record, or a decree in chancery, although not binding on strangers, puts an end to all further controversy concerning the points thus decided between the parties to such suit. In this, there is and ought to be no difference between a verdict and a judgment in a court of common law, and a decree of a court of equity. They both stand on the same footing and

may be offered in evidence under the same limitations, and it would be difficult to assign a reason why it should be otherwise. The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it an end could never be put to litigation."

The Sixth Circuit Court of Appeals, by its decision and judgment herein, has done what this Court has said it is incompetent for the judicial power to do, namely, "has revised the evidence on which the former decree was rendered", has denied the finality of the adjudication of material facts alleged and denied in the former suit, has in effect destroyed the principle of res adjudicata, while assuming to recognize it, and has retried the issues in the Eighth Circuit litigation, adjudging the material facts to be different from those adjudged by the Eighth Circuit Court of Appeals.

Under complainant's bill in that Eighth Circuit case the mark was open to adoption from 1855 to 1867, and being so open to adoption in 1867 complainant averred that in that year its predecessors in business adopted it. The Eighth Circuit Court of Appeals found, as a fact, first, that the complainant did not adopt or conceive the idea of adopting the words Old Crow as a trade-mark for whiskey prior to 1870 and under the averments in its amended bill could not claim it prior to 1867; second, that the Hellmans had adopted in good faith and were using the words Old Crow together with the figure of a crow upon their whiskey as early as 1862 and 1863 and had continuously used same ever since in good faith. That court considered the magnitude and extent of complainant's business and the alleged superiority of complainant's make of whiskey (straight) and determined that notwithstanding these contentions, the Hellmans by reason of their prior appropriation had the right to use their trade-mark ad libitum.

Upon these findings of fact that court rendered its decree, finding the issues in favor of the Hellmans. These facts and rights so found were taken as binding upon complainant by the District Court at Owensboro, but the Sixth Circuit Court of Appeals declined so to take them, but made an entirely new finding of facts, re-examining the Eighth Circuit record, finding that the complainant's predecessors and not the Hellmans were the first appropriators of the words as a trade-mark. Having found these facts (which the Eighth Circuit Court of Appeals found were not facts), the Sixth Circuit Court of Appeals interprets the Eighth Circuit Court of Appeals' decision as adjudicating to the Hellmans merely a defensive right acquired through W. A. Gaines & Company's laches, to a fractional use of the trade-mark, namely, on one variety of whiskey in one section of the country.

But the conclusiveness of the Eighth Circuit adjudication does not extend merely to the extent of the operation of the decree in that case, but to the material facts and rights directly in issue and actually determined in that case. Priority of appropriation and good faith in adoption and use were both material and necessary facts to the decision of the case. Both were directly considered and actually determined by that court, and upon these material facts as thus adjudicated that court held that the Hellmans, so far as complainant is concerned, have the right to use their trade-mark ad libitum, and dismissed complainant's bill, and the Circuit Court in the Eighth Circuit entered its decree dismissing complainant's bill

for want of equity and taxed all costs against complainant.

Is it to be sanctioned that a Court of Appeals in one circuit shall overturn, disregard or reverse the decision of the Court of Appeals in another circuit, adjudicating the material facts in controversy, involving the very same subject-matter and between the same parties or their privies?

We respectfully pray for *certiorari* in this case to the end that such practice may not be sanctioned.

#### II.

#### FRACTIONAL DIVISION OF TRADE-MARKS.

The Sixth Circuit Court of Appeals seems first to approve the doctrine laid down by Mr. Justice Blatchford. sitting in the Circuit Court, in the leading case of Collins v. Ames, 18 Fed. 561, wherein he held that the owner of a trade-mark upon a general class of goods such as edge tools, could restrain a person who subsequently applied the same mark upon a particular article of that class, such as shovels, although the first user had not extended his use of the mark as yet to shovels. The Sixth Circuit Court of Appeals holds that the Eighth Circuit Court of Appeals' finding of facts established priority of appropriation in W. A. Gaines & Co. and prima facie ownership as against the world. It then distinguishes Collins v. Ames on the theory that all that the Eighth Circuit Court of Appeals really decided is that W. A. Gaines & Co., as prior appropriators, had through laches lost a fraction of their trade-mark to the Hellmans, namely, that upon blended whiskey and that sold in the Southwest. Yet the Eighth Circuit Court of Appeals had not only adjudged priority of adoption and good faith in favor of the Hellmans, but

had said "Neither can their right to use it (the trademark) ad libitum be destroyed \* \* \*" (Vol. 11, p. 976).

We submit that a reconsideration will clearly show that the Shovel case doctrine properly applies to both phases of this case, namely (1) that the Hellmans, by reason of their priority of adoption of the words Old Crow in good faith upon blended whiskey had the right to use the mark upon all kinds of whiskey, free from interference by W. A. Gaines & Co.; (2) having that right, they had the right to apply it to straight whiskey, and when they apply the mark to their own straight whiskey, W. A. Gaines & Co. may not successfully complain.

The Courts of Appeals in other circuits, following Justice Blatchford's ruling in Collins v. Ames, have ruled that the prior adopter of a trade-mark or trade name in use upon certain articles of a class does not lose the right to employ the mark upon other articles of the class merely because a subsequent adopter employs such mark upon an article not yet made by the first adopter.

In the Second Circuit the Court of Appeals held, in Florence Mfg. Co. v. J. C. Dowd & Co., 178 Fed. 73, 75-6, 101 C. C. A. 565 (opinion by Judge Coxe, Judges Lacombe and Noyes concurring):

"The complainant did not abandon the right to make 'Keep Clean' tooth brushes because it did not at the outset make such brushes as well as other varieties of toilet brushes.

"Test it by an illustration: Suppose a hatter had for years engaged in making silk hats and 'derbys' and as such had acquired an enviable reputation, but had never made straw hats; could the proposition be successfully maintained that a rival could make straw hats and offer them to the public in circumstances which would lead them to believe they were producing the product of the old established manufactory?"

In the Eighth Circuit (Layton Pure Food Co. v. Church, 182 Fed. 35, 38, 104 C. C. A. 464, opinion by Judge Sanborn, Judge VanDevanter concurring) the Circuit Court of Appeals disposed of a similar contention as follows:

"After one has acquired a trade-mark for one member of a class of goods, in this instance, baking soda, another may not acquire the same trade-mark for another member of the class, in this instance baking powder, although the former has not applied the trade-mark to that member."

The Court of Appeals of the District of Columbia has followed the same rule.

In the case of Simplex Elec. Heating Co. v. Gold Car H. & L. Co., 43 App. D. C. 28, 30, 31, 32, prising out of interference proceedings in connection with the trademark "Simplex" upon thermostatic steam traps, the opposition mark was used upon a thermostatically operated relief valve. The Court, after stating the points of similarity in the two devices, said:

"Thus it will be observed that the product of appellant is within the same general class as that of appellee (l, c, 30), \* \* \*

"It is no answer that appellant has not manufactured a steam car-heating system upon which thermostatic steam traps are used or even that its trademark has not been applied directly to the thermostatic device in use. They are a part of its system to which the mark is applied, and it is at any time within their power to apply it to any appliance of that kind they may manufacture; and this is true should they extend their manufacture to electrically heated steam car heaters. Indeed, it appears that such heating apparatus may be manufactured by appellant. It therefore has the right to extend the use of its mark accordingly. Appellant should not, in justice, be permitted, by the adoption and use of this mark to invade the present field of appellant or the domain to which it may legitimately extend the use of its mark (*l. c.* 31).

"To the same effect are Collins Company v. Oliver Ames & Sons, 20 Blatchf. 542, 18 Fed. 569, American Tobacco Co. v. Polacsek, 170 Fed. 117."

The Hellmans having acquired as against W. A. Gaines & Company the right to the words Old Crow as a trademark upon whiskey, the mere fact that they had used the mark only upon blended and rectified whiskey in the beginning-the only kind of whiskey which at that time was marketed (President Taft's decision, Rec., Vol. I, Supp., pp. 348, 353)—did not give W. A. Gaines & Co. the right to exclude them from using the mark upon other kinds of whiskey. Under the adjudication of priority of adoption the Hellmans had the right to use the trade-mark ad libitum, free from interference by W. A. Gaines & Co. To carve up that use into fractional sections of the mark, limiting it to a particular kind of whiskey, is to overrule Collins v. Ames and the decisions of the Courts of Appeals of the various circuits and the District Court of Columbia.

The fractional-geographical division theory stands on no better basis than the particular-article-fractional theory which was disposed of in the Collins v. Ames case by Mr. Justice Blatchford.

We have failed to discover any case where the prior adopter of a trade-mark has been restricted to a fractional use of the trade-mark along the lines indicated by the Sixth Circuit Court of Appeals. We submit that it is novel doctrine in trade-mark law and is in conflict with established principles. It should be carefully reviewed by this Court before it is permitted to stand.

#### III.

# CONFLICT WITH COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Consequences scarcely less grave flow from the construction which the Sixth Circuit Court of Appeals placed upon the protective provisions of the Trade-Mark Act of 1905, thereby creating conflict of decision with the Court of Appeals of the District of Columbia.

It has been held that the decisions of the Federal Courts involving the same facts will be followed by the Commissioner of Patents in passing upon trade-mark applications. Seriven v. Towles, 32 App. D. C. 321.

The Davids case (Davids Co. v. Davids, 233 U. S. 461) referred to in the Sixth Circuit Court of Appeals' opinion has no application here because complainant, though using the name for more than ten years, has admittedly not been the *exclusive* user of the words.

We fail to find any language in the Act of 1905 which will support the fractional trade-mark theory or permit an applicant by limiting the kind of articles to which he applies his mark thereby to escape the operation of the doctrine laid down in Collins v. Ames (18 Fed. 561). We believe that upon a consideration of the case this Court would conclude that the Trade-Mark Act of 1905 does not permit of any mental reservation on behalf of the affiant or applicant by way of lost fractions or geographical subdivisions, both of which contentions were urged before and denied by Mr. Justice Blatchford in the Shovel case.

The proviso of Section 5 of the Trade-Mark Act of 1905, the affidavit of section 2, the prohibitions of section 21, all are protective provisions designed to insure against the very thing that has occurred in the registration proceedings in this case.

The Trade-Mark Act of 1905 requires a statement containing a description of the trade-mark and the class of merchandise and the particular description of the goods comprising the class to which the trade-mark is appropriated, a statement of the length of time during which the trade-mark has been used, and other items, verified by or on behalf of the applicant, to the effect that affiant believes said statements to be true and that he is the owner of the trade-mark sought to be registered and that no other person, firm, corporation or association, to the best of his knowledge or belief, has the right to use such trade-mark in the United States (not merely in a particular locality or region) either in the identical form or in such near resemblance thereto as might be calculated to deceive (33 Stat. 724, Secs. 1, 2), and said act further prohibits the registration of trade-marks which are identical with a registered or known trade-mark owned and in use by another, appropriated to merchandise of the same descriptive properties, or which so nearly resembles a known or registered trade-mark owned and in use and appropriated to merchandise of the same descriptive properties as to be likely to cause confusion and mistake in the mind of the public or deceive purchasers (Sec. 2).

The Act of 1905 has been construed frequently by the Court of Appeals of the District of Columbia, the Court of last resort, in which the ruling of the Commissioner of Patents on trade-mark applications may be reviewed, subject only to such supervisory control under the power

of *certiorari* as this Court may see fit to exercise. The rule is stated in the District Court as follows in Ky. D. & W. Co. v. Old Lexington C. D. Co., 31 App. D. C. 223, 228, to be that

"Confusion is not only forbidden between registered marks, but between a registered mark and a mark known to be in use."

And in Phoenix Paint & Varnish Co. v. Lewis, 32 App. D. C. 285, 288, 289:

"The purpose of the act being to prevent and not to permit fraud and mistake, we would not feel inclined, even in a doubtful case, to grant registration to a claimant where it appeared as here that when he adopted the mark he knew of its prior adoption and use by another firm in connection with goods of the same general character and purpose."

In Rookwood Pottery Co. v. A. Wilhelm Co., 43 App. D. C. 1, it was held that

"The statute is prospective in that it forbids the registration of a mark which is likely to create confusion in the public mind, or is likely to deceive purchasers. It is not necessary that actual confusion be shown, the mere probability of confusion is sufficient.

In a case, Anglo-American Incand. L. Co. v. General El. Co., 43 App. D. C. 385, 386-7, involving interference between similar trade-marks for electric lamps and gas mantles, the Court said:

"The Trade-Mark Act (33 Stat., at L. 724, Chap. 592, Comp. Stat. 1913, Sec. 9485), to which we have many times referred, denies registration to trademarks which are identical with a registered or known

trade-mark owned and in use by another and appropriated to merchandise of the same descriptive properties, or which so nearly resemble such a registered or known trade-mark as to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers, if appropriated to merchandise of the same descriptive properties. As we said in Phoenix Paint & Varnish Co. v. John T. Lewis & Bros., 32 App. D. C. 285, in enacting this legislation, Congress evidently intended to prevent the registration of a trade-mark that would enable an unscrupulous dealer to obtain the benefit of a valuable trade reputation established by conscientious effort and fair dealing to the injury of the public as well as to one who had established such a reputation. It is our duty therefore to give the act such a practical interpretation as will effectuate its obvious intent. In the above stated case we ruled that 'two trademarks may be said to be appropriated to merchandise of the same descriptive properties in the sense meant by the statute, when the general and essential character of the goods are the same'.

"We think Congress in using the words 'descriptive properties' intended that they should be given their popular signification. Giving them that signification, no trade-mark may be registered when it is appropriated to goods of the same general qualities or characteristics as those of the goods to which another trade-mark already has been appropriated."

In Walter Baker & Co. v. Harrison, 32 App. D. C. 272, 275:

"The intent of the statute is to protect the rightful owners of trade-mark in their valuable property rights, and it seems to tax the Court to the utmost to protect those rights against the ingenuity of counsel and the designs of sharp competitors. A mark should be denied not only when used upon goods of the same descriptive properties as a similar registered trade-mark, but when used on goods belonging to the same general class."

The "ingenuity" there spoken of has perhaps been attempted in the present case, where by narrowing the scope of the mark to two specific items of a class it is sought to overturn an existing trade-mark whose use was well known and whose priority had already been adjudicated.

The affidavit required by the statute applies to use by another anywhere in the whole United States, and not merely in that portion of the United States where applicant may have its trade.

Complainant's application for registration was ex parte. Under the rules laid down by the courts registration should be refused or regarded as null where an outstanding use, whose priority has been adjudicated, is known to the applicant upon merchandise so unquestionably of the same descriptive qualities as blended whiskey and straight whiskey, and particularly where an applicant's alleged earlier use was by parties preceding him in time only, but in no legal or proper sense predecessors in business. In fact, the bill in the Eighth Circuit averred that the mark was open to adoption in 1867 and had been for twelve years prior thereto.

The decision of the Sixth Circuit Court of Appeals is in direct conflict with the decisions of the Court of Appeals of the District of Columbia and with the provisions of the statute itself.

#### THE WRIT SHOULD ISSUE.

This being a registered trade-mark suit between citizens of the same State, federal jurisdiction arises wholly

from registration under the Act of 1905. The judgment of the Sixth Circuit Court of Appeals is therefore final and petitioners' sole remedy is by way of *certiorari* if this court shall be persuaded that the public and private interests involved justify the issuance of the writ (Street & Smith v. Atlas, 231 U. S. 348).

One of the chief reasons for reserving to this court the right to issue writs of *certiorari* to the Circuit Courts of Appeals in cases where their judgment was final was to insure *uniformity of decision* and to prevent the anomaly of separate appellate courts of equal dignity rendering a variety of conflicting decisions.

While the issuance of the writ is a right to be exercised sparingly and withheld in the ordinary case, nevertheless this court has not hesitated to order up the record when the subject-matter is of sufficient importance to warrant it, or there has occurred a conflict of decision between two or more circuit courts of appeals or a circuit court of appeals and another court.

Speaking through Mr. Justice Brewer, this Court has said (Forsyth v. Hammond, 166 U. S. 506, 512):

"Nine separate appellate tribunals might by their differences of opinion, unless held in check by the reviewing power of this court, create an unfortunate confusion in respect to the rules of federal decision."

Particularly will such confusion be apt to arise if the final decree in one circuit based upon facts adjudicated by the court in reaching its decision, may be nullified through the making of a new finding of facts upon the same record in another circuit and then interpreting the former decree in the light of such new adjudication.

In a recent case where it appeared that there was a conflict of decision between circuit courts of appeals in regard to the rules to be applied in taking an account in an action for unfair competition, petition for certiorari was granted (Hamilton-Brown Shoe Co. v. Wolf Bros., No. 813, October Term, 1913, 231 U. S. 756).

The conflict that has arisen between the Eighth Circuit Court of Appeals and the Sixth Circuit Court of Appeals is direct. The former adjudication of facts has been ignored, and unless this court exercises that corrective power which was specifically reserved to it by the Court of Appeals Act, the door is left open for any powerful litigant to speculate upon the law by going from circuit to circuit in the hope that if he finds a Circuit Court of Appeals whom he may persuade to disregard a former adjudication, he need have little fear of any disturbance of that court's decree. Such a practice is at variance with our whole system of jurisprudence. To the end that this conflict of decision may be reviewed by this court and in the interest of uniformity of decision, we urge that this petition may be granted and thereby public and private interests of the utmost gravity and importance be conserved.

The conflict of decision in the present case is direct. The doctrine of res adjudicata as applied has in reality been emasculated. A new principle involving the fractional division of trade-marks has been laid down. The protective features of the Trade-mark Act of 1905 have been disregarded. The final decision of the Court of Appeals in another circuit has been overruled. There is conflict of decision with the Court of Appeals of the District of Columbia and with the Circuit Court of Appeals. We respectfully ask that in the interest of uniformity of

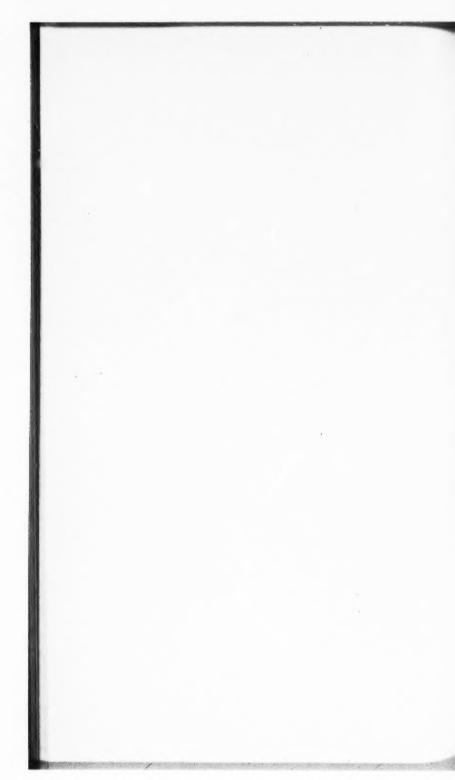
decision, and also for the other reasons noted, a writ of certiorari be granted as prayed for in the petition filed herewith.

Respectfully submitted, W. T. ELLIS, LUTHER ELY SMITH,

Solicitors and of Counsel for Petitioners Rock Spring Distilling Company and Silas Rosenfeld.

Dec. 13, 1915,

# APPENDIX.



#### OPINION EIGHTH CIRCUIT COURT OF APPEALS.

The appellee (complainant below) obtained decree in the Circuit Court establishing its asserted claim to the words "Old Crow" as a trade-mark, enjoining appellants (defendants below) from the use thereof in their business, and finding the defendants guilty of unfair competition in business and ordering an accounting. The original bill was filed in November, 1904.2

The bill alleges that the complainant is the sole and exclusive owner of a trade-mark for whiskey consisting of the words "Old Crow," which words were open to adoption as a trade-mark for whiskey in the year 1867,4 when the complainant's predecessor in business, Gaines, Berry & Co., adopted and commercially applied the said trade-mark for whiskey distilled by them,5 and that it acquired by assignment said trade-mark, which has been continuously applied by it and its predecessors in business. upon packages containing whiskey from the year 1867 to the time of filing the amended bill.6

The bill further alleges that in 1835 one James Crow became domiciled upon Glenn's Creek, Woodford County. Kentucky, when and where he began the manufacture of whiskey of superior quality, which became designated about that time as "Crow" or "Old Crow," and that he was continuously engaged in the distillation of whiskey as "Crow" or "Old Crow" to his death, in 1855.7. That at that time a considerable quantity of said whiskey remained upon the market and was commercially known

<sup>1—(</sup>R., Vol. II, p. 978.) 2—(R., Vol. II, p. 2.) 3—(R., Vol. II, p. 6.)

<sup>4—(</sup>R., Vol. II, p. 7.) 5—(R., Vol. II, p. 7.) 6—(R., Vol. II, p. 7.)

<sup>7-(</sup>R., Vol. II, p. 8.)

and dealt in until the year 1867;8 that no whiskey was produced during said period anywhere to which the words "Crow" or "Old Crow" were applied as a trademark;9 that in that year a predecessor of complainant, towit, Gaines, Berry & Co., began the production on said Glenn's Creek of their whiskey, using the same process and material theretofore used by said Crow;10 that from 1835 to this time, the words "Old Crow" have been applied continuously to whiskey produced by the process of Crow and to no other whiskey whatever;11 that the distillation and production of said whiskey has always been on said Glenn's Creek and not elsewhere. 12

The bill further alleges that Abraham M. Hellman and Moritz Hellman, the defendants, had been guilty of fraudulent acts and unfair competition in selling a spurious compounded liquor as and for the complainant's whiskey, to its damage in the sum of \$5,000.00,13 and prayed for an accounting.14

The answer denied specifically the allegations of the bill,15 alleged the ownership of the word "Crow," "Old Crow," "J. W. Crow," and the celebrated "Crow Bourbon," together with a figure of a crow in connection with their own business upon packages of whiskey in their and their predecessor's business, and so continued the use thereof from the year 1863 and prior thereto;16 alleging that the whiskey sold by complainant under the words "Old Crow" was an unrefined, harmful and deleterious article, and that the whiskey sold by them was a blend largely free from impurities.17 The replication was general.18

The defendants filed a cross-bill claiming the trade-

<sup>8--(</sup>R., Vol. II, p. 8.) 11—(R., Vol. II, p. 9.) 12—(R., Vol. II, p. 9.) 13—(R., Vol. II, pp. 10-11.) 9-(R., Vol. II, pp. 8-9.) 10—(R., Vol. II, pp. 8-3.) 10—(R., Vol. II, p. 8.) 15—(R., Vol. II, pp. 15-19, 21, 24-28.) 16—(R., Vol. II, pp. 20, 21-24.) 17—(R., Vol. II, p. 25.) 14-(R., Vol. II, p. 12.)

<sup>18-(</sup>R., Vol. II, p. 29.)

mark in question and asking for an injunction.19 This need not be considered, as at the hearing the defendant's counsel declined to insist upon any affirmative relief.

The evidence tended to show that a man named James Crow, usually called "Jim Crow" and sometimes known as "Crow,"21 or "Old Crow,"22 began the manufacture of whiskey in Woodford County, Kentucky, about the year 1850.23 The evidence does not show that he ever owned or operated any distillery in his own right, but worked for persons owning distilleries.24 He died about 1855.25 Prior to his death he worked at various distilleries in that neighborhood, to-wit, at the Edwards Distillery,26 at Anderson Johnson's Distillery,27 at Jack Johnson's Distillery,28 at Johnson & Yancev's,29 at the Oscar Pepper's Distillery,30 and at Captain Henry's Distillery.31 Whiskey made by him was called "Crow" or "Old Crow" as stated by one of the witnesses, just as whiskey made by Taylor was called "Old Taylor."32

The process employed by Crow was what is known as "Hand-made" whiskey, but there was no secrecy about his process,34 nor did it differ materially from that employed by other distilleries of the same period.35 He used in the manufacture the grain grown in the neighborhood,36 which was not different from that grown in the Western States.37 When he worked at Johnson & Yancev's Distillery it was not known as "Crow's" Whis-

<sup>19-(</sup>R., Vol. II, pp. 30-42.) 21—(R., Vol. II, pp. 200, 202.) 22—(R., Vol. II, pp. 172, 178.) 20-(R., Vol. II, p. 181.) 23-No witness testified to knowing Crow prior to 1850,

<sup>24—(</sup>R., Vol. II, pp. 122, 126, 173, 193, 199.) 25—(R., Vol. II, pp. 126, 193.) 28-28-(R., Vol. II, p. 173.) 29—(R., Vol. II, pp. 193, 199.) 32—(R., Vol. II, pp. 141, 182.) 26-(R., Vol. II, p. 126.)

<sup>27-(</sup>R., Vol. II, p. 126.) 30-(R., Vol. II, pp. 122, 193, 199.)

<sup>31-(</sup>R., Vol. II, p. 122.)

<sup>33-(</sup>R., Vol. II, pp. 159, 183, 201.)

<sup>34-(</sup>R., Vol. II, pp. 184, 201, 131-138.)

<sup>35—(</sup>R., Vol. II, p. 201.) 36—(R., Vol. II, pp. 201, 190, 174, 165, 126.)

<sup>37-(</sup>R., Vol. II, p. 145.)

key, but as "Johnson & Yancey's," The old Oscar Pepper's Distillery, at which Crow at one time worked, was run by various distillers from 1855 to 1865.39 This whiskey was called "Old Oscar Pepper,"40 and was sometimes called "Old Crow." The men who worked with him understood the process employed by Crow and used it in other distilleries.42

The co-partnership firm of Gaines, Berry & Co. began business as distillers in Woodford County, Kentucky, in 1867, and operated the old Pepper distillery as claimed successors.43 This concern was later succeeded by W. A. Gaines & Co., a co-partnership, 44 which, on the 9th day of July, 1882, filed in the Patent Office at Washington City application for registering the following as trade-mark:

"Old Crow Distillery, Woodford County, Kentucky, . Copper distilled whiskey, W. A. Gaines, Distiller. '45

Accompanying this application was the statement that "this trade-mark we have used in our business since January, 1870."46 In 1887 W. A. Gaines & Company incorporated under the same name. 47 In June, 1904, shortly before the institution of this suit48 and after the controversy had arisen between the complainant and the defendants respecting the use of the name of "Crow" or "Old Crow" in business,49 the complainant corporation filed in the Patent Office application to register as a trademark the words "Old Crow."50 The sworn statement of

<sup>39-(</sup>R., Vol. II, pp. 130, 172, 173, 200, 202.)

<sup>40-(</sup>R., Vol. II, pp. 141, 182.)

<sup>40—(</sup>R., Vol. II, pp. 141, 182, 1 41—(R., Vol. II, pp. 177-8, 182, 192, 202.) 42—(R., Vol. II, pp. 131-5, 201-2, 183.) 43—(R., Vol. II, p. 159.) 44—(R., Vol. II, p. 160.) 45—(R., Vol. II, p. 931.) 45—(R., Vol. II, p. 931.) 48—(R., Vol. II, p. 2—November 11, 1904; 925, suit in State Court filed September 11, 1904.)

<sup>49-(</sup>R., Vol. II, pp. 394, 410-Affidavits dated March, 1904.)

<sup>50-(</sup>R., Vol. II, p. 657.)

the officer of the company accompanying the application asserted that:

"This trade-mark has been continuously used by the said W. A. Gaines & Company and its predecessors since the year A. D. 1835,"51

To say the least of it, these different statements show some juggling with facts and disclose inconsistent positions.

The record does not show any written devolution of title or right of trade-mark passing from Gaines, Berry & Co. to W. A. Gaines & Company and from the latter to the complainant corporation.<sup>52</sup> Be this as it may, no unprejudiced mind can read the evidence in this case without the impression that the conception of a trade-mark in the words "Crow" or "Old Crow" did not enter the mind of Gaines, Berry & Co. prior to 1870,53 and they may not under the issue presented by the pleadings lay any claim thereto anterior to 1867.54 It is to be conceded that after 1870, Gaines, Berry & Company and W. A. Gaines and their successors, W. A. Gaines & Company, built up a large, successful business in the manufacture of whiskey. which has extended throughout the country, and that their whiskey, under the designation of "Old Crow,"55 attained wide celebrity.56 The question remains, however, to be answered, has the complainant maintained by proof the assertion that the defendants, or their predecessors in business, wrongfully invaded its exclusive right to the use of the words "Crow" or "Old Crow" in business?

<sup>51-(</sup>R., Vol. II, p. 659.)

<sup>52-</sup>No deeds, bills of sale, record entries or other documentary evidence of transfer were offered.

<sup>53—(</sup>R., Vol. II, pp. 932, 224.) 54—(R., Vol. II, pp. 3-5.) 55—(R., Vol. II, pp. 58-63, 142-144.) 56—(R., Vol. II, pp. 223, 208-9, 232, 254, 265, 275, 285, 289, 298, 306, 311, 317, 324-7, 913.)

The evidence, without contradiction, establishes the following facts: that as early as 1862, the firm of I. and L. M. Hellman, composed of Isaac Hellman and Louis M. Hellman, were engaged in the wholesale liquor business on Pine street in the City of St. Louis, Missouri;57 that as early as 1862 or 1863 on the whiskey barrels employed in their trade, they had a bird with wings spread, in imitation of a crow, burnt into the head of the barrel and the word "Crow" or the words "Old Crow" were burnt beneath this figure.58 This fact is affirmed by the testimony of Mr. Herman A. Haeussler, an attorney at law of St. Louis, whose reputation for intelligence and integrity is such as to entitle it to full credence. The firm of lawyers with which he was connected, whose office was next door to the business house of the Hellmans, acted as counsel for I. and L. M. Hellman in the conduct of their business. Mr. Haeussler testified that as early as 1862-3 they had a brand of "Crow Whiskey;" that he saw the barrels on the sidewalk ready to ship with the figure of a crow either on the barrels or on the signs (and he thinks the barrels), with the word "Crow,"59 The evidence further shows that as early as 1865 they had signs in frame prepared. displayed in the window of their storehouse, like Exhibit No. 6 (see opposite this page), large numbers of which were used in connection with their whiskey trade:

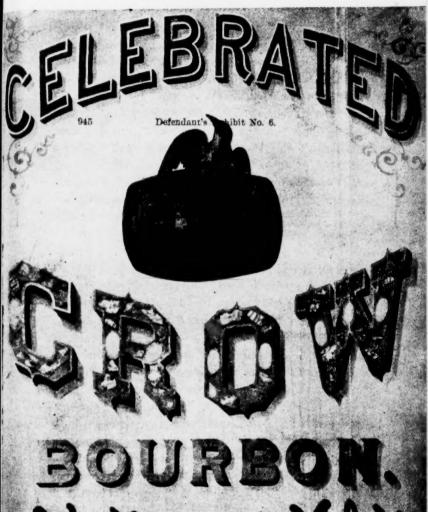
Some of the books of said firm kept at that time were in evidence and showed sales of whiskey sometimes designated as "Crow" and "J. W." or "J. C. Crow." That they used also the designative term "Old Crow" appears in the testimony of several witnesses. Mr. Charropin of Covington, Louisiana, testified that he entered the em-

<sup>58-(</sup>R., Vol. II, pp. 468, 470.)

<sup>57—(</sup>R., Vol. II, pp. 466-471.) 58— 59—(R., Vol. II, pp. 467-8-9.) 69—(R., Vol. II, pp. 399-493, 484, 366, 387.)

<sup>61-(</sup>R., Vol. II, pp. 367-383, 949-963.)

EXHIBIT 6.



STILOUIS.



ploy of L and L. M. Hellman about November, 1866, and continued therein until 1870;62 that he traveled first through Illinois and parts of Missouri, and afterward in the South as far as New Orleans and in Tennessee, Arkansas and Mississippi.63 He gave the names of parties to whom he had sold Hellman's whiskey, and deposed that he sold to customers "Old Crow" whiskey which the Hellmans handled, and that he remembered it was the brand used at the house at the time. 64 Mr. Schaeffer, of Yazoo City, Mississippi, testified that he had dealings with L and L. M. Helbnan, in 1866 and probably the latter part of 1865, and that he purchased liquor from them under the name of "Crow" or "Old Crow,"65

"Q. Will you describe what marks, if any, these barrels bore?

"A. They had on one end of the barrel a bird with wings spread out burnt in the head of the barrel and the words 'Old Crow' were burnt under them; they were all burnt, not marked; burnt in the wood, "66

Mr. Heron, of Memphis, Tennessee, testified that he entered the employ of I, and L. M. Hellman, in September, 1865, and remained with the firm until 1882 or 1883, as assistant rectifier.67 He identified exhibit as similar to the one used when he went there,68

"Q. Now, will you state, Mr. Heron, how frequently the firm sold whiskey as 'Old Crow' whiskey during the time you were in the employ of the firm? A. Well, I couldn't say how often I sold it, but to the best of my knowledge, there was very seldom a month or week that some did not go out. Q. By whom was the 'Old Crow' sold by the firm made? A. It was blended right in the

<sup>62-(</sup>R., Vol. II, p. 533.)

<sup>63-(</sup>R., Vol. II, p. 534.)

<sup>64-(</sup>R., Vol. II, pp. 537-542.)

<sup>65-(</sup>R., Vol. II, pp. 459-463.)

<sup>66-(</sup>R., Vol. II, p. 460.)

<sup>67- (</sup>R., Vol. II, p. 384.)

<sup>68-(</sup>R., Vol. II, p. 387.)

house. You could call it blending or compounding right in the house. 1969

This condition continued up to 1867, during which the bill alleges the claimed trade-mark had not been appropriated by the complainant. In August, 1867, Isaac Hellman died.<sup>71</sup> The business of this house has been continuously conducted in St. Louis, up to the time of this litigation, by the brother and their sons who succeeded thereto, doing business under the name of L and L. M. Hellman, employing the same brands and designation in business. 72 Their trade was confined principally to states down the Mississippi River and Southwest.73 Several of the men who worked for this house between 1862 and 1870, as well as several of the traveling salesmen of the house, are living and gave their depositions in this case.<sup>74</sup> Since 1867, this house has conducted its business as theretofore with no knowledge carried home to its members that the complainant, or its predecessors in business, were asserting any proprietary right to the use of the word "Crow" or "Old Crow" in trade. 75 The evidence fails to show that the Hellmans, prior to this controversy, ever heard of Glenn's Creek, in Woodford County, Kentucky. The whiskey sold by them carried with it, plainly marked on the packages, the fact that it was the whiskey of L and L. M. Hellman of St. Louis, Missouri, or the name of the firm at the time in business. 76 There is not a particle of evidence in this record to warrant the imputation that at any time or place

<sup>69—(</sup>R., Vol. II, pp. 387-8.) 71—(170—(R., Vol. II, pp. 6-9.) 72—(R., Vol. II, pp. 471-2, 485, 489, 429, 386.) 71-(R., Vol. II, p. 356.)

<sup>73-(</sup>R., Vol. II, pp. 473-4.)

<sup>74-(</sup>R., Vol. II, pp. 355, 384, 399, 532.)

<sup>75-(</sup>R., Vol. II, pp. 474, 477, 426-7, 432-3.)

<sup>76-(</sup>R., Vol. II, pp. 430, 474, 946.)

the defendants ever represented that their whiskey was manufactured on Glenn's Creek, or that it was the manufacture of the complainant. There is no evidence that any purchaser from them was ever deceived into the belief that he was obtaining from them whiskey manufactured by the Glenn's Creek monopoly. There is, therefore, no foundation in fact or law for the charge of unfair competition.

After alleging in the bill of complaint that by reason of the defendants' unfair competition, the complainant has been damaged in the sum of \$5,000.0077 and its vast business jeopardized and threatened with destruction by the defendants' competition, its counsel to impair the evidence that the Hellmans had sold whiskey as far back as 1863, under the name of "Crow" and "Old Crow". tacked course in argument by asserting that this use was so rare as to subject it to the maxim de minimus lex non The right of the defendants to use in their trade the designative words "Old Crow" or "Crow" cannot be measured by the extent to which they employed it, whether more or less frequent at times. It is sufficient to protect them from the charge of an unlawful invasion of the complainant's claimed monopoly that they used in connection with their business as whiskey dealers the trade-name in question prior to any appropriation thereof by the complainant, and that they have so continued to use it. Neither can their right to use it, ad libitum, be destroyed by the overshadowing comparative amount of the complainant's sales under the designation of "Old Crow" whiskey, nor by the asserted superiority of its product.

Passing by the criticism made by defendants' counsel of the word "Old Crow" as a trade-mark, on the ground

<sup>77-(</sup>R., Vol. II, p. 11.)

that in its origin it referred merely to the name of "Crow" as the compounder of that grade of whiskey, 78 and that its later use was merely designative of the quality of the article,79 and, therefore, it might not constitute a technical trade-mark if the complainant employed the words "Old Crow" and "Crow" in its trade as designating the quality of the whiskey sold by it, the defendants are not guilty of an invasion of the asserted exclusive monopoly of the complainant.

The bill stigmatizes the defendants' business as fraudulent in imposing upon the public a blended whiskey, impure and deleterious.80 And what it lacks in proof of this its counsel has undertaken to supply by invective and epithets.

The learned trial judge, from his opinion in the record, seemed impressed as to this charge of the bill by the opinion of the Kansas City Court of Appeals in the case of W. A. Gaines & Company v. the E. Whyte Grocery, Fruit and Wine Co. (107 Mo. App. 570).81 It is assigned for error that the Court admitted in evidence the entire record, including the voluminous evidence in the bill of exceptions in that case. In view of the conclusion reached by us on the merits, we may pass by this criticism with the observation, that while the evidence in that case could not be employed as proof of the matters in contestation in the case here under review against this appellant, who was not a party to that suit, it could be considered by the Chancellor for his information as to the scope of the decision in that case as a precedent. (Liebig's Extract of Meat Co. v. Libbey et al., 103 Fed. 87-89; N. Y. Filter Mfg. Co. v. Jackson, 112 Fed. 678-680; Liebig's Extract of Meat Co. v. Walker, 115 Fed. 822-825; American Bell

<sup>78—(</sup>R., Vol., II, pp. 181, 193,) 79—(R., Vol., II, pp. 160-2, 147.)

<sup>80-(</sup>R., Vol. II, pp. 10-11.) 81-(R., Vol. II, pp. 629-630.)

Tel. Co. v. Wallace Electric Co., 37 Fed. 672; Rose v. Fretz, 98 Fed. 112; Adams v. Tannage Patent Co., 81 Fed. 179.)

The evidence, especially on the part of the defendants, in the case under review is so materially different in character and effect from that in the case tried in the Jackson County Circuit Court, <sup>82</sup> as also that of Gaines & Co. v. Leslie, 54 N. Y. Supp. 421, <sup>83</sup> cited by complainant's counsel, as to render them of no controlling force on the facts involved in and the principles of law applicable to this case.

The only evidence touching the character of the whiskey sold by the Hellmans is, that it was blended whiskey—a mixture of so-called straight whiskey with refined spirits, from which the blenders claimed the largest possible percentage of impurities were removed. Whether this made it better or worse than that manufactured by the complainant, does not affect this case. No customer of the Hellmans is complaining, and the complainant has failed to show that the defendants palmed off their whiskey on anybody as that of the complainant's manufacture.

The complainant lays much stress upon the situs of its distillery on Glenn's Creek in Woodford County, Kentucky, 85 as if there were some peculiar virtue in the air and water of that place adapted to this distillation of whiskey, which it had in some way wholly appropriated. The evidence does not show that Glenn's Creek in any way entered into the composition of the whiskey, 86 The water used came from the springs some distance from the creek, in nowise different from other springs in the limestone region of the Bluegrass district of Kentucky. We

<sup>84—(</sup>R., Vol. II, pp. 387, 484, 489.) 82—(R., Vol. II, pp. 662-912.)

<sup>85-(</sup>R., Vol. II, pp. 4-7, 120, 124, 130, 160, 192, 199.)

<sup>86—(</sup>R., Vol. II, p. 99.) 83—(R., Vol. II, pp. 631-2.)

fail to perceive the relation of all this to the claimed trade-mark. $^{87}$ 

As there was no secret about the process of distillation employed by James Crow, which the complainant assumed to follow, as "hand-made" whiskey<sup>88</sup> (and there was some evidence that the complainant now employs machinery in some material respect in the process of manufacture),<sup>89</sup> the use of which process is not secured to the complainant by any patent, and as the defendants have not claimed to use either Kentucky coru, water or air in the composition of their blended whiskey, and did not represent that it came from Glenn's Creek, all these matters are quite immaterial on the issue of unfair competition in trade.

After the careful consideration of the mass of relevant and irrelevant evidence in this record our conclusion is: (1) that inasmuch as the defendants' predecessors in business prior to the use of the adoption of the designative word "Crow" or the words "Old Crow" as a trade-mark, employed those words in descriptive terms in connection with their business as dealers in whiskey in St. Louis, Missouri; that the said predecessors and the defendants so continued to use the same, to a limited extent, up to the time of the institution of this suit, in good faith, they are not guilty of infringing the complainant's claimed trademark; and, (2) that the defendants are not guilty of having engaged in unfair competition with the complainant in the prosecution of their business.

It results that the decree of the Circuit Court must be reversed, and the case remanded with direction to the Circuit Court to dismiss the bill of complaint.

<sup>87-(</sup>R., Vol. II, pp. 122, 127, 197, 203.)

<sup>88-(</sup>R. Vol. II, pp. 131, 183-4, 201.)

<sup>89-(</sup>R., Vol. II, pp. 184-5, 597-8,)

#### EIGHTH CIRCUIT FINAL DECREE.

Now, on this day, this cause coming on again to be further heard and to be disposed of in conformity with the mandate of the United States Court of Appeals, heretofore received by this Court and filed herein on the 29th day of June, 1908, and it appearing to the Court that the appeal taken by the respondents from the interlocutory judgment and decree rendered and entered of record in this Court against the said respondents on the 24th day of June, 1907, and at the March Term, 1907, of this Court, to the United States Circuit Court of Appeals for the Eighth Circuit, has been duly heard by the said Circuit Court of Appeals, upon the transcript of the record in said cause, brought into the said Circuit Court of Appeals on said appeal, and upon the argument of counsel on said transcript of record in said cause, and that upon consideration thereof it was ordered, adjudged and deereed by the said Circuit Court of Appeals that the said decree of this Court in this cause be reversed with costs, and that the respondents recover against the said W. A. Gaines and Company, a corporation, the sum of \$920,20 for their costs in this behalf expended and have execution therefor.

And it further appearing to the Court from the mandate of the said Circuit Court of Appeals, that said cause was remanded to this Court with directions to dismiss the bill of complainant as of April 27th, 1908, and this Court was commended that execution and further proceedings be had in this cause in conformity with the opinion and decree of the said Circuit Court of Appeals, also filed herein, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Now, therefore, in conformity with and in obedience to the said mandate, it is considered, adjudged and decreed by the Court that the injunction be granted by this Court in and by said interlocutory decree, be, and the same is hereby dissolved and for naught held, and that the said interlocutory decree against the said respondents and in favor of the complainant, be and the same is now set aside, annulled and for naught held.

And it is further ordered, adjudged and decreed by the Court that the complainant's bill and supplemental bill be, and the same are hereby dismissed for want of equity, and the said respondents recover of and against the complainant, W. A. Gaines and Company, a corporation, the said sum of \$920.20 adjudged in their favor by the said Circuit Court of Appeals, and that they also recover from said complainant all the costs of this Court taxable in their favor, or incurred, in their behalf, and in favor of their solicitors and counsel, and that they have execution therefor.

## OPINION OF DISTRICT COURT (JUDGE EVANS) UPON FINAL HEARING.

From time to time as questions arose during the progress of this case we expressed our views upon them in opinions then filed. Those opinions, if it be necessary or desirable, can be referred to in connection with what we may now say without repeating them.

The complainant, a corporation, by its bill, alleges an infringement by the defendants of a certain trade-mark, which on the 20th day of July, 1909, had been admitted to registration in the office of the Commissioner of Patents under the provisions of the Act of February 20th, 1905. The trade-mark is familiarly known as Old Crow, and is described in the certificate of registration as being used upon "Straight Bourbon and Rye Whiskey."

Upon the allegations of the bill an injunction was prayed for, together with other relief.

On May 2nd, 1910, the Hellman Distilling Company came and tendered and asked leave to file a petition, in which it is alleged that it was the transferee and successor of A. M. Hellman & Co., who long previously to the transfer to the petitioner had owned the trade-mark referred to in the bill of complaint; that the defendants, Rock Spring Distilling Co., and Silas Rosenfeld were petitioner's agents in Kentucky, and as such were using the trademark; that it had undertaken to defend them in such use, and thereupon prayed that it might be admitted as a defendant in the suit for the purpose of making such defense. The Court expressed then its opinion (179 Fed. 545), that the petitioner could not, in the face of complainant's opposition, be made a defendant, but that any estoppel by the former judgment referred to in the petition

and presently to be described, would, under the facts therein stated, be available for the defendants.

Thereafter the defendants interposed a plea to the effect that long before the registration of the trade-mark by the complainant, the latter, on November 11th, 1904, had filed its bill of complaint in the Circuit Court of the United States for the Eastern District of Missouri, at St. Louis, against A. M. Hellman & Co., a firm composed of Abraham Hellman and Moritz Hellman, in which it alleged itself to be the owner and proprietor of the trademark Old Crow when used in connection with whiskey, and, charging that the defendants were infringing it, had sought an injunction against them to prevent such use: that both sides in that suit claimed ownership of the trade-mark Old Crow; that after the death of Abraham Hellman, his administrator, Max Kahn, was made a defendant, and the issues of fact were made up in that case in due course of pleading, and that it was finally brought to trial in that court, whose judgment was rendered therein against said defendants, who were enjoined from using said trade-mark; that the defendants in said cause thereupon prosecuted an appeal from said judgment to the Circuit Court of Appeals for the Eighth Circuit, which Court, after full consideration and argument, reversed, on February 27th, 1908, the decree of the Circuit Court and remanded the case with directions to the latter court to dismiss the action for want of equity, and that the latter Court had, by its decree, entered on July 10th, 1908, done as directed by the Circuit Court of Appeals. The defendants pleaded the final judgment in that cause in bar of the present action. When the plea was set down for argument and heard, the Court, in an opinion and judgment thereon, on May 2nd, 1910, held that the plea was sufficient in law, Instead of dismissing the bill the Court gave leave to the

complainant to take issue on the plea, which was done. The Court also, in its opinion filed February 27th, 1912, stated its reasons for giving the defendants leave to answer such part of the complainant's bill as were not covered by the plea. This was done upon authorities cited in the opinion last referred to. The defendants, in the answer thus allowed to be filed, assailed the registration of the trade-mark upon various grounds. At the final hearing the issues thus raised, alike upon the plea and upon the answer, were heard and argued. As already stated, it will serve little or no purpose to restate the grounds of our former rulings, as the several opinions heretofore filed in the case do that with a clearness quite sufficient to indicate the bases of our several rulings, but a brief summary of the essential facts as we find them may not be amiss in disposing of the plea.

Many years ago, probably in 1835, one James Crow, in Woodford County, Kentucky, began the use of the trademark Crow or Old Crow in connection with bourbon whiskey of his own make. He continued the use of his trademark until his death in 1855, at which time its use was discontinued. In 1867 one Mitchell, a former employe of Crow's, in the same or in a contiguous locality in Kentucky, began the use of the same trade-mark on whiskey. He did this on his own initiative and without having in any way inherited or purchased the right to use the trademark from Crow or his heirs or representatives. It is, therefore, only from Mitchell's use of the trade-mark, begun in 1867, that complainant's claim can come. But four years previously to the beginning of its use by Mitchell, namely, in 1863, the use of a similar trade-mark was begun in reference to whiskey in St. Louis, Mo., by persons who have transmitted their rights to the defendants. It was out of this general state of fact that the controversy

arose which was adjudicated finally in the Circuit Court of the United States for the Eastern District of Missouri. Whatever may have been the merits of the controversy which that Court determined in that case we are not to inquire, nor are we to inquire into the merits of the whiskey made or sold by either party thereto. The question we are to determine on this phase of the case is whether, in its essential elements, the title adjudicated in that case was the same as the one again attempted to be litigated in this action. When we attentively examine the record, the pleadings and the final decree in the former cause we cannot doubt that the essential question in dispute there was the same as that involved here. This being so, and the defendants and the Hellman Distilling Company having in due course succeeded to the rights of A. M. Hellman & Co., we hold that the plea has been established, and that it is a bar to the relief now sought as to the infringement of the alleged trade-mark.

But the defendants in that cause were denied an injunction upon their cross-bill asking that relief, and it is insisted that that shows that neither themselves nor their successors have any rights in the trade-mark inasmuch as the record shows that they dismissed their crossappeal from that part of the judgment in that case. We have not been able to see how that affects the question here involved, because, whatever effect may be given the denial to defendants of the relief they sought in that action, it is certain that in the most impressive way it was adjudged that the complainant had no equity to the relief it there prayed. At most it might be said that the result of that litigation was to leave both parties to it, each of whom had used the trade-mark for about forty years, free to use the trade-mark as each pleased in connection with whiskey. Indeed, it might probably be that the proper

conclusion is that the effect would be to open up the use of the trade-mark in connection with whiskey to the public generally, because no one party had acquired a right to its exclusive use since Crow's death in 1855. Which of the views thus indicated be right is immaterial. They are only suggested as illustrations.

Again it is insisted by the complainant that it uses the trade-mark in connection with "straight" whiskey, while the defendants have heretofore used it in connection with "blends". The bill of complaint, as we shall see, charges a broader use. The general doctrine, we apprehend, is that a trade-mark used in connection with any class of things must apply to all the various species of grades of that class. It would be an endless task to differentiate the various grades or qualities of whiskey or any other article of merchandise and say to which one or more of them a trade-mark was appropriated or applicable. Especially, we apprehend, would this be so in reference to whiskey, which has as great a variety of grades (extending from the very best to the very worst) as probably any article in commerce. Some of the authorities illustrating this view are Layton Pure Food Co. v. Church & Dwight Co., 182 Fed. 35, 38, and authorities therein cited, and Collins Co. v. Oliver Ames & Sons Corporation, 18 Fed. 561, 570.

Another question of vital importance is to be considered. It is whether the registration obtained by the complainant is effective and available to overthrow a judgment finally, and under the direction of the Circuit Court of Appeals, rendered by the Circuit Court previous to the registration of the trade-mark. In an opinion delivered on February 27th, 1912, we endeavored to clearly indicate our views on this phase of the case and our reasons for supposing that it was never in the contempla-

tion of Congress that such a registration, especially if obtained ex parte, should invalidate the solemn judgment of a court having jurisdiction. The controlling facts in this connection are that on February 27th, 1908, the opinion of the Circuit Court of Appeals was rendered in the former suit then styled Kahn, administrator, and others v. W. A. Gaines & Co., 179 Fed. 496. After an application for a stay of the mandate was refused on July 18th, 1908, the Supreme Court, on October 19th, 1908, denied a petition for a writ of certiorari. On February 13th, 1909, Edson Bradley, describing himself as vicepresident of W. A. Gaines & Co., was sworn to a statement intended to be filed as the basis of an application for the registration of the trade-mark Old Crow on straight bourbon and rye whiskey. This statement and the accompanying petition were filed in the Patent Office on February 26th, 1909, about one year after the decision by the Circuit Court of Appeals. This latter circumstance may be most significant in connection with the fact that in the papers just referred to, and as amended later, the vice-president stated under oath that W. A. Gaines & Company in the County of Franklin and State of Kentucky "has adopted for its use a trade-mark which consists of the words Old Crow, and that said trade-mark has been used in the business of ourselves and our predecessors since, to-wit, January 1, 1835. The class of merchandise to which the trade-mark is appropriated is class 49, distilled alcoholic liquors and the particular description of goods in said class upon which the said trademark is used is straight bourbon and rye whiskey." The vice-president also swore "that no other person, firm, corporation or association, to the best of his knowledge and belief, has the right to use said trade-mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive." As we have seen, it is altogether incorrect to say that the complainant and its predecessors had used that trade-mark since January 1, 1835, because the complainant and its predecessors did not begin its use until 1867, nor then, in any legal sense as the successors of James Crow. Besides, from the testimony and developments in the suit in St. Louis the complainant certainly knew that its opponents in that suit had been adjudged the right to use and that they in fact had used the trade-mark Old Crow ever since 1863 though probably not as energetically or as extensively as complainant. Yet upon these statements the registration was obtained.

The application for the registration was dealt with in the Patent Office in an entirely ex parte way, and though there was a formal publication on May 18th, 1909, in the Official Gazette of the Patent Office of the notice required by Section 6 of the Act of February 20th, 1905, the record in no way indicates that W. A. Gaines & Company caused notice of the application to be actually given to any of those who had been defendants in the previous suit, nor that they otherwise had such notice. There is no indication in the record that those defendants ever knew of the application until long after the registration had been made on July 20th, 1909. While under the Act of 1905 the registration, even when thus made, affords a prima presumption of ownership of the trade-mark in complainant, is not that presumption entirely overcome by the judgment which had been rendered against the complainant in the suit in St. Louis, long before the application was made, and of which litigation and judgment no information was given by the complainant to the Patent Office! To ask the question is to answer it in the negative unless such ex-parte registration, obtained under such circumstances, and in the way indicated, is to override the previous judgment directed by the Circuit Court of Appeals in a litigation between the opposing claimants of that trade-mark and in which all were fully heard. That such a result is impossible is, in our view, too plain for argument. Nor can we conceive that Congress ever contemplated such a result when enacting the legislation of 1905.

Notwithstanding all this, it is insisted that there is a question of unfair trade to be considered, and we find that in stating its causes of action that complainant, in its bill filed the next day succeeding that of the registration, while alleging an infringement of its trade-mark, also says "that well knowing the premises and with full knowledge of this complainant's rights above recited, the respondents above named, without knowledge or consent, and against the will of the complainant, did on the twenty-first day of July, A. D. 1909, and then continuously from day to day until the time of the filing of this bill of complaint, in violation of the complainant's rights in and to said trade-mark consisting of the words 'Old Crow' and in invasion of the complainant's rights under its said registration and in infringement of your orator's said registered trade-mark, and in fraud against this complainant and against the public, did make, or cause to be made, and sell or cause to be sold, in Owensboro. in the County of Daviess, State of Kentucky, a certain spurious straight bourbon whiskey not the product of this complainant's 'Old Crow' distillery, or distilled by this complainant, or licensed to be distilled by this complainant, and that they, the said respondents, have marked or branded the same with the words 'Celebrated Old Crow whiskey Bottled in Bond and have caused the same to be bottled in bond, and have applied to the labels thereon the words 'Old Crow' in script type; and have caused the same to be sold and transported in commerce among the several States of America; that a specimen of the packages so made and sold by respondents is exhibited with this bill and is filed herewith as 'Exhibit B' accompanying the bill.'

The bill also stated "that the whiskey so dealt in by the respondents and marked and branded with the words 'Old Crow' was so marked and branded for the purpose and with the intent to mislead and deceive the public and consumers of whiskey distilled by the complainant and bottled in bond by the complainant, and the public and consumers of whiskey have, by the said acts of the respondents, been led into purchasing the respondents' whiskey under the false belief that it was the whiskey of the complainant, and that by means of the said fraud and imposition upon the public by means of and through the instrumentality of their said unlawful appropriation and infringement of your orator's said registered trademark, the respondents have sold very large quantities of their whiskey so falsely marked and branded, all of which wrongful acts have resulted in injury to the complainant's business and the good will thereof, and were wantonly, willfully, deliberately and maliciously done by the respondents to complainant's damage in the sum of twenty thousand dollars (\$20,000,00)."

If in addition to an action for the infringement of a registered trade-mark the bill shows a claim for damages for unfair trade in blended whiskies, it is probably multifarious. However, the defendants have not insisted upon that objection, and the Court will not at this stage treat the bill as open to it, but will dispose of the question of unfair trade upon the entire record before it. Treating it thus, we think the record clearly shows that the defend-

ants, in using the trade-mark Old Crow, whether in connection with a picture of a raven, as was usual, or not, used what they had a clear right to use. This being so, there could be no deception in doing that thing. This, however, is what is claimed to constitute unfair competition with complainant, and the testimony clearly shows that in other respects the defendants' labels, brands and other marks are altogether different from complainant's and of themselves show that complainant did not make the whiskey seld under defendants' brands.

So that at least this phase of the case seems to resolve itself into a complaint that the defendants use the words Old Crow on their labels, brands and other marks and probably in their advertising matter. After much consideration we have concluded that the defendants have acted within their rights, and have attempted to sell their own whiskey as being of their own make, and not as complainant's, each using the words Old Crow, as they had the right to do, and as the predecessors of each had done for over forty-five years. Besides, while at the argument it was much asserted that complainant's whiskey was "straight" and defendants' a "blend", the testimony indubitably shows that much of complainant's Old Crow whiskies are "blends" and so labeled under the pure food laws. As "blends" they are not within the registered trade-mark, which on its face refers only to "straight" rye and bourbon whiskey. The testimony also demonstrates that much of the defendants' whiskey is bottled in bond, and is, therefore, necessarily "straight", inasmuch as under the statute nothing but "straight" whis key is permitted to be so bottled. So that as to "straight" whiskey the complainant must be regarded as suing only on its trade-mark, while, as to "blends" as well as "straight", it is suing for unfair competition in trade.

And in this connection it may be stated as matter almost of common knowledge, first, that the purchaser of drinks over the counter of a bar-room seldom knows or is told what he is getting, or if he is told it soon becomes a matter of indifference to him, and, second, that the wholesale or retail dealer who buys from a manufacturer generally knows exactly from whom he purchases and the character of spirits he gets. The danger to the manufacturer is, therefore, not great. The same may be said of a wholesale dealer who sells to a retail dealer.

It results that the decree now must be, first, that the plea of the fermer adjudication is sustained; second, that the registration of the trade-mark under which relief is claimed in this action was insufficient to invalidate the judgment in the prior suit; third, that the charge of unfair trade has not been established, and, fourth, that the action be dismissed with costs to the defendants.

A decree accordingly will be entered.

## SIXTH CIRCUIT COURT OF APPEALS' OPINION UPON APPEAL.

Appellant, Gaines & Co., is a Kentucky corporation. Appellee, Rock Spring Distilling Co., is also a Kentucky corporation, and appellee, Rosenfield, is the licensee and operator of its distillery, and is a citizen of Kentucky. The appellant will be referred to as plaintiff, the appellees as defendants. The litigation involves a controversy over the words "Crow" or "Old Crow" as a trade-mark for whiskey. Plaintiff filed its bill in the court below alleging its trade-mark right in these words, and claiming that defendants were infringing. The answer denied the existence of the right claimed, and set up as a bar a decree rendered against plaintiff in the United States District Court at St. Louis, under mandate of the Circuit Court of Appeals for the Eighth Circuit. The answer claimed privity between the Hellmans,—the defendants in that case,—and these defendants. A plea of former adjudication was held good (179 Fed. 544); after replication filed, proofs were taken, including, by stipulation, all proofs in the Hellman case; and, on final hearing, the bill was dismissed (202 Fed. 989).

From the pleadings and proofs, these facts appear, either without dispute or beyond fair question: Woodford County, Kentucky, is not far from Bourbon County, and is in the heart of the limestone formation, "bluegrass" country. This general region has always been and is the center of the distilling business for the best known Kentucky whiskies. The water from the limestone springs,—whether or not it is really better than other waters for making whiskey,—in the early days was thought to be of unique purity and essential to the highest grade of the distilled product. Three brands, among those most advertised and so most widely known now for

a generation, are made within a few miles of each other, in Woodford County, along Glenn's Creek,-"Taylor", "Pepper" and "Crow". For a long period before 1855, James Crow was a practical distiller in the Glenn's Creek neighborhood. He did not have a distillery of his own, but was employed by various distillers--for some years before Crow's death in 1855, by Oscar Pepper (except for the last year or two, and even then Crow retained some supervision for Pepper). He was reputed to be the first man in Kentucky to make a sour mash whiskey, and he had a high reputation as a skillful distiller. During his years at the Pepper distillery, he made a large quantity of whiskey; this whiskey came to be called by his name as "Crow" or, as it aged, "Old Crow" whiskey, and it acquired, by that designation, a reputation for good quality. At his death, a considerable quantity was in existence, both where it had been scattered upon the market and where it was aging in the distiller's possession. During the succeeding years, it continued to have a market reputation and represent a high standard, under one or the other of these names. After Crow's death, Oscar Pepper, at the same distillery and with the same formula. continued to make a whiskey which some witnesses say he continued to call "Crow". He died about 1865. 1866 or 1867, the Pepper distillery was bought by Gaines, Berry & Co. They employed, as distiller, a man who had been a foreman for Crow and who knew his formula and methods, and their product they called "Crow" or "Old Crow". They were succeeded in the business by W. A. Gaines & Co., first a partnership and then the plaintiff corporation. Since such adoption by Gaines, Berry & Co., these words have been continually used by plaintiff and its predecessors as a trade-mark; vast sums of money have been expended on advertising the brand and the

trade-mark; and the brand, under that name, has, for many years, been one of the best known in the country. All the other distilleries where Crow worked, and which so might have had special rights in the name, have now, for sixty years or more, not questioned the exclusive rights of the Pepper distillery, and its successor; and while, doubtless in the seventies, and perhaps in the eighties, there were some instances of trespassing which were not attacked, plaintiff's right was even then generally observed, and now, for 25 or 30 years, has not been seriously challenged—save for the Hellman use.

The witness Mida, who conducts the Bureau of Registration for brands and trade-marks regarded as authoritative by all the liquor trade, and who has published, since 1878, "Mida's Criterion", the recognized price list of "all brands and all ages" of liquor, testifies that "Old Crow" has always and everywhere been considered the Gaines brand, and is universally understood to refer to whiskey made at the Gaines Old Crow distillery. This testimony is undisputed—excepting the Hellman use, if that is an exception.

It further appears that Gaines & Co., in 1882, registered, as a trade-mark, "Old Crow", alleging its use as a trade-mark "since 1870". Again, in 1904, plaintiff duly registered as a trade-mark the words "Old Crow", alleging its continuous use, by plaintiff and its predecessors, since 1835. Again, in 1909, and under the Act of 1905, plaintiff duly registered the same trade-mark, alleging that it had been used since 1835; that the class of merchandise to which it was appropriated was "distilled alcoholic liquors"; and that the particular description of goods comprised in the class upon which the trade-mark was used is "Straight Bourbon and Rye Whiskey". This last registration is the only one alleged in the bill in this

cause; and upon it, jurisdiction depends, since there is no diverse citizenship.

Since it is admitted that defendants are using the name "Celebrated Old Crow" upon whiskey not made by plaintiff, the right to an injunction would be clear, except for the defense and counter-claims made in the Hellman case. taking effect here either by virtue of the inherent force of the facts there and here appearing, or through the operation of the rule of adjudication. In that case, the defendants Hellman filed a cross-bill alleging their own prior and superior right to the trade-mark "Old Crow", and asking for appropriate relief. By the proofs, it appeared that prior to 1867, and perhaps as early as 1863, the Hellmans had made some shipments of whiskey which they invoiced under the name of "Crow", and which were contained in barrels stamped with the picture of a crow, and with the words "P. Crow" or "J. W. Crow"; that they had distributed to their customers signs advertising "Celebrated Old Crow Bourbon"; that they were not distillers, but were wholesalers or jobbers; and that the whiskey which they sold under that name had no connection with the Kentucky "Old Crow", but was a "blend" and made by them on their own premises, while the plaintiff's product was a straight whiskey, and its trade-mark was never applied with its approval, to anything else than its product. Upon this general situation, the District Court, at St. Louis, found the facts and the law in plaintiff's favor, awarded to it the usual injunctional relief and dismissed the cross-bill of defendants Hellman (Gaines v. Kahn, 155 Fed. 639). Both parties appealed; but the Hellmans dropped their appeal from the dismissal of their cross-bill, whereby, whatever adjudication was carried by such dismissal became final. The opinion of the Court of Appeals is reported in Kahn v. Gaines, 161 Fed. 495. Its precise effect, we must hereafter consider. It directed that the decree be reversed and that plaintiff's bill be dismissed; and this was done. Denison, Circuit Judge:

1. The first objection which plaintiff's alleged trademark rights must meet is that the words are descriptive, and so incapable of becoming a true trademark. If nothing were involved except the effect of the 1909 registration, this objection might be passed without decision, since the application for registration indicates use for more than ten years before 1905, thus perfecting rights which might have been imperfect when the use began, and would have so continued except for the statute (Davids Co. v. Davids, 233 U. S. 461; Nashville Co. v. Coca Cola Co., 215 Fed. 527, 529); but it is impossible wholly to separate the force of this registration from the underlying broader question, because rights prior to this registration are indirectly involved.

During the lifetime of the distiller Crow, it seems clear enough that to call his product by his name could not amount to the adoption of a valid trade-mark; the use of the name was descriptive rather than arbitrary, and a manufacturer cannot thus exclude all others. Such use might give rise to quasi-exclusive rights on the secondary meaning theory; but this theory is not alleged. The same situation, apparently, must continue after Crow's death, and in reference to whiskey which had been manufactured by him during his life. The necessary meaning of the words, as merely describing the article or stating the name of the maker, would seem to merge and destroy any otherwise possible implication that they were an arbitrary symbol of origin. As the making of whiskey after Crow's death, but by the same formula and methods, was continued by Pepper or by Gaines, and as it con-

tinued to be called "Old Crow", this appellation would gradually change its character. It at once ceased truly to personify the maker; it did not immediately become merely arbitrary. As the trade lost the sense of Crow's personality, as he became less real and more traditional, as no one else of the same name challenged the growing right, and as with Crow's personality fading there must also fade the vague descriptive effect of using his formula, the words "Old Crow" would become less descriptive and more arbitrary; and after a period of such unchallenged use, they would become dominantly and substantially a mere symbol of origin. Whether this right of exclusive appropriation as a trade-mark had matured in 1866 or 1867, when Gaines, Berry & Co. began the use, or matured in 1876, the date named in their first trademark registration, or matured at some other date, is not now material; the facts seem to show an unbroken development of the type which the courts had recognized but which had not been effectuated by statute until the law of 1905; words which were at first essentially incapable of exclusive appropriation were continually used as descriptive by the only one who could truthfully make such use, until, by change of circumstances and by long acquiescence, they had come to indicate, and indicate only, a particular product of a particular manufacturer. It might be otherwise, if the words had originally been more purely descriptive of quality or method; and it may be that some person named Crow would even yet have a measure of right to call his product "Crow". We do not meet either of these questions; and, in what has been said regarding the capability of the name for exclusive appropriation, we have, for the time being, disregarded whatever force the St. Louis use by Hellman may have.

2. When we consider the claim that the Hellman de-

cree is a bar to any relief in this suit, we first meet the objection that there is no privity of parties. We must think that privity sufficiently appears. The parties defendant in that case, at the time of its commencement, had been the two Hellmans, who were partners. ing the suit, one partner died and his administrator. Kahn, was substituted. Later, but still pending the suit. the entire business of the Hellman Bros, was transferred to the just organized corporation, the Hellman Distilling Company, and, by supplemental bill, this corporation was made defendant. The corporation was, therefore, a party to the suit at the time of the final decree. During the existence of the partnership of Hellman Bros., it had leased the distillery of the Rock Spring Distilling Company, near Owensboro, Kentucky, and, as lessee, it had manufactured whiskey there in 1904. The Hellman Distilling Company, as such lessee, continued such manufacturing in 1905, 1906 and 1907. In 1909, all this remained in bond in the distillery warehouse. In 1909, and after the final decree in the Missouri case, the Hellman Distilling Company contracted with the Rock Spring Company, and with Rosenfeld, as its lessee, for the further manufacture of whiskey, and for the bottling in bond of the 1904 stock, and for the use upon such bottles of the brand or label "Hellman's Celebrated Old Crow". The Hellman Company gave to defendants a bond of indemnity to protect them against plaintiff's claims; in using this brand or label, defendants are acting for and in behalf of the Hellman Distilling Company; and the right of that company to use this brand on this article is the very thing in controversy. The former decree must be given the same force and effect as if the Hellman Distilling Company were the nominal, as it is the real, defendant here (Kesler v. Eldred, 206 U.S. 285).

3. Plaintiff next urges, by way of escape from the claimed force of the Hellman decree, and even if that decree is to be considered as an adjudication that the plaintiff had no lawful title to the trade-mark, yet, that since the only use there involved was upon a blended whiskey while the use here involved is upon a straight whiskey, a judgment that plaintiff had no trade-mark valid against a blended whiskey would not be a judgment that plaintiff had no trade-mark valid for straight whiskey. Disregarding, for the present, such limitations as for the purposes of this suit must be thought to have been imposed on plaintiff's rights by the peculiar form of the 1909 registration, and with reference only to the general question and the general rule, we cannot be satisfied with the theory which would thus interpret and then limit the effect of the Hellman decree. The general rule is clear that a common-law trade-mark for one article extends to another article of the same descriptive properties; the difficulties come in applying this limitation. "of the same descriptive properties". The distinctions between a straight whiskey and a blended whiskey have given rise to much controversy in other legal fields, but it seems to us clear that whatever the extended classifications and sub-classifications of the Patent Office practice may contemplate, neither the common-law nor the registration statute can intend such confusion as must result from recognizing the same trade-mark as belonging to different people for different kinds of the same article. Established trade-marks directly indicate origin, but if they have any value, it is because they indirectly indicate kind and quality; and to say that the seller of a blended whiskey might properly put upon it a mark which was known to stand for a straight whiskey, or vice versa. would be to say that he might deceive the public not only

as to the origin, but also as to the nature and quality of the article. The decided cases do not permit a trade-mark like this to be thus divided as to its subject-matter,\* and we must think that whatever was adjudicated regarding plaintiff's title to its trade-mark applies to its use on both kinds of whiskey.

4. It is next urged that the Eighth Circuit decree may be reconciled with granting the relief now sought, and upon the theory that trade-mark rights may be limited in territory, and that plaintiff might have the right to this trade-mark for whiskies throughout the country generally, while the Hellmans might have an exclusive right to the same words as a trade-mark for the same article in St. Louis and the Southwest, thus being given the field which they claimed they had first exploited and reduced to possession. This suggestion presents two conflicting theories of trade-mark origin and right—and we speak now only of marks which are so-called "technical" trademarks. One theory is that the right arises from adoption-from a kind of creation or discovery followed by appropriation. Whether the right is perfect at the instant of adoption or whether there first must be sufficient use upon the goods to create for the mark a meaning among that part of the public which begins to purchase, is a detail which would not usually be important. According to this theory, if the right is once acquired by prior adoption, it is, by its very nature, exclusive of all later, similar rights which might otherwise be acquired by similar adoption; and from that theory it would seem

<sup>\*</sup>Coffee and cocoa—Court of Appeals, D. of C.—Baker v. Hanson, 138 O. G. 770; toilet brushes and tooth brushes—C. C. A. 2—Florence Co. v. Dowd, 178 Fed. 73; soda and baking powder—C. C. A. 8—Layton Co. v. Church, 182 Fed. 35; axes and shovels—Collins v. Ames Co.—Mr. Justice Blatchford—18 Fed. 561; tobacco and cigarettes—American Co. v. Polacsek (Coxe, C. J.)—179 Fed. 117.

to follow that one who first adopts the mark and applies it to his goods in interstate commerce, and who extends his business into new localities, until, in regular course, his business may cover the country, may prevent the use of the mark by another later user, even though that other has adopted the mark in good faith, and, in his particular field, has given it identity with his goods. How much diligence on this theory the first user must employ in extending his business to get the full benefit of his initial right need not now be considered. The other theory is that no right is perfected until the mark has been used to such an extent that it has come to have a meaning to the particular purchasing public as to which a controversy arises, and that the duty of courts of equity to enforce such rights depends essentially upon the duty of protecting this public against being misled. From this theory, it will follow, or it may follow, that the later adopter, who has brought it about in a given locality that the mark indicates to the public that the goods are of his manufacture, may thereby himself acquire a trademark right or its equivalent, affirmatively enforceable in that locality and among that public, even against the first proprietor.

We do not find it necessary to consider or to attempt to decide the question so presented. For the purposes of this case, and without intimating any opinion, we give the first appropriator the benefit of the doubt and assume that his title is *prima facie* country-wide and exclusive against all others, and that as against all who have no special and superior equity, he is entitled to carry his trade into the new territory and there to enforce his exclusive right. However, the existence of this general or *prima facie* exclusive right is not inconsistent with an inability to enforce it against some persons and under

some circumstances. Instances may arise where the affirmative conduct or the laches of the first appropriator, and with reference to what he was at first entitled to call an infringement, has been such that on the principles of estoppel or the rule of laches a court of equity cannot tolerate that he should enforce against the later user the right which might have been originally perfect. This subject is more fully discussed and the reasons which lead us to this conclusion pointed out, with some reference to the decided cases, in our opinion in the Rectanus case, this day decided.

Under these considerations and upon reference to the pleadings and the proofs in the Hellman case, we conclude that the latter case is of the class where the refusal to give an injunction to the first appropriator of the mark may be justified upon the ground of his laches or estoppel; and so this ground of support must be considered in determining what is the true basis of that decree.

5. Is the Eighth Circuit decree a judgment that the trade-mark, in its general, prima facie, affirmative aspect, belonged to the Hellmans by prior appropriation? This is the interpretation claimed by defendants. The language in the body of the Circuit Court of Appeals' opinion is consistent with that interpretation, but the last paragraph indicates that the two judges (only two sitting) did not unite in putting the decision on this ground. When we turn to the record for further light, we find, first, that the defendants' cross-bill claiming the trade-mark ownership was dismissed, and that the dismissal became final. If it had been even seriously contended by defendants that their early use of the words was effective to vest a trade-mark right therein, surely there would not have been acquiescence in the dismissal

of the cross-bill. It was apparent, then as now, that affirmative title to the trade-mark would have been of great value to defendants, if they could maintain that position. We find, second, that there was in the record practically nothing indicating that the Hellmans ever pretended to adopt or claim these words as their trademark. They stamped some barrels with the words "P. Crow" or "J. W. Crow"; but no person of this surname had ever been connected with the Hellmans. The Crow or Old Crow which, in 1863, had been manufactured in Kentucky for twenty years or more, was at least considerably known on the market. No reason has ever been suggested in this litigation, and we can think of none, why they should put this name on their barrels, unless they intended to indicate that the whiskey was that made by Crow of Kentucky. Unless the selection of this name meant that, it meant nothing. Witnesses for the defense frankly stated that in those years it was nothing unusual for jobbers or blenders of whiskey to use well-known brands belonging to others, and that if the initial of a proper name was changed, this was thought sufficient in morals to remove any objection to the appropriation. This may be the genesis of the otherwise unexplained use of "P" and "J. W." The Hellmans also used advertising signs "Celebrated Old Crow Bourbon". From the record, we must doubt whether these signs antedated 1870. But if they did reach back to 1863, and if they referred to the blend or mixture which the Hellmans produced, it was neither "Celebrated", nor "Old", nor "Crow", nor, unless by chance, "Bourbon".2 It was

 Assuming the test date, "Bourbon" fairly meant a corn whiskey from somewhere in Kentucky, even if not from Bourbon County.

<sup>1.—</sup>Ore of the stencils was "J. Crow-Bourbon-Paris, Ky.",—a plain declaration that "Crow" was a maker's name, and not a Hellman trademark: and as there never was any "Crow" in "Paris, Ky.", the intent seems clear enough.

made by mixing colors and flavors with neutral spirits or high wines, or, sometimes, straight whiskey; but, if the latter, it was whatever they happened to have on hand. Defendants' witness says, "any brand would do". Records which seem to be complete show that during the seven years from 1863 to 1870, the Hellmans sold, of this "Crow" whiskey, an average of less than eight barrels per year.

In considering whether their use was of a trade-mark character, the peculiar nature of their business and their markings must not be overlooked. The brands or marks on whiskey are usually those of the original manufacturer. The dealer or jobber may handle many well-known brands and may mark his own name upon the packages or upon the advertisements, but this does not indicate that he claims the brands as his, or that he is acquiring a trade-mark right therein. While the stencils on the barrel and the glass signs carried the name "Hellman & Co.", they did not say "manufactured by", or that Hellman & Co. were manufacturers or distillers, nor were they in any way inconsistent with mere sale by Hellman as jobber of a well-known brand made by some one else.

The thus described nature and character of the Hellman early use might not always be thought sufficient to initiate and support even a defensive right; but they were so regarded in the former decree, and it is immaterial whether we would independently reach that conclusion. It did there appear that the Hellman use thus began and continued for seven years before 1870, or four years before 1867—the earliest date to which, under the pleadings, plaintiff could then resort—and that after 1870 it continued, increasing somewhat, although remaining comparatively small, and continuing without

challenge from plaintiff until 1904. It may well be that, even if plaintiff did not know of this use and acquiesce, it was legally chargeable with such knowledge and acquiescence for many years, and that in 1904 the use would have matured into a possession of which a court of equity would not deprive defendant. At any rate, we think that is the theory upon which the former decree should be considered to stand; and, accordingly, it adjudicates such defensive right and not ing more. As interpreted by Judge Lacombe in the Baltimore Club Case (Carroll v. McIlvaine-C. C. A. 2-183 Fed. 22, at p. 28), this right does not go beyond what has actually been "reduced to possession" by defendant, and does not extend to any whiskey not mixed or blended, so as to be of the same general type as that which defendants had been making. or to trade or territory which they were not selling when that bill was filed. Such difficulties as there may be in drawing the exact line of its effect are not here involved, because the infringement here sought to be enjoined is in another locality and of another character. This limitation—to blended whiskey as distinguished from straight -thus imposed on defendants, is not inconsistent with our earlier holding that a trade-mark cannot be so divided. This limitation is not of the trade-mark itself, but of the fraction thereof which has been lost.

6. The validity of plaintiff's registration under the Act of 1905 is attacked upon two grounds: first, that the registration was forbidden by Sec. 5, because the mark was identical with a "known trade-mark owned and in use by another and appropriated to merchandise of the same descriptive properties", viz, the Hellman trademark; and, second, that it would be invalid under that provision of Sec. 21 which relates to certificates of registration fraudulently obtained.

We pass by the plaintiff's contention that the validity of registration cannot be collaterally attacked, but must be directly reached under the provisions of Sec. 13, which provides for the cancellation of the certificate if it is made to appear that the registration was unlawful; and we do so because we conclude that the registration of a word capable of exclusive appropriation has no effect upon the substantive rights of the parties, excepting its evidential force to make a prima facie case of title. We find nothing in the act purporting to cut off or impair any substantive defense which would have been open to the defendant if there had been no registrationexcept in so far as it perhaps may affect the character of registrant's title to a descriptive word of a secondary meaning (Nashville Co. v. Coca Cola Co., 215 Fed. 527, 529), and this effect is not now involved. If, then, the law does not otherwise indicate the intention to cut off or embarrass ordinary defenses by one who has not been heard in the registration proceedings, that intention cannot be inferred merely from the insertion of a provision by which a hostile party can secure the cancellation of a certificate and so destroy even its evidential force and its effect upon questions of jurisdiction as between different courts.

The first objection is that because the trade-mark "Old Crow" belonged to the Hellmans for use upon blended whiskey and because this is an article of the same descriptive qualities as plaintiff's straight whiskey, the registration was forbidden. This objection must fall, when it is found, as we have held, that upon the basis of the former decree the adjudication does not establish the ownership of the trade-mark by the Hellmans, but only a defensive right sufficient to protect them against the remedy then sought, and that if we go behind the adjudi-

cation and into the facts, the Hellman right is not enlarged.

It is next said that the registration was "fraudulently obtained" because, before the application was made, the Eighth Circuit litigation had been finished, and yet the application falsely stated two things, the untruth of which had then been judicially established (1) that the trade-mark had been continuously in use by registrant and its predecessors since 1835; (2) that no other person had the right to use the mark.

The statement that the trade-mark had been in use since 1835 is not shown to be untrue to such extent and with such certainty as would be necessary to fix a fraudulent character on the application-within the meaning of fraudulent, as used in this connection. The proof does not carry the use of the word back to a definite beginning. At Crow's death, in 1855, the name had been long used. No one undertakes to say how long. It was not important for plaintiff to prove that the use did extend back of, say 1850, and defendant did not undertake to prove that the use did not go as far as 1835. The period between 1835 and 1850 was not important either for the purpose of registration or for the purpose of this suit. It is true that the use was of a character analogous to a descriptive use rather than a strictly trade-mark use for a period which did not expire until an indefinite date, perhaps 1870, perhaps earlier; but this fact, with these surroundings, is plainly insufficient to make "fraudulent" the statement that the trade-mark had been continuously used since an earlier period.

The application says "that no other person \* \* \* has the right to use the trade-mark". It had then been decided that as against plaintiff's claimed exclusive right, the Hellmans could continue to use the words as

they had been doing, viz., in their trade and territory and upon their blended product. The registrant thought to avoid this apparent conflict by limiting the registration to straight whiskey only, and undoubtedly the application, when read together, is only a statement that no one else has the right to use the words upon straight whiskey. We have expressed our opinion that a trademark cannot be so limited; but we see no reason why an applicant may not, if he wishes, confine his registration and its effect to such classes or sub-classes of the article "of the same descriptive properties" as he may select." or why he thereby necessarily abandons such rights as he may have to the use of the mark upon other sub-classes of the same article. It is true that the jurisdiction in this case depends upon this registration; but the decree sought is confined strictly within the limitations of the registration, viz., it affects straight whiskey only; and it is no concern of defendants if the registration might have been broader

The application, obviously, did not state the whole truth regarding the mark, but as far as it stated anything in this respect, it was carefully accurate. It claimed only that exclusive right of use which remained unimpaired by the Hellman decree.

It is also said that the registration was fraudulent because the Hellmans' well known interests were, by silence, concealed, whereby they were not summoned as adverse claimants, and lost their chance to be heard. The registration statute contemplates that adverse claimants, when known, shall have notice and an opportunity to oppose. There is little reason to doubt that this applica-

<sup>\*</sup>Koehler v. Beeshore, 59 Fed. 572; Richter v. Reynolds, 59 Fed. 577; and Pittsburg Co. v. Diamond Co., 85 Fed. 637, pertain to the word itself, not to its use.

tion was carefully so shaped as to avoid any necessity for such specific notice; and if the effect of the registration was to take away any right of use which the Hellmans actually owned, it might well be that any intentional failure to disclose facts which might give another the right to be heard, would be fatal to the proceeding: but with due regard for the limited effect of the registration, there is no occasion for so strict a rule in determining "when the certificate is fraudulently obtained". Whatever new rights, of evidence or of forum, plaintiff was getting were confined to its trade-mark used upon straight whiskey; in that use, the Hellmans had no concern. Their failure to receive notice impaired no right of theirs; and it follows that the deliberate limitation and shaping of the registration so as to avoid conflict with their claims was not fraudulent, as against them or as against the public.

We think the plaintiff was entitled to an injunction against the continuance of what defendants were doing, viz., using the names "Crow" or "Old Crow" in connection with straight whiskey not made by plaintiff. Extending the injunction in the broad terms of the prayer of the bill might not only cause confusion with rights secured by the Eighth Circuit decree, but might go bevond our jurisdiction in this case. That jurisdiction is confined to protecting the class of merchandise specified in the certificate of registration, "straight Bourbon or rve whiskey"; and, if, upon the principles herein declared, plaintiff would be entitled to any broader measure of relief, this limitation of the injunction will not prejudice proceedings therefor in a court whose jurisdiction does not depend solely upon the registration. The difficulty of distinguishing between the results of defendants' wrongful use of these names as compared with the results of a rightful use make the case inappropriate for an accounting (Ludington Co. v. Leonard—C. C. A. 2—127 Fed. 155, 157). The decree below is reversed with costs, and the case is remanded for the entry of a new decree consistent with this opinion.

# SIXTH CIRCUIT COURT OF APPEALS' OPINION DENYING MOTION FOR REHEARING.

An application for rehearing points out certain supposed errors in the opinion, and their existence and effect should be considered:

(a) We assumed that the distinctions between straight whiskey and blended whiskey and their attendant market conditions had existed substantially as at present. from the commencement of the period under consideration. Undoubtedly, this assumption somewhat colors the discussion in the opinion. This assumption is now said to be wrong, and our attention is directed to the decision of President Taft in the controversy arising under the Pure Food Law, and to its recital of facts in the trade history. This recital shows that prior to the Civil War, the greater part of all whiskey sold in the usual retail methods had been, in different ways, purified and refined after leaving the original distiller, and had also been artificially colored and flavored—all by the methods then or later known as rectifying and blending. Only at about the time of the Civil War was it discovered that whiskey, by aging in charred barrels, could be satisfactorily refined and colored, and, in a sense, flavored, without any secondary treatment. Thus and then, what is now called "straight" whiskey first came into existence.

Upon a review of the opinion, we cannot see that its conclusions are seriously affected by this correction of our misapprehension. The sales of "Old Crow" whiskey made before 1865 by the predecessors of Gaines & Company would have been more largely to rectifiers and less to the consumer than we had assumed would be natural, and so much reputation as the name had would be more among rectifiers and less among the users; but

this is only a matter of degree; it comes to saying that the standing and reputation which grew up with the name were more local and less wide-spread than would have resulted under present day conditions; and correcting this matter of degree according to the fact will bring no different result. Even if up to a given date, say 1867, rectifiers had been the sole purchasers of the distillery product and had been the only class to whom the product was known as "Crow" or "Old Crow", this would not subject the growth and development of the trade-mark right to any different principles.

(b) The opinion, in a note, refers to the use by the Hellmans of the brand "J. Crow, Paris, Ky." This particular brand was in fact not used by the Hellmans, but by another rectifier in St. Louis. It may be noted, also, that at the same time (in the sixties) a Cincinnati house was marking some of its output "Crow".

This correction, and its resulting inferences, do not help the Hellman case. If it is improbable that such a name as "Crow" was adopted by one rectifier merely by chance, it is rather incredible that each of three rectifiers, in communities where Kentucky whiskeys came to market, fortuitously hit on the same unusual trade-mark; and to find that in 1865 three dealers were using a name which had become at least somewhat known in a nearby center of original production many years before, confirms the conviction that the name must have acquired reputation enough to make it worth taking, or else that it had become at that time indicative of a class or type of product.\*

<sup>\*</sup>The latter seems to be the interpretation expressly adopted by the Eighth Circuit opinion in saying that the Hellmans at this period "employed these words as descriptive terms". (161 Fed., at p. 502.)

(c) It is said we were in error in assuming that "Old Crow" had anything to do with the age of the whiskey, but that, in fact, this word, refers only to the age of the man, Crow. This may be so; but the same mistake would have been natural in the sixties to those who heard the name but did not know of the man; and as to its effect on the trade-mark development discussed in the opinion, it would not be important whether the natural inference that "Old Crow" implied age in the whiskey was the right or the wrong inference.

The petition assures us that there was no "implication of age in applying 'Old Crow' to the Hellmans' blended whiskey", and that it was used as "Old Hickory" might have been. If so, the reference was to an individual; and as no man of this name or so-called appears ever to have been known, except the Gaines Creek James Crow, it would follow that the Hellman use must have been fraudulent.

- (d) The opinion is criticised because we hesitated to accept, at its face value, the Hellman testimony regarding the extent of their Old Crow sales, the use of their advertising signs, etc., before 1867. There is a considerable volume of this testimony, but it consists almost wholly of unaided recollections of dates forty years old—and it is that class of testimony which, by decisions familiar in patent cases, the Supreme Court has refused to accept. True, there is in a trade-mark case no initial presumption of validity to be overcome, but the principles for determining the evidential value of testimony cannot differ according to the subject-matter of the case.
- (e) The petition points out that the opinion, after stating that the Hellmans appealed from the St. Louis decree dismissing their cross-bill asking affirmative relief, then erroneously states that they dropped this ap-

peal "whereby, whatever adjudication was carried by such dismissal, became final". The facts are that the decree below directed an injunction against the Hellmans on the original bill and the dismissal of their cross-bill; that they appealed from each portion of the decree; that in the Court of Appeals their counsel announced that they would not ask affirmative relief, and the Court of Appeals did not consider that subject; and that the deeree below was reversed and a new decree was entered below simply dismissing the bill. It is not of controlling importance in what technical situation this final dismissal left the rights claimed by the cross-bill. The persuasive thing is that the Hellmans abandoned any claim to relief on the theory that they had any trade-mark; and it is this conduct that helps to interpret the Eighth Circuit litigation and tends to support our conclusion that such litigation should not be taken as an adjudication that the Hellmans had adopted and had become the owners of the trade-mark.

(f) The petition assumes that this court has made a new finding of facts inconsistent with the finding made by the Court of Appeals in the Eighth Circuit. Of course, if this assumption were true, our opinion would be wrong. We intended only to determine what was the real thing decided in the former suit, and so what was the thing adjudicated; and it became necessary to separate, as best we could, those conclusions of the court upon which its action was based, from those recitals of the judge writing the opinion, in some of which, at least, the other judge sitting apparently did not concur.\* Further

<sup>\*</sup>Judge Sanborn, "the other Judge sitting," filed no separate opinion. In so far as petitioners are advised there is no basis in the record, or otherwise, for the view that Judge Sanborn did not fully and heartily concur in the opinion rendered for the court by Judge Philips.

than this, we had neither the right nor the disposition to go.

The other criticisms which the petition makes on the opinion, we have considered, and we think they are either based upon misapprehension or else are sufficiently covered by the opinion itself. The application for rehearing is denied.



Office Supreme Court, U. S.

FILED

DEC 13 1915

JAMES D. MAHER

IN THE

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

ROCK SPRING DISTILLING COMPANY and SILAS ROSENFELD,

Petitioners,

٧.

W. A. GAINES & COMPANY (a Corporation),

Respondent.

In Equity.

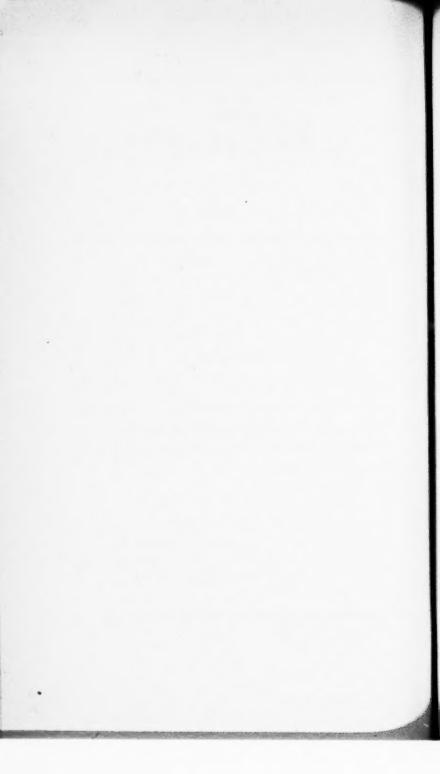


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REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

W. T. ELLIS, LUTHER ELY SMITH.

Solicitors and of Counsel for Petitioners, Rock Spring
Distilling Co. and Silas Rosenfeld.



#### IN THE

### SUPREME COURT OF THE UNITED STATES.

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REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

It is true that an application was made by W. A. Gaines & Company for a writ of *certiorari* to review the decision of the Eighth Circuit Court of Appeals. As stated in that petition (Pearcy's Exhibit D, p. 15; Rec., Vol. I, p. 263), W. A. Gaines & Company prayed this Court to review the said decision of the Eighth Circuit Court of Appeals because:

"The judgment of the Circuit Court was reversed on the sole ground that the respondents had used the words 'Crow' and 'Old Crow' before the petitioner had adopted the words 'Old Crow' as a trade-mark."

Manifestly the question as to the correctness of the Eighth Circuit Court of Appeals' finding of the essential facts there in issue, namely, priority of adoption and good faith in the adoption and use of the trademark, in favor of the Hellmans, was of interest to complainant and the Hellmans alone, and in which

"no question of either public interest or public policy is involved; merely matters of private interest."

And so, as respondent points out in its brief herein (page 6):

"This Court refused to grant the writ, or the decision of the Eighth Circuit Court of Appeals would very certainly long since have been reversed."

(The italics, which are our own, we feel are justified by the fact that respondent cites in support of its proposition the two state court cases—neither of them by a court of last resort—discussed and distinguished by the Eighth Circuit Court of Appeals in its opinion, and also cite "Judge David P. Dyer in 155 Fed. 639", whose said opinion and findings at nisi prius was

found by the Eighth Circuit Court of Appeals to be erroneous as to the material facts, and was reversed by that Court in toto.)

The final decree entered in the Eighth Circuit in conformity with the finding of the Appellate Court in that Circuit, has at all times remained in full force and effect, until the Sixth Circuit Court of Appeals spoke by way of interpreting that decree. Though in form professing to recognize the former decision, the Sixth Circuit Court of Appeals in effect reversed it by making a new finding of the material facts and practically reinstated the decision of Judge Dyer (155 Fed. 639), which is even now again invoked by respondent's present brief (page 6) as being a correct determination of the issues in the original (Eighth Circuit) case.

Respondent's apprehension lest this Court's jurisdiction under the writ of certiorari become so greatly extended as to include all cases where the plea of res adjudicata is interposed and denied, is groundless. On the other hand, the results that may occur if this Court fails to take cognizance of successful attempts to secure a reversal of the findings of one Court of Appeals by another Court of Appeals, will lead directly to the situation mentioned by Mr. Justice Brewer in the Forsyth case (166 U. S. 506), namely, "nine separate appellate tribunals might by their differences of opinion, unless held in check by the reviewing power of this Court, create an unfortunate confusion in re-

spect to the rules of Federal decision". The Sixth Circuit Court of Appeals applied rules of decision to the facts which it found, that were not applied by the Eighth Circuit Court of Appeals, and are inconsistent with those that were applied by that Court. The mere fact that the "conflict of decision" also involves antagonistic findings of fact, does not make the result any less "confusing", but rather more so. It might be added that the very case relied on by respondent, Forsyth v. Hammond, arose out of a refusal to apply the doctrine of res adjudicata properly.

In the case of Hamilton Brown Shoe Company, Petitioner, v. Wolf Bros (No. 813, October, 1913, Term, 231 U. S. 756) it was contended in opposition to the petition for *certiorari* upon the second appeal that a similar petition had been denied in the first appeal, but notwithstanding that fact, the petition in the second appeal was granted.

Respondent intimates that it will confess our petition herein, if this Court will set aside its order entered October 19, 1908 (212 U. S. 572), denying respondent's petition in the Eighth Circuit case. Respondent's eagerness to have this Court now review the record which this Court declined to review seven years ago is eloquent tribute to the correctness of our position that there is now a direct conflict of decision between the former opinion, whose correctness cannot now be questioned, and the Sixth Circuit Court of Appeals'

opinion which has in effect overruled and reversed that former decision by interpretation.

It is true that Collins v. Ames (18 Fed. 561) was a case at nisi prius (in the Circuit, not "District Court"). But the opinion of Mr. Justice Blatchford, who rendered the decision, then a member of this Court, far from being reversed, has been uniformly approved and adopted ever since by other courts, including Circuit Courts of Appeals. In applying the doctrine of Collins v. Ames to a case in the Eighth Circuit Court of Appeals, Judge Walter H. Sanborn, speaking for that Court (Judge Van Devanter concurring), said:

"Few, if any, of the Judges of this country have been more learned in the law of patents and trademarks than Judge Blatchford, and there is none whose opinions on these subjects command more respect." (Layton Pure Food Co. v. Church-Dwight Co., 182 Fed. 35, 39, 104 C. C. A. 464.)

It is true that the Sixth Circuit Court of Appeals professed to approve Collins v. Ames, but it then proceeded to sustain the very contention that Mr. Justice Blatchford denied in Collins v. Ames. Under the Sixth Circuit Court of Appeals' rule of defensive rights in fractions of a trade-mark, it would be possible for a given trade-mark upon edge tools to be divided up into separate fractions upon knives, razors, axes, hatchets, drawknives, machetes, and so on ad infin. And so a trade-mark upon whisky would be susceptible of

fractional division upon bourbon, rye, malt, Irish, Scotch, white, bottled-in-bond, 10-year-old, ad infin.

Doubtless the Sixth Circuit Court of Appeals would not have felt compelled to announce the fractional theory, had it not adjudicated that **W. A. Gaines & Company** was the prior appropriator of the mark. This it could only do by revising the evidence in the Eighth Circuit case and thereby reaching a different finding of material facts therein determined. In so doing, it went contrary to the controlling decisions of this Court cited in our principal brief (pages 17-27).

The decisions cited in our principal brief (pages 31-35) from the Court of Appeals of the District of Columbia clearly show that the protective features of the Trade-mark Act of 1905 as construed by the Court particularly charged with its interpretation forbid the very kind of fractional registration which the Sixth Circuit Court of Appeals has declared valid. The decisions of the Court of Appeals of the District of Columbia are open to review by this Court by certiorari, and their interpretation of the provisions of the Act of 1905 has never been disapproved either by this Court or by any other court, in so far as we are advised, until the Sixth Circuit Court of Appeals spoke.

The Davids case (233 U. S. 461) could not apply to the case at bar since respondent had not been the exclusive user of the mark for ten years. The direct and immediate conflict of decision squarely raised between two Circuit Courts of Appeal, the apparent stamp of approval bestowed by the Sixth Circuit Court of Appeals upon respondent's studied and ingenious efforts, through the aid of the Federal Trade-mark Act of 1905, to avoid the effects of the former adverse judgment, the announcement of the new theory of fractional division of trade-marks, the conflicts of decision noted in our principal brief, all create considerations of the very greatest public interest, considerations which concern every litigant and every person in the land. Stability of judgments and uniformity of decision are of primary importance to the nation.

We respectfully submit that respondent, by its brief herein urging that the Eighth Circuit Court of Appeals decision was wrong and should have been reversed by this Court (as, indeed, it has, in effect, been reversed by the Sixth Circuit Court of Appeals), has furnished the strongest reasons possible why our petition herein should be granted. Respondent feels that the Sixth Circuit Court of Appeals was correct in deciding the material facts of priority of adoption and good faith in adopting and using the mark against petitioners and in favor of respondent. But under the decisions of this Court the Sixth Circuit Court of Appeals had no authority for so overruling the findings

as to material facts made by another Circuit Court of Appeals between the same parties or their privies, particularly where those findings are as fatal to respondent's present claim as they were to its former claim.

We earnestly urge that in view of the great injustice done the petitioner in this case and the far-reaching and disastrous effect that will necessarily result from the conflict between the rules laid down by the Sixth Circuit Court of Appeals in this case and the rules laid down by this Court and the Court of Appeals for the Eighth Circuit, the Court of Appeals of the District of Columbia and other Circuit Courts of Appeals in the cases cited in our original brief, in the interest of justice and in the interest of uniformity of decision, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

W. T. ELLIS, LUTHER ELY SMITH,

Solicitors and of Counsel for Petitioners Rock Spring Distilling Company and Silas Rosenfeld.

December 11, 1915.

IN THE

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

ROCK SPRING DISTILLING COM-PANY and SILAS ROSENFELD, Petitioners.

VS.

In Equity.

W. A. GAINES & COMPANY, a Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

> JAMES LOVE HOPKINS, DANIEL W. LINDSEY, EDMUND F. TRABUE, Counsel for Respondent.



#### IN THE

### SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

ROCK SPRING DISTILLING COM-PANY and SILAS ROSENFELD, Petitioners.

VS.

W. A. GAINES & COMPANY, a Corporation,

Respondent.

In Equity.

### BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

A comparison of the petition with the opinions of the Circuit Court of Appeals, which the petitioner assails, and a comparison of such opinions with the opinion and judgment of the Court of Appeals for the Eighth Circuit (reprinted in Petitioners' Brief, pp. 64, 83), would probably make any suggestion from us in opposition to the petition unnecessary. The principal

ground for application for the writ relied on by petitioner is "conflict of decision in action for trade-mark infringement"; and such conflict is predicated upon the Sixth Circuit decision that the Eighth Circuit decision was not res adjudicata.

I.

Obviously, such case is not within this Court's exposition of the principles governing the issuance of the writ of certiorari (American Construction Co. v. Jacksonville Railway, 148 U.S. 372; Forsyth v. Hammond, 166 U. S. 506). The conflict of decision claimed, but denied by the Sixth Circuit opinion (Petitioners' Brief, pp. 74, 86 [f]) is not in the exposition of legal principles, but in the application of legal principles to the particular facts involved in the cases, and ascertainable from the voluminous evidence. If a conflict of decision within the intent of the rule announced in Forsyth v. Hammond (166 U. S. 506, 512) exists in the instant case, it would seem to exist in every case where res adjudicata were pleaded and the plea denied. This court would under such conditions have indeed an extensive jurisdiction under the writ of certiorari.

The Court of Appeals' response to petitioners' petition for rehearing said on the instant point (Petitioners' Brief, p. 86; Opin. [f]):

"The petition assumes that this Court has made

a new finding of facts inconsistent with the finding made by the Court of Appeals in the Eighth Circuit. Of course, if this assumption were true, our opinion would be wrong. We intended only to determine what was the real thing decided on the former suit, and say what was the thing adjudicated," etc., etc.

#### II.

The next point is that the Sixth Circuit Court had advanced a "fractional theory of trade-marks" in conflict with "the rule announced in *Collins v. Ames*, 18 Fed. 561, and the decisions of other Courts of Appeals cited".

Collins v. Ames is not a Court of Appeals decision, and the decision of a District Court might be reversed without creating the conflict of decision meant in Forsyth v. Hammond. It is, therefore, unnecessary to consider this question raised by the petition. Clearly, the Sixth Circuit Court did not understand that it was advancing a doctrine in conflict with Collins v. Ames nor any decision of the Court of Appeals of another circuit; wherefore the "conflict of decision" appeals to be prepounded here for the purpose of making a basis for application for the writ which would seem to be within the doctrine of Forsyth v. Hammond.

Indeed, the Sixth Circuit Court appears to recognize the dectrine for which petitioner contends (Petitioners' Brief, pp. 71 et seq.; foot note, p. 72), but holds that the doctrine invoked by petitioner is inapplicable. Obviously, this decision makes no conflict between the doctrines of different circuits within the rule of Forsyth v. Hammond.

Concerning the so-called "fractional theory" the Court said (Brief, p. 72):

"The decided cases do not permit a trade-mark like this to be thus divided," etc., etc.

Concerning the conflict of authority on the limitation in territory of trade-marks, the Court said (Brief, p. 73):

"We do not find it necessary to construe or to attempt to decide the question so presented. \* \* \* However, the existence of this general or prima facie exclusive right is not inconsistent with an inability to enforce it against some persons and under some circumstances,"

and suggests "laches", "estoppel" and the like.

In so concluding the Sixth Circuit remarked the defense made by the Hellmans in the Eighth Circuit case, and the avowed abandonment in the Court of Appeals of their appeal from the decree of the Circuit Court dismissing their cross-bill which claimed the proprietary right to the trade-mark. The Circuit Court had dismissed the cross-bill and cross-plaintiff appealed, but cross-plaintiff (Hellmans) abandoned their appeal

as to the cross-bill upon the hearing in the Court of Appeals (161 Fed. 497, 88 C. C. A. 439, Record, Vol.II, p. 971, Petitioners' Brief, pp. 41 and 74). As the Sixth Circuit Court of Appeals said in the instant case "the Hellmans abandoned any claim to relief on the theory that they had any trade-mark; and it is this conduct that helps to interpret the Eighth Circuit litigation" (Petitioners' Brief, p. 86).

#### III.

Finally, the petition for *certiorari* urges that the Court below erred in sustaining as valid the plaintiff's trade-mark registration, certificate No. 74,537, issued July 20, 1909 (Record, Vol. I, p. 9).

There is no conflict of decision alleged as to this point. The Court below found the registration valid under the rule of Davids Co. v. Davids, 233 U. S. 461; Nashville Co. v. Coco Cola Co., 215 Fed. 527, 529 (Petitioners' Brief, pp. 68, 78). This registration was not involved in the Eighth Circuit case; the present decision is in perfect accord with the decisions of this Court. The decisions of the Court of Appeals D. C., cited by the petitioners, are not in point with any issue in this case, and all were rendered in opposition or cancellation cases on appeal from the Patent Office.

#### CONCLUSION.

The application for *certiorari* does not present any ground for the issuance of the writ recognized by the decisions of this Court, and no attempt to justify the application by citation of authority has been made in either brief or petition.

This Court refused to grant the writ in the former case, when certiorari was sought by W. A. Gaines & Co. (212 U. S. 572) or the decision of the Eighth Circuit Court of Appeals would very certainly long since have been reversed. The fraud sought to be enjoined in that case was the making of a blended concoction called whiskey by the Hellmans, under the trade-mark Old Crow, unquestionably the sole and exclusive property of W. A. Gaines & Co., so established by repeated adjudications. W. A. Gaines & Co. v. Leslie, 54 N. Y. Supp. 421; W. A. Gaines & Co. v. Whyte Grocery, Fruit & Wine Co., 107 Mo. App. 507; Judge David P. Dyer, in 155 Fed. 495.

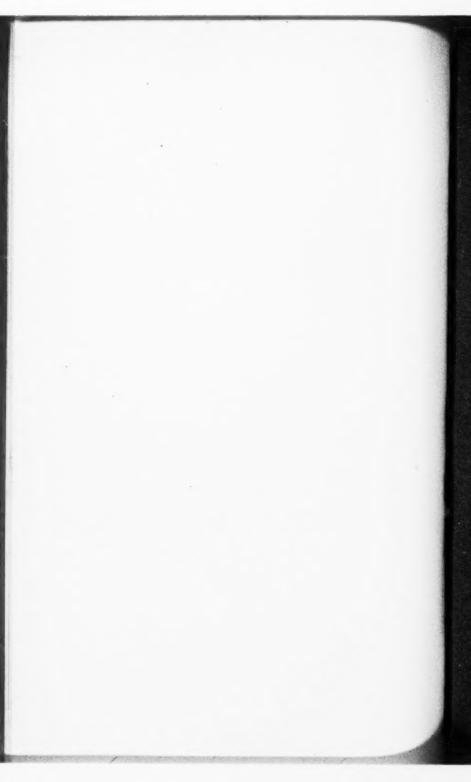
The present case presented is a new fraud—the bottling in bond of a straight whiskey under our trademark Old Crow—by a new and different defendant, in another state and circuit. The Court of Appeals of the Sixth Circuit has very properly enjoined the further perpetration of that fraud.

Under all the facts disclosed in this record, the writ of *certiorari* should here be denied as a matter of con-

formity to the denial of the writ in 212 U.S. 572; otherwise, if the writ issued here, as a matter of simple obvious justice to W. A. Gaines & Co. this Court should concurrently set aside its order denying the writ in 212 U.S. 572, and of its own motion grant the writ of certiorari to the Eighth Circuit Court of Appeals to review Kahn v. W. A. Gaines & Co., 161 Fed. 495, 88 C. C. A. 437. Subject to the condition that the writ once denied us by this Court be granted here, so that both the Eighth Circuit and Sixth Circuit decisions may be considered by this Court, we have not the slightest objection to the granting of this instant application. But to grant this application, after the refusal of our application to review the very record that constitutes volume II in this case, would seem unwarranted unless coupled with the reconsideration of this Court's order in 212 U.S. 572.

JAMES LOVE HOPKINS,
DANIEL W. LINDSEY,
EDWARD F. TRABUE,

Counsel for Respondent.



Total States (1915)

Stirle Company

ROCK SPIRITE DISTRUMBED ON PARY AND SILAS ROCEREES.

K.A. GAURES & GEORPAIN (n. Carsonalis)

SMERY OF BUILDING

GA COTTON CONTRACTOR OF THE

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#### IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

ROCK SPRING DISTILLING COM-PANY and SILAS ROSENFELD, Petitioners,

VS.

W. A. GAINES & COMPANY (a Corporation),

Respondent.

No. 311.

# STATEMENT, BRIEF AND ARGUMENT FOR PETITIONERS.

# STATEMENT.

Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit which reversed the decree of the United States District Court for the Western District of Kentucky (Owensboro Division) in a suit brought by W. A. Gaines & Co., as complainant against Rock Spring Distilling Co. and Silas Rosenfeld as defendants (petitioners herein) to enjoin the use of the words OLD CROW upon whisky.

The defendant, Rock Spring Distilling Co., was the owner of the Rock Spring distillery at Owensboro, which was operated by defendant, Silas Rosenfeld, as lessee. The defendants will be referred to collectively as "Rock Spring"; the complainant, W. A. Gaines & Co., a corporation and its two predecessors in business, the partnerships of W. A. Gaines & Co. and Gaines-Berry & Co., will be referred to as "Gaines", and the Hellman Distilling Co., with whom Rock Spring is in privity of contract, and its predecessors in business, the firms of A. M. Hellman & Co. and I. & L. M. Hellman, will be referred to as "The Hellmans".

(Italies, unless otherwise indicated, are our own.)
Registered Trade-Mark the Subject of the Suit.

The suit, which was based upon Federal registration of the words OLD CROW as a trade-mark upon straight Bourbon and rye whisky, issued to Gaines July 20, 1909, upon application filed in the United States Patent Office, February 26, 1909, sought to enjoin Rock Spring from applying those words to any whisky not made by Gaines (Rec., p. 7).

#### The Bill,

filed September 28, 1909 (Rec., pp. 2-7), alleged the incorporation of Gaines and of the Rock Spring Dis-

tilling Co., and of the issuance to Gaines of the certificate of registration on July 20, 1909, of the words OLD CROW as a trade-mark for straight bourbon and rye whisky.

The bill further averred that Gaines was the sole owner of a certain distillery in Woodford County, Kentucky, known as "The Old Crow Distillery", and that it was the only distillery in Kentucky ever designated by the name "Crow" or "Old Crow" and that the words "Old Crow" had never been lawfully applied to any whisky but that produced by Gaines and its predecessors and distilled by them at their Woodford County Distillery; that since the passage of the Federal Bottling-in-Bond Act, March 3, 1897. Gaines had bottled its Old Crow whisky in bond and sold it extensively throughout the United States, and that such whisky was labeled with the words "Old Crow" in script letters and that it commanded a high price and was known and called for as "Old Crow Bottled in Bond".

The bill charged that from July 21, 1909 (i.e., the day following the issuance of the registration relied on), Rock Spring had infringed Gaines' trade-mark rights by making or causing to be made, and selling or causing to be sold, in Owensboro, Daviess County, Kentucky, a certain spurious straight Bourbon whisky not the product of Gaines' Old Crow Distillery, and had marked same "Celebrated Old Crow Bottled-in-

Bond" in script type and had caused same to be sold and transported in commerce among the several states.

By way of injunctive relief the bill prayed in substance that defendant be enjoined from using Gaines' registered trade-mark on any whisky not made by Gaines, and "from affixing the same to merchandise of substantially same descriptive properties as those set forth in the registration of your orator's trademark" (Rec., p. 7). Accounting and other appropriate relief were also prayed. The bill was verified by the affidavit of George F. Berry, Gaines' secretary and treasurer, under date of September 13, 1909 (Rec., pp. 7-8).

## Preliminary Injunction Denied.

Gaines at once filed application for a preliminary injunction (Rec., pp. 9-11) and supported same by numerous exhibits including the entire Eighth Circuit record and the affidavits of witnesses. The purport of this evidence was along the same line as Gaines' testimony in the Hellman case (Rec., pp. 11-77, 80-86, 126). Rock Spring, in opposition, filed various affidavits and exhibits setting forth their privity with the Hellmans and the former adjudication of priority of adoption in favor of the Hellmans and against Gaines in the Eighth Circuit case (Rec., pp. 88-122). Rock Spring also filed

exhibits showing use by Gaines of its trade-mark upon blended whisky (Rec., pp. 98-99). The Court denied the preliminary injunction (Rec., p. 127) in an opinion (Rec., pp. 127-128), which, for the purpose of disposing of the motion, recognized the Eighth Circuit Court of Appeals' adjudication as superior to the registration.

#### The Plea in the Instant Suit.

Thereupon (March 7, 1910), Rock Spring interposed a plea of res judicata alleging (Rec., pp. 129-135) that Gaines' action was completely barred by a final judgment and decree theretofore entered in the certain suit filed by Gaines in the United States Circuit (now District) Court for the Eastern Division of the Eastern District of Missouri by Gaines against Abraham M. Hellman and Moritz Hellman, comprising the firm of A. M. Hellman & Co., with whom Rock Spring was in privity of contract; that in that case a material fact decisive of this case was involved, namely, the right to use the words Old Crow as a trade-mark for whisky; and that at the end of that litigation which included the taking of elaborate proofs and the exhausting of all appeals possible, the Hellmans had been adjudged by virtue of their adoption and use in good faith of the words Old Crow upon their whisky in 1862 and 1863 and their continued use of same, to be the

prior appropriators of the words "Old Crow" as a trade-mark for whisky as against Gaines, and that the final decree entered in that cause remained in full force and effect unmodified in any respect.

On the same date (March 7, 1910, Rec., pp. 135-6) on which said plea was filed, the Hellman Distilling Company presented its petition for leave to intervene. Thereafter, the sufficiency of the plea as a matter of law having been challenged by Gaines and duly briefed, argued and submitted to the Court (Rec., p. 136), the Court on May 2, 1910 (Rec., pp. 136-139, 179 Fed. 544) handed down its opinion denying the petition to intervene, but sustaining the sufficiency of the plea. Gaines thereupon filed its replication (Rec., p. 140) denying generally the averments of the plea, and thereafter and under leave of Court (Rec., pp. 145-151) Rock Spring filed its answer in support of the plea to meet such part or parts of the bill, if any, as might not be fully met or covered by said plea.

# The Answer in the Instant Suit.

The answer (Rec., pp. 151-164) specifically denied the averments of the bill, denied that Gaines was the sole or exclusive owner of the words "Old Crow" as a trade-mark for whisky; denied that said words had never been lawfully applied to any whisky but that produced by Gaines.

Directly attacking the validity of Gaines' 1909 registration, the answer further alleged that Gaines and all its officers and agents, including its vice-president, Edson Bradley, well knew of the said final decision and finding of the Eighth Circuit Court of Appeals; that notwithstanding all of said facts, Gaines had filed in the U.S. Patent Office on February 26, 1909, in support of its application for registration of the words "Old Crow" upon "Straight Bourbon and Rye Whisky", the said statement and declaration (which was set out in full), sworn to on behalf of Gaines on February 13, 1909, by said Edson Bradley, Gaines' vice-president, and filed with the bill (Rec., pp. 8-9) that no other person, firm or corporation or association, to the best of his knowledge or belief. had the right to use said trade-mark either in the identical form or in any such near resemblance thereto as might be calculated to deceive.

The answer further averred that said application for registration was not filed or prosecuted in good faith and that said registration was fraudulently obtained and was null and void and that Gaines was entitled to no relief based thereon under the Federal Trade-Mark Act of 1905; that under the 21st section of said act (33 Stat., 724-729), Gaines was precluded from maintaining any suit or action based upon said registration obtained as aforesaid.

As a further defense, it was alleged that

Gaines, by reason of its conduct in the premises, was not in equity with clean hands. The answer further pleaded that Gaines' registration proceedings were ex parte and if Gaines' contention that the trade-mark of 1905 should be construed to mean that an ex parte registration nullified the effect of a prior adjudication, then said statute deprived Rock Spring and its privies of their property without due process of law and said act was unconstitutional and void.

The replication (Rec., p. 164) denied generally the averments of the answer.

# The Proofs—Federal Registration (1909).

The proofs established that Gaines had on February 26, 1909, filed application for and on July 20, 1909, had secured the issuance of registration of the words "Old Crow" as a trade-mark upon straight bourbon and rye whisky (Rec., pp. 8, 29, 188), and was using that mark in interstate commerce upon bottled-in-bond whisky (Rec., pp. 187-8).

The statement filed in support of the application for registration recited that Gaines had adopted and used the trade-mark which consists of the words Old Crow, and that said trade-mark had been continuously used in the business of themselves and their predecessors since January 1, 1835, and the class of goods to which it was appropriated was class 49,

and designated the particular description of the goods comprised in said class upon which it was used as straight bourbon and rye whisky.

The declaration, which was sworn to by Edson Bradley, stated that said Edson Bradley was Gaines' vice-president; that he believed that the foregoing statement was true and that Gaines was the owner of the trade-mark sought to be registered; "that no other person, firm or corporation or association, to the best of his knowledge and belief, had the right to use said trade-mark either in the identical form or in any such near resemblance thereto as might be calculated to deceive"; that said mark was used in interstate and foreign commerce. Bradley made the foregoing affidavit February 13, 1909 (Rec., p. 9).

# Former Adjudication (Eighth Circuit).

Copies of proceedings in the Gaines-Hellman case in the Eighth Circuit established that Gaines had originally filed suit in the State Circuit Court at St. Louis in September, 1904, against the Hellmans for \$10,000 damages on account of infringement of the trade-mark Old Crow, alleging that it (Gaines) was the sole and exclusive owner of the trade-mark Old Crow and that Gaines and its predecessors in business had continuously, since 1835, applied same to whisky (Rec., pp. 938-9). But this suit was dis-

missed in November, 1904, and in that month Gaines filed suit against the Hellmans in the United States Circuit (now District) Court at St. Louis on two counts, one based on infringement of the trade-mark Old Crow registered in the United States Patent Office June 28, 1904, and the other for unfair competition in trade (Rec., pp. 931-8).

In this (original) bill Gaines again alleged sole and exclusive ownership and continuous use since 1835, including the period from 1855 to 1867. The Hellmans interposed exceptions in the nature of a demurrer, and Judge Elmer B. Adams, in an opinion (Rec., pp. 662-4) sustaining these as to the first count of the bill on the ground of insufficient averments with reference to jurisdictional facts under the Federal Trade-Mark Act of 1881, expressed doubt as to whether the bill contained sufficient averments to constitute a trade-mark in the words Old Crow, but overruled a motion to strike out the second count, which was for unfair competition.

### The Amended Bill in the Former Suit.

The amended bill on which the case went to trial (Rec., pp. 208-213), thereafter filed, alleged that Gaines was the sole and exclusive owner of the trademark consisting of the words Old Crow, and that it and its predecessors in business had used the same

upon whisky made by them on Glenns Creek, Woodford County, Kentucky, continuously since 1867, in which year its predecessor in business, Gaines, Berry & Company, had adopted and commercially applied said words to whisky, "and that said words, 'Old Crow', were then open to adoption as a trademark for whisky; that from 1835 to 1855 one James Crow had lived on Glenns Creek, Woodford County, Kentucky, and had there made a whisky of superior excellence, which was known as "Crow" or "Old Crow"; that said Crow died in 1855, and that at the time of his death there remained a considerable quantity of said Crow whisky in the market which was dealt in until 1867; that the said words "Crow" and "Old Crow" had been left open for adoption by the death of said James Crow and the cessation of the distillation of whisky designated by said words, so that same were lawfully appropriated and used by Gaines in 1867; that from 1855 to 1867 no whisky was made on Glenns Creek or elsewhere to which the words Old Crow were applied as a trade-mark; that from 1835 to the present time the words Old Crow have always indicated whisky made by the process devised and invented by James Crow and made on Glenns Creek, Woodford County, Kentucky; that the Hellmans had infringed said trade-mark by applying said mark to and selling in St. Louis and elsewhere a certain spurious liquor not made by Gaines.

The bill prayed for accounting and general relief and that the Hellmans be enjoined "from making, keeping, offering for sale or selling any liquor not produced by Gaines and bearing Gaines' trade-mark Old Crow."

Thus it will be noted that the amended bill pleaded a common-law trade-mark and it commingled its averments with reference to trade-mark infringement and those with reference to unfair competition. Jurisdiction was based on diversity of citizenship.

In an opinion overruling a demurrer interposed to this amended bill, Judge Adams again expressed doubts as to whether Gaines had pleaded a common-law trade-mark, but sustained the bill upon the theory that under its averments the words "Old Crow" had a geographical significance, namely, whisky made on Glenns Creek and by James Crow's process, and under the doctrine of the Pillsbury Flour case (86 Fed. 608), the amended bill should be upheld as stating a case of unfair competition in the wrongful use of a geographical name (Rec., pp. 664-6).

## The Hellmans' Answer in the Former Case.

The answer of the Hellmans (Rec., pp. 213-230) specifically denied the averments of the bill and alleged the adoption of the figure of a crow and the words "Crow" or "Old Crow" by the Hellmans in

1863 and prior thereto upon whisky made and sold by them and their continuous use of same ever since. The answer denied that the Hellman whisky was a spurious liquor, but affirmatively averred that it was a blended whisky, free from impurities, whereas Gaines' whisky had not been subjected to any process of blending or vatting, but contained a large and dangerous percentage of fusel oil, a deadly poison.

#### The Hellmans' Cross-Bill.

Hellmans also The filed a cross-bill (Rec., 223-230), praying affirmative relief against Gaines upon facts pleaded substantially the same as those alleged in the answer. Gaines filed a general replication to the answer (Rec., p. 222), and an answer to the cross-bill (Rec., pp. 239-243) specifically denying the averments of the cross-bill and directly attacked the use of the mark by the Hellmans in 1863 and thereafter as fraudulent, stealthy, secret and as a scheme to defraud Gaines of its rightful trade and to cheat and deceive the public. The answer to the cross-bill further averred that the glass sign (later reproduced in the Eighth Circuit Court of Appeals opinion, Rec., p. 978), was not used in 1863, or until long after 1870. The Hellmans filed a general replication to this answer to cross-bill (Rec., p. 243).

# Elaborate Proofs (Eighth Circuit Case).

Gaines produced some 26 witnesses and numerous exhibits (Rec., pp. 243-465, 624-650, 675-698), including the entire record in a case theretofore tried in Kansas City (Rec., pp. 698-930); the Hellmans some 16 witnesses and various exhibits (Rec., pp. 466-623, 931-969). Under stipulation all testimony was available to either side under the issues raised by the amended bill and the cross-bill and the answers and replications thereto respectively (Rec., p. 286).

#### Original Decree by Judge Dyer.

The case being duly submitted upon oral argument, briefs, and the record on May 29th, 1907, Judge D. P. Dyer handed down his opinion (Rec., pp. 666-672) on June 13th, 1907, sustaining all the contentions of Gaines including priority of adoption by Gaines and bad faith on the part of the Hellmans. The decree (Rec., pp. 652-3) denied all relief under the cross-bill, perpetually enjoined the Hellmans "from making, advertising for sale, selling, keeping on hand for sale, or in any manner dealing in any whisky not distilled and produced by Gaines and bearing the words "Crow", "Old Crow", or the figure of a crow or any combination or variation of same, and from passing off upon the public any whisky not made by Gaines as and for Gaines' Old Crow Whisky, and directed

the Master to take a full and true account of the Hellmans' dealing since January 1896 in whisky marked Old Crow not made by Gaines.

The same reference to "whisky" dealt in by the Hellmans appears in orders then granted by Judge Dyer as follows: "Order amending decree" (Rec., p. 657), "order correcting record" (Rec., pp. 657-8), and "order granting appeal" (Rec., pp. 658-9).

# The Hellmans' Appeal

to the U. S. Circuit Court of Appeals for the Eighth Circuit coming on for hearing January 21, 1908 (Rec., p. 974), when the case was called, Judge Elmer B. Adams, who had heard the demurrers below, retired, and upon inquiry from the bench by presiding Judge Sanborn, it was agreed in open court between counsel for Gaines and the Hellmans that the case should proceed before Judges Sanborn and Philips, and if the court deemed it necessary the case might be submitted to a third judge upon the printed record and briefs (Rec., pp. 973-4).

# Forbearance by the Hellmans to Insist Upon Affirmative Relief Under Cross-Bill.

During the hearing, upon the completion of the statement of the case by counsel for the Hellmans, the Court inquired as to the cross-bill, and after conference then and there held by the Hellmans' counsel it was stated in open court that the defendants would not then insist on affirmative relief, which fact is mentioned in the course of the Court's opinion as follows: "The defendants filed a cross-bill claiming the trademark in question and asking for an injunction. This need not be considered, as at the hearing the defendants' counsel declined to insist upon any affirmative relief" (Rec., p. 976).

#### Complete Concurrence

between the judges comprising the Court in the opinion handed down on April 27, 1908, through Judge Philips is indicated by the record. The cause was not submitted to a third judge, but the opinion rendered was the opinion of the Court, composed of Judges Sanborn and Philips (Rec., p. 975).

## Eighth Circuit Court of Appeals Finding and Decision.

The Court analyzed the pleadings to ascertain the issues and determined the vital issue of priority of adoption in favor of the Hellmans, and in a careful examination of the testimony found in substance that (Rec., pp. 976-7):

"A man named James Crow, usually called 'Jim Crow' and sometimes known as 'Crow', or 'Old Crow', began the manu-

facture of whisky in Woodford County, Kentucky, about the year 1850. He did not own or operate any distillery in his own right, but worked for persons owning distilleries. He died about 1855. Prior to his death he worked at various distilleries in that neighborhood, to-wit, at the Edwards' Distillery, at Anderson Johnson's Distillery, at Jack Johnson's Distillery, at Johnson & Yancey's, at the Oscar Pepper Distillery, and at Captain Henry's Distillery. Whisky made by him was called 'Crow or 'Old Crow', as stated by one of the witnesses, just as whisky made by Taylor was called 'Old Taylor'.

"The process employed by Crow was what is known as 'hand-made' whisky, but there was no secrecy about his process, nor did it differ materially from that employed by other distilleries of the same period. He used in the manufacture the grain grown in the neighborhood, which was not different from that grown in the western states. When he worked at Johnson & Yancev's Distillery it was not known as 'Crow's' Whisky, but as 'Johnson & Yancey's'. The old Oscar Pepper's Distillery, at which Crow at one time worked, was run by various distillers from 1855 to 1865. This whisky was called 'Old Oscar Pepper' and was sometimes called 'Old Crow'. The men who worked with him understood the process employed by Crow and used it in other distilleries.

"The co-partnership firm of Gaines, Berry & Company began business as distillers in Woodford County, Kentucky, in 1867, and operated the old Pepper Distillery as claimed successors."

#### Gaines's Use From 1870.

Further reviewing the evidence the Court found:

"No unprejudiced mind can read the evidence in this case without the impression that the conception of a trade-mark in the words 'Crow' or 'Old Crow' did not enter the mind of Gaines, Berry & Company prior to 1870; and they may not under the issue presented by the pleadings lay any claim thereto anterior to 1867" (Rec., p. 977).

"After 1870, Gaines Berry & Company and their successors built up a large successful business in the manufacture of whisky which has extended throughout the country, and under the designation of 'Old Crow' attained wide celebrity" (Rec., p. 977).

#### The Hellman Use From 1862.

Further reviewing the evidence the Court found (Rec., p. 977) "the evidence, without contradiction", establishes the following facts:

"As early as 1862, the firm of I. and L. M. Hellman, composed of Isaac Hellman and Louis M. Hellman, were engaged in the wholesale liquor business on Pine street in the City of St. Louis, Missouri; that as early as 1862 or 1863 on the whisky barrels employed in their trade they had a bird with wings spread, in imitation of a crow, burnt into the head of the barrel and the word 'Crow' or the words 'Old Crow' were burnt

beneath this figure. As early as 1865 they had signs in frame prepared, displayed in the window of their store-house—a cut, large numbers of which were used in connection with their whisky trade. This cut or glass sign contained the legend, 'Celebrated Crow Bourbon, I. & L. M. Hellman, St. Louis', together with the picture of a barrel and a bird (Rec., pp. 977-8).

"There was a constant steady sale for Hellmans' Old Crow—'there was very seldom a month or a week that some did not go out—it was blended right in the house' (Rec., pp. 977-9)".

"This condition continued up to 1867, during which the bill alleges the claimed trade-mark had not been appropriated by Gaines. In August. 1867, Isaac Hellman died. The business of this house has been continuously conducted in St. Louis, up to the time of this litigation, by the brother and their sons who succeeded thereto, doing business under the name of I, and L. M. Hellman, employing the same brands and designation in business. Their trade was confined principally to states down the Mississippi River and Southwest. Since 1867 the house of Hellman has conducted its business as theretofore with no knowledge carried home to its members that the complainant, or its predecessors in business, were asserting any proprietary right to the use of the word 'Crow' or 'Old Crow' in trade, The Hellmans, prior to this controversy, had never heard of Glenn's Creek, in Woodford County, Kentucky. The whisky sold by them carried with it, plainly marked on the packages, the fact that it was the whisky of I. and L. M. Hellman of St. Louis, Missouri, or the name of the firm at the time in business (Rec., pp. 979-980).

"The waters of Glenn's Creek do not in any way enter into the composition of whisky. The water used by Gaines comes from the springs some distance from the creek, in nowise different from other springs in the limestone region of the Bluegrass District of Kentucky.

#### No Secret Crow Process.

"There was no secret about the process of distillation employed by James Crow, which the complainant assumed to follow, as 'hand-made' whisky (and there was some evidence that the complainant now employs machinery in some material respect in the process of manufacture) (Rec., p. 981).

"The character of the whisky sold by the Hellmans was blended whisky—a mixture of so-called straight whisky with refined spirits from which the blenders claimed the largest possible percentage of impurities were removed."

## The Court held that:

"Whether this made it better or worse than that manufactured by Gaines does not affect this case" (Rec., p. 981).

The Court further held (Rec., p. 980) that

"the right of the defendants to use in their trade the designative words 'Old Crow' or 'Crow' can not be measured by the extent to which they employed it, whether more or less frequent at times. It is sufficient to protect them from the charge of an unlawful invasion of the complainant's claimed monopoly that they used in connection with their business as whisky dealers the trade name in question prior to any appropriation thereof by the complainant, and that they have so continued to use it. Neither can their right to use it, ad libitum, be destroyed by the overshadowing comparative amount of the complainant's sales under the designation of 'Old Crow' whisky, nor by the asserted superiority of its product.'

The Court, in conclusion, further found (Rec., pp. 981-2):

"(1) That inasmuch as the defendants' predecessors in business prior to the use of the adoption of the designative word 'Crow' or the words 'Old Crow' as a trade-mark, employed those words as descriptive terms in connection with their business as dealers in whisky in St. Louis, Missouri; that the said predecessors and the defendants so continued to use the same, to a limited extent, up to the time of the institution of this suit, in good faith; they are not guilty of infringing the complainant's claimed trade-mark; and (2) that the defendants are not guilty of having engaged in unfair competition with the complainant in the prosecution of their business.

"It results that the decree of the Circuit Court must be reversed and the case remanded, with direction to the Circuit Court to dismiss the bill of complaint."

## Gaines' Motion to Stay Mandate Denied.

Gaines filed no motion for rehearing, but on June 18, 1908, presented to the Eighth Circuit Court of Appeals its motion to stay the issuance of mandate pending the presentation to this Court of petition for certiorari. Said motion to stay was denied (Rec., pp. 116-117), for the reason, as stated by the Court from the bench, that to grant it would have the effect of continuing an injunction which the Court had already determined never should have been issued.

#### Caines' First Petition for Certiorari.

Thereupon, Gaines filed its first petition to this Court for *certiorari* (No. 455, Oct. Term, 1908), stating its grounds, in substance, as follows:

I-II. The Eighth Circuit Court of Appeals was in error in reversing the Circuit Court's opinion and decision (which the said petition set out in full).

"The judgment of the Circuit Court was reversed on the sole ground that the respondents, Hellmans, had used the words 'Crow' and 'Old Crow' before the petitioner, Gaines, had adopted the words 'Old Crow' as a trade-mark'' \* \* \* "The Circuit Court of Appeals found that the liquor prepared and sold by the respondents (Hellmans) with the labels and brands herein described was a blended whisky, but attached no im-

portance to that fact, merely saying, 'Whether this (blending) made it better or worse than that manufactured by the complainant does not affect this case'' (Petition No. 455, 1908, p. 15).

III-VI. That the protection of truthful trademarks is a matter of utmost public importance; that the decision of the Eighth Circuit Court of Appeals is in conflict with two state decisions (107 Mo. App. 507 and 54 N. Y. Supp. 421); that several thousand suits for the infringement of this trade-mark already brought had all resulted favorably to Gaines, except the Hellman suit, and 'until the question is finally settled by this Court the litigation will continue and diverse decisions will be rendered in the state courts as well as in the courts of the United States.'

VII-IX. That the Hellmans, by reason of their misrepresentations, could not acquire the right to use the words Old Crow as a trade-mark, and that therefore up to 1867, when these words were adopted by Gaines' predecessors, they had not been lawfully appropriated by anybody and were open (in 1867) to adoption by Gaines' predecessors, who, honestly and in good faith, applied them to their goods.

Said petition for *certiorari* was, on October 19, 1908, denied (212 U. S. 572; Rec., p. 117).

## Final Decree in Favor of the Hellmans.

In accordance with mandate issued to the Circuit Court, final decree was duly entered in that court, on July 10, 1908, setting aside as null and void the original decree and directing costs in both courts in favor of the Hellmans (Rec., pp. 124-125). This decree also operated in favor of the Hellman Distilling Co., who, as successors in business to the original defendants in the Hellman case, had been brought in by Gaines (Rec. 653) as a defendant by supplemental bill, and had been enjoined pending appeal in the main case (Rec., pp. 122-123, 117-125).

# Privity Between the Hellmans and Rock Spring.

The Hellman Distilling Co., who had been enjoined in the Eighth Circuit litigation under the supplemental proceedings (Rec., pp. 117-125), as successors to all the business and all the rights of the original Hellman firm (Rec., pp. 194-195, 193-194, 985-992), in the spring of 1909 entered into a contract (Rec., pp. 1008-1010) with Rock Spring, employing Rock Spring to bottle in bond under their Old Crow Label under and in accordance with the U. S. Internal Revenue law and regulations whisky of the requisite age made at the Rock Spring distillery by the Hellmans and then in storage in the Rock Spring warehouse (Rec., pp. 185-186).

The Hellmans furnished bottles and other supplies, including their "Old Crow" label. All the whisky so bottled was shipped direct to the Hellmans in St. Louis (Rec., pp. 183-5, 191-5).

The District Court (Judge Evans) and the Sixth

Circuit Court of Appeals both found that privity was established. Privity between Rock Spring and the Hellmans has also been asserted and relied on by Gaines, in its second petition for certiorari to the Eighth Circuit in the Hellman case, presented to this Court after the granting of Rock Spring's petition in this case (W. A. Gaines & Co. v. Hellman Distilling Co., No. 905, Oct. Term, 1915, denied 241 U. S. 668).

## Rock Spring Wrote Gaines

on May 24th, 1909, a letter (Rec., pp. 95-96), that through a reliable source a rumor had reached Rock Spring that Gaines was contemplating an action against Rock Spring for using the Hellman Old Crow label. "We have no intention, wish or purpose to infringe upon your rights or any one's or do aught that would be unfair to any one in the conduct of our business." The letter further stated that the Hellmans, who had some whisky of the requisite age of their own make in storage in the Rock Spring warehouse, had asked Rock Spring to bottle same in bond under the Hellman Old Crow label. The letter further stated that the controversy with Gaines in regard to Hellmans' right to use their Old Crow brand and labels having been determined in the Hellmans' favor, Rock Spring had examined the opinion in the Eighth Circuit case and had been advised by special and general counsel that the Hellmans had the right to use the label as requested. The letter concluded:

"That we may perform our duty as per the terms of our contract with A. M. Hellman & Company and the Hellman Distilling Company, and without infringing on your rights or doing anything unfair to you, we ask what objection you have to the label, etc., being used in the manner mentioned."

Again, on June 7, 1909, Rock Spring wrote and mailed a letter (which contained a copy of the first) to Gaines (Rec. p. 96), inquiring if the first letter had been received.

Gaines duly received both letters, but, under advice of counsel, did not answer either (Rec., p. 188).

## Gaines Represented by Same Counsel.

The counsel referred to was James L. Hopkins, Esq., who was Gaines' counsel throughout the Hellman case and the present case, and in the 1909 and 1904 registration proceedings in the U. S. Patent Office (Rec. pp. 7, 213, 975, 1012, 8, and exhibit opposite p. 696).

## The Hellmans Employ Block Letter Label.

Even though Gaines did not answer either of the letters, yet out of abundance of caution the Hellman Old Crow Label was changed, using heavy black letter type in deep black ink so as to furnish all

possible distinguishing marks and remove all ground for complaint that might be based upon the use of the script type of lettering. No script lettering was used in the Hellman Old Crow Labels either after July 21, 1909, or for a considerable period prior thereto (Rec. pp. 106, 109). The type of label used by the Hellmans is found on pages 1010-1 of the Record.

# Gaines' Label Used on Blended Whisky.

The evidence further showed that since Gaines' 1909 registration, which was obtained for use upon "straight bourbon and rye whisky", Gaines' trade-mark "Old Crow" had been used upon whisky marked and sold as "Blended" whisky. Gaines asserted that the whisky was a mixture of straight whiskies and that the "Blend" label was used in order to avoid any question of compliance with the Federal Food Law (Rec. pp. 98-9, 100, 126, 188-9).

# Gaines' Testimony the Same in Character in This as in the Former Case.

Gaines produced two witnesses (Rec., pp. 187-191) and various affidavits (Rec., pp. 11-77, 80-86, 126). The testimony of all of these was along identically the same lines as the testimony given in the Gaines-Hellman controversy (Rec., pp. 345-465), including the extent of

Gaines' trade in recent years. Some of the same witnesses who testified in the Eighth Circuit Court gave affidavits in this case on the motion for preliminary injunction. All of the evidence of this character had been fully considered by the Eighth Circuit Court of Appeals in making its findings in that case and had been found by that court to be ineffectual to overcome the undisputed evidence showing priority of adoption, and use in good faith by the Hellmans of the words Old Crow as a trade-mark for whisky (Rec., pp. 977-982).

## Finding and Decree in This Case.

Upon submission for final decree upon all the issues in the case, the trial court below, Judge Walter Evans, found the plea to be true in fact and a bar to Gaines' suit, and further found the registration to be of no effect as against the Hellmans and their privies. The Court's opinion (Rec., pp. 168-174) in part is as follows:

"" \* Whatever may have been the merits of the controversy which that court (Eighth Circuit Court of Appeals) determined in that case we are not to inquire, nor are we to inquire into the merits of the whisky made or sold by either party thereto. The question we are to determine on this phase of the case is whether, in its essential elements, the title adjudicated in that

case was the same as the one again attempted to be litigated in this action. When we attentively examine the record, the pleadings and the final decree in the former cause we can not doubt that the essential question in dispute there was the same as that involved here. This being so, and the defendants and the Hellman Distilling Company having in due course succeeded to the rights of A. M. Hellman & Co., we hold that the plea has been established, and that it is a bar to the relief now sought as to the infringement of the alleged trademark.

"But the defendants in that cause were denied an injunction upon their cross-bill asking that relief, and it is insisted that that shows that neither themselves nor their successors have any rights in the trade-mark inasmuch as the record shows that they dismissed their cross-appeal from that part of the judgment in that case. We have not been able to see how that affects the question here involved, because, whatever effect may be given the denial to defendants of the relief they sought in that action, it is certain that in the most impressive way it was adjudged that the complainant had no equity to the relief it there prayed. \* \*

"Again, it is insisted by the complainant that it uses the trade-mark in connection with 'straight' whisky, while the defendants have heretofore used it in connection with 'blends'. The bill of complaint, as we shall see, charges a broader use. The general doctrine, we apprehend, is that a trademark used in connection with any class of things must apply to all the various species of grades of that class. It would be an endless task to differ-

entiate the various grades or qualities of whisky or any other article of merchandise and say to which one or more of them a trade-mark was appropriated or applicable. Especially, we apprehend, would this be so in reference to whisky, which has as great a variety of grades (extending from the very best to the very worst) as probably any article in commerce. Some of the authorities illustrating this view are Layton Pure Food Co. v. Church & Dwight Co., 182 Fed. 35, 38, and authorities therein cited, and Collins Co. v. Oliver Ames & Sons Corporation, 18 Fed. 561 570.

"On February 13, 1909, Edson Bradley, describing himself as vice-president of W. A. Gaines & Co., was sworn to a statement intended to be filed as the basis of an application for the registration of the trade-mark Old Crow straight bourbon and rve whisky. This statement and the accompanying petition were filed in the Patent Office on February 26, 1909, about one year after the decision by the Circuit Court of Appeals. This latter circumstance may be most significant in connection with the fact that in the papers just referred to, and as amended later, the vice-president stated under oath that W. A. Gaines & Company in the County of Franklin and State of Kentucky, 'has adopted for its use a trade-mark which consists of the words Old Crow, and that said trade-mark has been used in the business of ourselves and our predecessors since, to-wit, January 1, 1835'. we have seen, it is altogether incorrect to say that the complainant and its predecessors had used that trade-mark since January 1, 1835, because the complainant and its predecessors did not begin its use until 1867, nor then, in any legal sense as the successors of James Crow. Besides, from the testimony and developments in the suit in St. Louis the complainant certainly knew that its opponents in that suit had been adjudged the right to use and that they in fact had used the trade-mark Old Crow ever since 1863, though probably not as energetically or as extensively as complainant. Yet upon these statements the registration was obtained. \* \* \*

"While under the Act of 1905 the registration, even when thus made, affords a prima facie presumption of ownership of the trade-mark in complainant, is not that presumption entirely overcome by the judgment which had been rendered against the complainant in the suit in St. Louis, long before the application was made, and of which litigation and judgment no information was given by the complainant to the Patent Office? To ask the question is to answer it in the negative unless such ex parte registration, obtained under such circumstances, and in the way indicated, is to override the previous judgment directed by the Circuit Court of Appeals in a litigation between the opposing claimants of that trade-mark and in which all were fully heard. That such a result is impossible is, in our view, too plain for argument. Nor can we conceive that Congress ever contemplated such a result when enacting the legislation of 1905. \*

Decree was entered in accordance with the Court's finding and decision (Rec., pp. 167-8) sustaining the plea in bar and dismissing the bill for want of equity,

# Gaines Appealed to the Sixth Circuit Court of Appeals Urging That Court to Disregard the Former Decree.

From that decree Gaines appealed to the Sixth Circuit Court of Appeals (Rec., pp. 174-8). In its brief before that court Gaines frankly urged the Sixth Circuit Court of Appeals to "disregard the former decree as manifestly wrong and opposed to public morals", stating its contention as follows (Gaines' Brief before Sixth Circuit Court of Appeals, pp. 7-8):

"There is necessarily involved the investigation of the former adjudication pleaded, as to what it determined as to the facts, and whether upon the determined and admitted facts the Eighth Circuit Court of Appeals correctly applied the law. As to this, we contend that the decision of the Circuit Court (the trial court, Judge D. P. Dyer, in the Eighth Circuit litigation) was so clearly right, and the Court of Appeals so manifestly wrong in applying the law to the undisputed facts of the case in the Eighth Circuit that the adjudication should be disregarded in this or any other circuit under any circumstances, in a subsequent suit in equity, and that this Court now has the right and duty to so decree. That even if the present and former suits were so related as to parties and subjectmatter that the former adjudication could properly be pleaded, it is for this Court, on inspection of the former decree and at least the undisputed facts in the former case, to direct the lower court in this circuit to disregard the opinion and decree of the Eighth Circuit Court of Appeals altogether, if the opinion is found to be clearly inequitable and opposed to sound public morals. That in this regard the duty of this Court is to the public first and then to the litigants."

## Opinion of Sixth Circuit Court of Appeals

1013-1014) purported to recognize (Rec., pp. and "interpret" the Eighth Circuit Court of Appeals' finding and judgment. It omitted to state the issues raised in the Eighth Circuit litigation and contained no analysis of the pleadings or reference to the terms of the decree appealed from, but re-examined the evidence in the Circuit case and made an entirely new finding of facts, unlike that found by the Eighth Circuit Court of Appeals, and in all essential respects like those found by Judge Dyer, whose finding and decree had been reversed. (Direct conflicts with facts found by the Eighth Circuit Court of Appeals are noted in the statement supporting the petition for rehearing [Rec., pp. 1036-1047]). The Sixth Circuit Court of Appeals found that the Eighth Circuit Court of Appeals had adjudged that Gaines (and not the Hellmans) was the prior appropriator of the words

"Old Crow" as a trade-mark for whisky; that the Hellmans' adoption of these words was in bad faith instead of in good faith, and that all that the Eighth Circuit Court of Appeals had decreed was that Gaines, as prior appropriator of the mark, had through laches lost to the Hellmans a certain defensive right to a fractional part of the mark, namely, the right to use the mark upon blended whisky, and that in the South and Southwest. Gaines' 1909 registration was upheld as valid.

The case was reversed, with directions to grant an injunction. Accounting was denied.

## Motion for Rehearing Overruled.

Timely motion for rehearing was interposed (Rec., p. 1024), but the Sixth Circuit Court of Appeals, in overruling this motion (Rec., pp. 1053-5), while admitting certain errors in its findings, held that these errors did not affect the result, and, in conclusion, said:

"The petition (for rehearing) assumes that this Court has made a new finding of facts inconsistent with the finding made by the Court of Appeals in the Eighth Circuit. Of course, if this assumption were true, our opinion would be wrong. We intended only to determine what was the real thing decided in the former suit, and so, what was the thing adjudi-

cated, and it became necessary to separate, as best we could, those conclusions of the Court upon which its action was based, from those recitals of the Judge writing the opinion, in some of which, at least, the other Judge sitting apparently did not concur. Further than this, we had neither the right nor the disposition to go" (Rec., p. 1055).

If the other Judge sitting, Judge Walter H. Sanborn, did not concur fully and heartily in all that was said in the Court's opinion, written by Judge Philips, he failed to indicate it by separate opinion, dissent or otherwise. The basis of the foregoing statement indicating a dissent by Judge Sanborn is not found in this record.

# Assumption That Present Conditions Prevailed Sixty Years Ago.

The Sixth Circuit Court of Appeals, in its second opinion, frankly admits that it "assumed that the distinction between straight whisky and blended whisky and their attendant market conditions had existed substantially as at present from the commencement of the period under consideration," and that "undoubtedly this assumption somewhat colored the discussion in the opinion" (Rec., p. 1053).

The Sixth Circuit Court of Appeals' decision was also manifestly influenced by its apparent assumption that in 1855 and prior thereto whisky

made by James Crow had been sold under the name of Old Crow beyond the immediate neighborhood of small log-house distilleries which had a barrel or a barrel-and-a-half capacity per day for short runs on the various farms where Crow worked from time to time. The facts are quite the contrary, as shown by the record in the Eighth Circuit Court, and also as established by the careful opinion and finding of President Taft in his decision under the Federal pure food law in "What is Whisky," rendered December 27, 1909 (Rec., pp. 1031-3).

Not until conditions had become settled after the Civil War, when storage in charred barrels and improved distilling processes had come into use, did Kentucky whisky begin to reach the public. Up to and during the Civil War the only whisky of commerce was the purified product of rectifiers and blenders, such as the Hellmans made. The distiller's product was crude "raw" whisky, and the small farm distilleries of Woodford County had a local trade. Not till the 70's did distillery brands come into use in Kentucky.

## No Diverse Citizenship.

All the parties to the present controversy are residents and citizens of Kentucky. No diversity of citizenship exists. Federal jurisdiction, therefore, depends solely upon the registration pleaded in the bill.

# SPECIFICATIONS OF ERROR.

I.

The Sixth Circuit Court of Appeals erred in not holding that the former decree had adjudged the issue of priority of adoption of the trade-mark "Old Crow" in favor of the Hellmans and against Gaines, and in not holding that by reason thereof Gaines was not entitled, as against the Hellmans, with whom Rock Spring is in privity, to any trade-mark rights in or to these words upon whisky.

The priority of adoption thus adjudged was fatal to Gaines' present suit and was an insuperable barrier to Gaines' registration under the Act of 1905.

The Sixth Circuit Court of Appeals "interpreted" the Eighth Circuit Court of Appeals' decision to mean that Gaines was the first appropriator of the words "Old Crow", and not the Hellmans, and that the Hellmans had adopted the mark in bad faith. In point of fact, the Eighth Circuit Court of Appeals had found just the opposite, namely, that the Hellmans were the first appropriators and that the Hellmans had adopted and used the words in good faith.

#### II.

The Sixth Circuit Court of Appeals erred in "interpreting" the Eighth Circuit Court of Appeals' decision and judgment as denying relief to Gaines upon the ground that Gaines, as prior appropriators, had been guilty of laches in delaying to assert exclusive rights against the Hellmans in their use of the mark upon blended whisky. In point of fact, the Eighth Circuit Court of Appeals found that the difference in the two kinds of whisky cut no figure in the case at all and placed its decision squarely on the ground of Hellmans' priority of adoption.

#### III.

The Sixth Circuit Court of Appeals erred in refusing to hold that Gaines' 1909 registration, upon which Federal jurisdiction in this case alone depends, created no right whatever under the express terms of the Federal trade-mark statute, in view of the fact that at the time said application was prepared, verified and filed Gaines had full knowledge of the fact that "another corporation (the Hellmans) had the right to use the same mark in the United States on goods of the same descriptive qualities."

Whether the Hellmans' right of use extended to all whisky or to blended whisky only, whether it included all of the United States or only a portion of the United States, such outstanding right was, under the statute, fatal to Gaines' registration and to the maintenance of the present suit.

#### IV.

By reason of the misleading statements contained in Gaines' application for registration, by reason of the misleading statements contained in its verified bill of complaint, by reason of Gaines' refusal, under advice of counsel, to respond to letters of inquiry addressed by Rock Spring to Gaines during the pendency of Gaines' application for registration, and by reason of Gaines' other unlawful conduct in the premises, Gaines is not in equity with clean hands and is entitled to no relief in a court of equity.

# The Issues in This Case Involve the Correct Application of the Principle of Res Judicata.

The errors specified center around the doctrine of res judicata and may be summarized in the question:

Was the final judgment in the former suit rendered upon the merits and did it determine the vital issue of priority of adoption and use in good faith in favor of the Hellmans, and, if so, shall that judgment as against Federal registration sought and secured exparte for the same mark subsequent to the rendition of the former judgment, be given full force and effect in this suit brought by the same complainant against the privies of the former defendants?

# POINTS AND AUTHORITIES.

I.

The former judgment is a complete bar to this suit.

- (a) Privity is established between Rock Spring and the Hellmans.
- (b) The subject-matter is the right of Gaines to use the words Old Crow as a trade-mark upon whisky to the exclusion of the Hellmans and those claiming under them.

The cause of action remains the same, notwithstanding the narrowing of the claim in the second suit.

Bigelow v. Winsor, 1 Gray 299; Dowell v. Applegate, 152 U. S. 327; Last Chance M. Co. v.Tyler M. Co., 157 U.S. 683.

The pursuit of different means or a new theory to secure the same end does not constitute the second suit a different cause of action.

Hubbell v. U. S., 171 U. S. 203; Calaf v. Calaf, 232 U. S. 371; Green v. Bogue, 158 U. S. 478; Northern Pac. Ry. v. Slaght, 205 U. S. 122; U. S. v. Cal. and Or. Land Co., 192 U. S. 355; Werlein v. New Orleans, 177 U. S. 390.

(c) The thing adjudged in the former suit was priority of adoption and use in good faith by the

Hellmans of the mark complained of and the consequent inability of Gaines to interfere with the right of the Hellmans to use the mark.

U. S. v. B. & O. R. R. Co., 229 U. S. 244; Lessee of Parrish v. Ferris, 2 Black 606; Montezuma Canal v. Smithv. C., 218 U. S. 371; Gould v. E. & C. R. R. Co., 91 U. S. 526.

(d) The former judgment was rendered by a competent court, on the merits, and was final, notwithstanding the fact that there was no right of appeal to this court.

The Johnson Co. v. Wharton, 152 U. S. 252.

(e) The prior judgment is fatal to the present suit as an estoppel by judgment to question the fact of priority of adoption and use of the mark in good faith by the Hellmans, as to the right of the Hellmans to use the mark free from interference by Gaines, and as to each and every other fact in issue and determined by the Eighth Circuit Court of Appeals, as well as each and every claim that Gaines put forward or might have put forward in the former suit.

Southern Pacific Ry. v. U. S., 168 U. S. 1; Nalle v. Oyster, 230 U. S. 164; New Orleans v. Citizens' Bank, 107 U. S. 371; Outram v. Morewood, 3 East. 346; Aurora City v. West, 7 Wall. 82, 103. Lumber Co. v. Buchtel, 101 U. S. 638; Stockton v. Ford, 18 How. 418; Kessler v. Eldred, 206 U. S. 285.

II.

The Sixth Circuit Court of Appeals, in interpreting the former decree by "revising" the evidence and making a new finding of facts different from those found by the Eighth Circuit Court of Appeals, and then considering the opinion of that court in the light of the new facts so found, failed to apply approved tests to determine the thing adjudged.

(a) Facts found can not be changed. The judicial power is incompetent in a subsequent case to revise the evidence upon which a former decree was rendered,

Bank of U. S. v. Beverly, 1 How. 134; Last Chance M. Co. v.Tyler M. Co., 157 U.S. 683.

Or retry the case, even though all the evidence be preserved in the record.

Franklin County v. German Bank, 142 U. S. 93.

(b) The nature and extent of the former decree is not to be determined by separating parts and taking isolated passages of the opinion rendered.

> Vicksburg v. Henson, 231 U. S. 259; Deposit Bank v. Frankfort, 191 U. S. 499; Fayerweather v. Ritch, 195 U. S. 307; Durant v. Essex Co., 7 Wall. 107.

(c) The correct method of interpreting the decree is to examine the issues made and intended to be submitted and what the decree was intended to accomplish.

Graham v. Railroad Co., 3 Wall. 704; Campbell v. Rankin, 99 U. S. 261; Young v. Block, 7 Cranch. 565; Packet Co. v. Sickles, 24 How. 333; Vicksburg v. Henson, 231 U. S. 259; Last Chance M. Co. v.Tyler M. Co., 157 U.S. 683; Railroad Co. v. Schutte, 103 U. S. 118; Hubbell v. U. S., 171 U. S. 203.

(d) The former judgment will be upheld, even though the Court in the second suit may question the correctness of the conclusion reached in the first.

Case v. Beauregard, 101 U. S. 688; Gunter v. Atlantic Coast Line, 200 U. S. 273; Goodrich v. City of Chicago, 5 Wall. 566; Goodrich v. City, 10 Fed. Cas. 5,542, p. 604; Jeter v. Hewitt, 22 How. 352; Elliott v. Peirsol, 1 Pet. 328; Hubbell v. U. S., 171 U. S. 203; Kessler v. Eldred, 206 U. S. 285.

### III.

The thing adjudged in the former case as found by the Sixth Circuit Court of Appeals was not the thing adjudged by the Eighth Circuit Court of Appeals.

(a) Laches by Gaines as prior appropriators. This was not and could not have been adjudged by the Eighth Circuit Court of Appeals, for that Court found

the Gaines use began in 1870 and the Hellman use in 1862.

An adverse decree on the merits will not be interpreted to mean withholding relief because of "laches".

Baker v. Cummings, 181 U. S. 117.

Laches was urged before the Eighth Circuit Court of Appeals, but only in connection with the contention of the Hellmans, that in any event, even if the Court should find against them on the ground of priority, nevertheless Gaines, by reason of its laches, was not entitled to an accounting. That Court found the issue of priority in favor of the Hellmans.

If the Eighth Circuit Court of Appeals had found that *Gaines* had been the first appropriator and as such had been guilty of laches, it would have sustained the injunction while denying an accounting.

Menendez v. Holt, 128 U. S. 514; McLean v. Fleming, 96 U. S. 245.

(b) The difference between straight and blended whisky. This difference was before the Court in the Eighth Circuit case, but only in connection with the contention urged by the Hellmans (who at that time in company with all blenders were under severe attack by the straight whisky interests as not entitled to apply the term "whisky" to their product at all) that the Gaines product was unrefined and contained a large percentage of fusel oil, a deadly poison, whereas

the Hellman whisky was highly refined and of superior excellence.

The Eighth Circuit Court of Appeals found that this difference did not affect the case.

A party having the right by reason of priority of adoption to use a mark upon an article in a class, has the right to use it on all articles in that class, even as against one who subsequently applies the mark to an article on which the original appropriator's mark had not theretofore been used.

Hubbell v. U. S., 171 U. S. 203; Layton Pure Food Co. v. Church, 182 Fed. 35; Collins Co. v. Oliver Ames & Co., 18 Fed. 561; Amer. Tobacco Co. v. Polacsek, 170 Fed. 117; Carroll v. Ertheiler, 1 Fed. 688; Florence Mfg. Co. v. Dowd, 178 Fed. 73; White v. Miller, 50 Fed. 277; Worden v. Cal. Fig Syrup Co., 187 U. S. 516; Dec. of Pres. Taft, "What is Whisky?", Dec. 27, 1909.

- (c) Declining to insist upon affirmative relief under the cross-bill before the Eighth Circuit Court of Appeals, did not diminish the verity of the facts found by that Court.
- (d) The Sixth Circuit Court of Appeals' decision was colored by the erroneous assumption that present conditions in the manufacture and sale of whisky had always existed, and as a result that court found

essential issues diametrically opposite to those found by the Eighth Circuit Court of Appeals.

Dec. of Pres. Taft, "What is Whisky?", Dec. 27, 1909;

U. S. v. Eight Barrels of Whisky, 25 Fed. C. 15028, p. 982;

Act July 20, 1868, 15 Stat. 125; Act April 10, 1869, 16 Stat. 41, 42.

#### IV.

Under the Federal Trade-Mark Act registration is denied to a mark owned and in use by another and appropriated to merchandise of the same descriptive qualities, or which so nearly resembles such a mark as to be likely to cause confusion or mistake in the mind of the public or deceive purchasers.

A verified application, stating that to the best of affiant's knowledge and belief no one else has the right to use such a mark in the United States must be filed in order to create any rights whatever under the act.

Gaines filed such an affidavit after the conclusion of the Eighth Circuit litigation and made no mention of the prior judgment or the Hellmans' rights.

(a) Federal registration creates no new right or title.

Waldes v. Int. Mfrs. Agency, 237 Fed. 502; U. S. v. Braun, 39 Fed. 775; Stephano Bros. v. Stamatopoulos, 238 Fed. 89; Dyer Quarry Co. v. Schuylkill S. Co., 185 Fed. 557;

Hennessy v. Braunschweiger, 89 Fed. 664;

Steinwender-S. Coffee v. Nat. Gro. Co., 44 App. D. C. 493;

Act Feb. 20, 1905, 33 Stat. 724, Secs. 2, 5, 7, 9, 16; Act of Mar. 3, 1881, 21 Stat. 503, Sec. 7.

(b) The application, though narrowed to "straight bourbon and rye whisky", was, in view of the former judgment, contrary to the statute and the registration creates no rights in Gaines.

Act Feb. 20, 1905, 33 Stat. 724, Sec. 2, Sec. 5;

Anglo-Am. Inc. L. Co. v. Gen. El. Co., 43 App. D. C. 385;

Ky. D. & W. Co. v. Old L. C. D. Co., 31 App. D. C. 223;

Phoenix Paint & Var. Co. v. Lewis, 32 App. D. C. 285;

Walter Baker v. Harrison, 32 App. D. C. 272;

N. Wolf v. Lord & Taylor, 41 App. D. C. 515;

Fishbeck S. Co. v. Kleeno Mfg. Co., 44 App. D. C. 6;

Canton C. & S. Co. v. Con. Car H. Co., 44 App. D. C. 491;

Act Mar. 3, 1881, 21 Stat. 503, Sec. 2;

Act July 8, 1870, 16 Stat. 210, Sec. 17;

Seubert v. Senataella & Co., 36 App. D. C. 447; Church Co. v. Russ, 99 Fed. 276.

(c) The registration is invalid for the reason that the Hellman use is "upon merchandise of the same descriptive properties", whether their right extends to all whisky or to blended whisky only. White v. Miller, 50 Fed. 277;

Collins v. Ames, 18 Fed. 561;

Simplex E. H. Co. v. Gold C. H. & L. Co., 43 App. D. C. 28;

Bass v. Feigenspan, 96 Fed. 206;

P. J. Bowlin L. Co. v. Eager, 148 O. G. 571;

Amer. Stove Co. v. Detroit Stove Co., 3 App. D. C. 304;

Morgan's Sons Co. v. Ward, 152 Fed. 690;

Burrell v. Simplex E. H. Co., 44 App. D. C. 452;

Walter Baker v. Harrison, 32 App. D. C. 272;

Fishbeck S. Co. v. Kleeno M. Co., 44 App. D. C. 6; In re Independent Brew. Co., 39 App. D. C. 118.

The Hellman use is "in the United States", whether their right to use it is unlimited or is confined to the South and Southwest, and as against this use, under the terms of the statute, the registration creates no right.

Act Feb. 20, 1905, 33 Stat., Sec. 2; Act Feb. 18, 1909, 35 Stat. 627; O'Rourke v. Central City S. Co., 26 Fed. 576.

(d) The registration was fraudulently obtained. Gaines, under the terms of the statute, is precluded from maintaining this suit.

Act Feb. 20, 1905, 33 Stat. 729, Sec. 21.

#### V.

# Gaines Is Not in Equity With Clean Hands.

By reason of the affidavits it relies on, and by reason of its conduct toward Rock Spring during the pendency of its registration proceedings, Gaines is entitled to no relief in a court of equity.

Act Feb. 20, 1905, 33 Stat. 729, Secs. 19, 21, 23; Worden v. Cal. Fig Syrup Co., 187 U. S. 516; Gaines v. Turner-Looker Co., 204 Fed. 553; Manhattan Med. Co. v. Wood, 108 U. S. 218.

#### VI.

#### In Conclusion.

The registration is void. To hold otherwise would be to give the Registration Act unconstitutional interpretation.

Fifth Amendment to U.S. Constitution.

There is no federal jurisdiction.

Leschen Rope Cø. v. Broderick, 201 U. S. 116.

The decree of the Sixth Circuit Court of Appeals should be reversed with directions to affirm the decree of the District Court.

Kessler v. Eldred, 206 U. S. 285;
Hopkins v. Lee, 6 Wheat. 109;
Lyon v. Perin & Gaff Mfg. Co., 125 U. S. 698.
Dec. Pres. Taft, "What is Whisky?", Dec. 27, 1909;
24 Op. Att'y-Gen'l, 695.

# ARGUMENT.

We have set out at some length the pleadings and the proceedings and the findings of the courts in the former suit as well as in the present in order to present fully and fairly the questions involved and the pertinent facts upon which they depend, but the real dispute is over the correct application of the doctrine of res judicata to the present suit and the present registration.

To adduce authorities upon the conclusiveness of final judgments when invoked in subsequent controversies between the same parties or their privies over the same subject-matter, would be an altogether gratuitous task. Yet the boldness of the present attempt to defeat the rule and by indirection deprive a successful litigant in a former suit of the benefits flowing from the judgment then rendered, warrants an examination of decided cases in which this Court has dealt with attempts of that character in the past.

I.

# The Former Judgment Is a Bar to Gaines' Present Suit.

(a) The former judgment enures to the benefit of Rock Spring by reason of Rock Spring's privity with the defendants in the former suit.

Rock Spring has disclaimed all interest in this

controversy save as agent of the Hellman Distilling Co. to carry out their contract for bottling the Hellman whisky in the warehouse at Owensboro, and the Hellman Distilling Company is the successor in business of the original defendants in the Eighth Circuit case and as such was brought in by supplemental bill and enjoined (Rec., pp. 117-124). The final decree in the Eightl Circuit case operated in their behalf and dissolved the injunction which had been rendered against them (Rec., p. 125). The Sixth Circuit Court of Appeals and the trial court at Owensboro both found that privity had been established. Gaines, in its second petition for certiorari to this Court in the Eighth Circuit Court of Appeals case, presented since your petitioners' application herein was granted, has asserted and relied on the privity of Rock Spring with the Hellmans, defendants in the Eighth Circuit case (Petition, pp. 3-4, No. 905, October Term, 1915, 241 U.S. 668). Privity thus found by the courts and relied on by Gaines is not now open to question.

(b) The Subject-Matter of Each of These Two Suits Is the Right of Gaines to Use the Words Old Crow as a Trade-Mark Upon Whisky to the Exclusion of the Hellmans or Those Claiming Under Them.

The same words "Old Crow" are claimed by Gaines as its exclusive and sole property in this suit as in the former suit. The use of the same infringing mark is sought to be enjoined in this suit as in the other, namely, Hellman's figure of a crow and the words "Crow" or "Old Crow". The right of Gaines as sole and exclusive owner to enjoin the Hellmans from using the mark was vigorously urged by Gaines, adjudged against Gaines and in favor of the Hellmans in the former suit. That adjudication was absolutely and unreservedly in favor of the Hellmans on the merits. The issue fought throughout that controversy was the issue of priority of adoption in good faith.

The present suit is based on the same mark, although in the meantime it has been registered under the Federal Trade-Mark Act and the use claimed has been narrowed from "whisky" to "straight bourbon and rye". But although registration is made *prima facie evidence* of title, it creates no new rights whatever, except by way of jurisdiction in the federal courts where diversity of citizenship does not exist (as here).

Narrowing the claim of title is not effective to avoid the force of a prior judgment holding that such title does not rightfully exist at all.

Attempts to employ such means to defeat a prior judgment have uniformly been discountenanced by the courts.

In a Massachusetts case where a decree adjudging

that certain conveyances were not in fraud of creditors was pleaded as a bar of an action of trover by assignees for the same property against one of the defendants in the equity suit, Chief Justice Shaw (Bigelow v. Winsor, 1 Gray 299, 302), said:

"It is no objection that the former suit embraced more subjects of controversy than the present; if the entire subject of the present controversy was embraced in it, it is sufficient; it is res judicata."

This Court, in applying the doctrine of res judicata, has not hesitated to hold that the whole includes the part. After having suffered defeat as to the entire claim asserted in a suit, a party may not carve out a portion or segment of that claim and again urge it as a new cause of action.

In a case that came to this Court from the Supreme Court of Oregon it appeared that that court had construed a decree rendered by the Federal Court in Oregon as permitting the second suit to be prosecuted on the ground that it was a lesser and different claim.

In considering and distinguishing the authorities there relied on Mr. Justice Harlan (Dowell v. Applegate, 152 U. S. 327, 344-6) said:

"The present suit is not a second one between the same parties, upon a different claim or demand. It seeks, by additional evidence, to reopen the controversy that arose, and was determined, in the suit in the Federal Court, as to the right of Dowell to have all the lands described in his bill subjected to his claims. \* \* \* This case, consequently, comes within the rule that 'a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented.' \* \* \*''

In the present case Gaines now relies upon a restricted claim, namely, upon straight bourbon and rye only, and upon a title dating from 1835. The restricted claim was within the issue in the former suit and the date now claimed was there abandoned. Neither of these devices is effective to relieve against the former judgment.

"It is suggested by counsel," said Mr. Justice Brewer, speaking for the Court (Last Chance Mining Co. v. Tyler Mining Co., 157 U. S. 683, 693, 695), "that the abandonment by the owners of the Tyler location of any claim to the disputed territory was in effect a waiver of the adverse claim within the language of the statute, on the happening of which the right of the land office to proceed was restored. \* \* \*"

"We are clearly of the opinion that this can not be tolerated, that the judgment was in all respects regular, that it was conclusive as to the particular ground in controversy, and binding by way of estoppel as to every fact necessarily determined by it, and that priority of location was one fact so determined."

In the present case Gaines, after exhausting all efforts to overturn the adverse finding of the Eighth Circuit Court of Appeals upon the issue of priority of adoption of the words "Old Crow" as a trademark upon whisky, seeks to escape the effect of that judgment by filing a new registration waiving Gaines' right to use the mark on blended whisky and at the same time in effect claiming that the Hellmans had waived their right to use the mark on straight bourbon and rye.

# Employing Different Means to Achieve the Same End Is Ineffective to Defeat a Former Judgment Covering the Same Subject-Matter.

In Hubbell v. U. S., 171 U. S. 203, 209 (opinion by Mr. Justice Brown), applying the rule to a patent case, it was said:

"But even if a somewhat different theory or state of facts were developed on the trial of the second case, the former judgment would not operate the less as an estoppel, since the patentee can not bring suit against an infringer upon a certain state of facts, and, after dismissal of his action, bring another suit against the same party upon the same facts and recover on a different theory. The judgment in the first action is a complete estoppel in favor of the successful party in a subsequent action on the same state of facts."

Even though in a subsequent suit a different theory is put forward, yet if the "differing allegations are simply different means to reach the same result" as that which was closed by the decree in a former suit between the same parties "the true principle" has been declared by this Court to be that a judgment or decree bars all grounds for the relief sought (Calaf v. Calaf, 232 U. S. 371, 373-4).

In Green v. Bogue, 158 U. S. 478, 502, this Court, speaking through Mr. Justice Shiras, said, in passing upon a former decree that had found a charge of fraud to be without foundation:

"But the facts averred and relied on in the State Court are substantially these now alleged, and we do not deem the fact that a different form or measure of relief is now asked, deprives the defendants in error of the protection of the prior findings in their favor."

In Northern Pacific Railway v. Slaght (205 U. S. 122, 130-3, opinion by Mr. Justice McKenna), in ruling against the railway's contention that "not

only was the right now relied on not asserted, but that it could not have been proven in the former suit", this Court quoted with approval Herman on Estoppel, Sec. 92, and aptly asked

"If this (asserting a new title after being defeated on the merits on a claim of the entire title) may be done, how often may it be repeated? If defeated upon the new title may plaintiff in error assert still another one, either in its predecessor or in itself, and repeat as often as it may vary its claim? The principle of res judicata and cases enforcing and illustrating that principle declare otherwise."

It may well be asked how often, in how many different ways will Gaines undertake to assert an exclusive title as against the Hellmans to the words "Old Crow" as a trade-mark for whisky.

In U. S. v. Calif. and Ore. Land Co., 192 U. S. 355, 358, reversing a decision which had held a plea of former adjudication bad, this Court, speaking through Mr. Justice Holmes, said:

"It is said, to be sure, that the United States now is suing in a different character from that in which it brought the former suit. There it sued for itself; here it sues on behalf of the Indians. But this is not true in any sense having legal significance.

"Here the plaintiff is the same person that

brought the former bill, whatever the difference of the interest intended to be asserted. Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means; that is to say, by evidence that the lands originally were excepted from the grant. But in this, as in the former, it seeks to establish its own title to the fee."

And in that same case it was further said that even though it may be the law of Scotland that a judgment is not a bar to a second attempt to reach the same result by a different medium concludendi, nevertheless the whole tendency of our decisions is to require a plaintiff to try his whole case at once.

In a suit by the City of New Orleans for the purpose of recovering a certain lot of ground, the action of the Supreme Court of Louisiana in excluding a former judgment offered by the defendant denying relief under the city's bill to enjoin the sale of said land to defendant's grantor, was reversed by this Court (Werlein v. New Orleans, 177 U. S. 390, 400, 401, 403), in an opinion by Mr. Justice Peckham, wherein it was said:

"It is true that in the chancery suit the thing demanded was an injunction restraining Klein from selling the property, while in this suit it is a decree declaring the sale effected by Klein absolutely null and void. But the two demands, though different in terms, are in substance the same, and are founded upon the same cause of action, viz, the total illegality of the sale, whether threatened or accomplished."

On the main issue now in controversy, namely, Gaines' right to exclude the Hellmans, no new facts have developed whatever. The registration in the Patent Office by Gaines, the application of the Hellman label to bottles by Rock Spring, have not the slightest bearing on the claim of Gaines to exclusiveness of title or the adjudged rights of the Hellmans under which they are entitled to proceed free from interference by Gaines. All those facts were in evidence in the former case, and the judgment there rendered is final.

(c) The Inability of Gaines to Exclude the Hellmans From Using, and the Right of the Hellmans to Use the Mark Free From Interference by Gaines, by Reason of the Priority of Adoption and Continuous Use in Good Faith of the Mark Complained of, Was the Thing Adjudged in the Former Suit.

A reference to the averments of the bill in the Gaines-Hellman case reveals that Gaines then claimed that it was the sole and exclusive owner of the words OLD CROW as a trade-mark for whisky by reason of priority of adoption of said words in 1867 and continuous use thereafter upon whisky of its own

distillation and that said words were open for adoption as a trade-mark in 1867, when Gaines adopted them. The bill prays an injunction against the Hellmans from using the words on any liquor not of Gaines' manufacture (Rec., pp. 209-12).

The answer specifically denies Gaines' claimed priority and asserts prior adoption and use by the Hellmans (Rec., pp. 213-222). Gaines vigorously denied the Hellmans' claim of priority and challenged any such prior use as fraudulent, stealthy, secret and deceitful (Rec., pp. 240-2).

Judge Dyer's opinion in the trial court in the Eighth Circuit disposing of the whole case on the merits (Rec., pp. 666-672) is devoted to the discussion of the issue of priority of adoption by the Hellmans and the counter issue raised by Gaines, namely, the good faith of the Hellmans in adopting and using their mark. Finding the issue of good faith against the Hellmans, Judge Dyer determined the issue of priority in favor of Gaines and entered a decree granting the relief prayed (Rec., pp. 652-3).

The thing adjudged by Judge Dyer was priority of adoption, and he adjudged it in favor of Gaines.

An examination of the opinion of the Eighth Circuit Court of Appeals (Rec., pp. 975-982) discloses that that Court carefully stated the substance of the pleadings, showing clearly that the issue of priority of adoption was raised, and considered the evidence in

the light of the issue raised, and adjudged priority of adoption against Gaines and in favor of the Hellmans, at the same time determining that the Hellmans had acted in good faith in adopting and using the mark.

The briefs before the Eighth Circuit Court of Appeals were largely devoted to the issue of priority.

If further light were required as to the thing adjudged by the Eighth Circuit Court of Appeals, reference might be made to Gaines' first petition to this Court for *certiorari*, wherein it is said:

"The judgment of the Circuit Court was reversed on the *sole ground* that the respondents had used the words 'Crow' and 'Old Crow' before petitioner had adopted the words 'Old Crow' as a trade-mark" (Rec., p. 202; Petition for *Certiorari*, Gaines v. Kahn, No. 455, October Term, 1908).

Reference to the grounds assigned by Gaines in that petition in urging a review of the former judgment on certiorari, clearly establishes identity of the thing adjudged in that case with the subject-matter of the present suit. Such reference to errors assigned on appeal in a former suit has been approved by this Court as proper in determining the identity of the cause of action in the former case with that in the instant case U. S. v. B. & O. R. R. Co., 229 U. S. 244, 253-4 (opinion by Mr. Chief Justice White).

Gaines, in its brief before the Sixth Circuit Court of Appeals, copied bodily, in haec verba, the statement of facts and argument from its brief before the Eighth Circuit Court of Appeals (in some instances without making apt changes to fit the Sixth Circuit case). Stronger evidence could scarcely be found that "the precise questions" in the first suit were the very ones involved in the second.

The rule was announced by Mr. Justice Nelson, speaking for this Court in Lessee of Parrish v. Ferris, 2 Black 606, 608-9-10, after reviewing the issues in an ejectment suit which involved the proper construction of a will, as follows:

"It will be seen from the above statement of the issue that the precise question in the former suit between these parties, or those under whom they claim, was involved and decided that is presented in the present one; and, further, that the decision of the Court could not have been rendered in favor of the defendants in that suit without determining it."

The case of Montezuma Canal v. Smithville Canal (218 U. S. 371, 382-4, opinion by Mr. Justice White) was reversed by this Court because the Supreme Court of Arizona had failed to recognize the binding force of a decree in a former suit establishing irrigation rights in favor of the Montezuma Canal, but had upheld a claimed prior appropriation of water

rights not recognized by the former judgment, and in so doing had created a direct conflict with the former judgment.

The Eighth Circuit Court of Appeals' decision was not rendered, and from the review of the evidence and findings of fact which that Court made, could not have been rendered, without deciding the issue of priority of adoption by the Hellmans in good faith against Gaines and in favor of the Hellmans. Gaines is concluded by that finding in this case.

#### (d) The Former Judgment Was on the Merits and Is Final. The Judgment Relied on Remains in Full Force and Effect, Unmodified and Unreversed.

The fact that there was no right of appeal to this Court from the Eighth Circuit Court of Appeals' final decision furnishes no basis for disregarding the conclusiveness of that decision. Gaines has now made two attempts to have the record in the Eighth Circuit Court of Appeals case certified up to this Court. And because there was not and could not be any showing that that case came within the rule justifying the granting of the writ, Gaines has urged that this Court should retry the former case. The contention is unsound.

In a case where it was asserted that the former judgment was not a bar to the later suit because of the fact that the amount in controversy was too small to entitle the losing party to an appeal to the United States Supreme Court, Mr. Justice Harlan, speaking for this Court (*The Johnson Co. v. Wharton*, 152 U. S. 252, 256), said:

"Does the principle of res judicata, in its application to the judgments of courts of general jurisdiction, depend, in any degree, upon the inquiry whether the law subjects such judgments to re-examination by some other court? Upon principle and authority these questions must be answered in the negative."

(e) The prior judgment is fatal to the present suit as an estoppel by judgment to question the fact of priority of adoption and use of the mark in good faith by the Hellmans, as to the right of the Hellmans to use the mark free from interference by Gaines, and as to each and every other fact in issue and determined by the Court, as well as each and every claim that Gaines put forward or might have put forward in the former suit.

A particular fact in issue in the Eighth Circuit Court of Appeals case which was decisive of that case and directly determined by the Eighth Circuit Court of Appeals was the issue of priority of adoption. By reason of priority of adoption the Hellmans were adjudged to have the right to use the words "Old Crow" in connection with the figure of a crow as a trade-mark upon whisky free from inter-

ference by Gaines. Gaines' bill seeking to exclude the Hellmans from using the words "Old Crow" "upon any liquor not made by Gaines" was dismissed for want of equity. The issue of priority of adoption having once been determined against Gaines and in favor of the Hellmans may not again be reopened by Gaines in a suit against the Hellmans or their privies.

This Court, in an opinion by Mr. Justice Harlan (Southern Pacific Ry. v. U. S., 168 U. S. 1, 48), reviewing the effect of two former adjudications against the Southern Pacific Railroad affecting certain lands, laid down the rule as follows:

"The general principle announced in numerous cases is that a right or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery can not be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once determined, must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

In that case different lands were involved in the second case (168 U. S. 1) from those in the first. But both cases turned upon the effect to be given to certain maps filed by the Atlantic & Pacific Railway

Company in the Interior Department. If they were valid maps of definite location, the defense in the second case must fail. The Court in the first case distinctly found that the maps were valid maps of definite location.

That judgment rendered in the first case relied upon in the second case was held to be binding upon the Southern Pacific and that company was not permitted to question it.

Said Mr. Justice White, in a tax case (City of New Orleans v. Citizens' Bank of La., 167 U. S. 371, 396):

"The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies. This is the elemental rule stated in the text-books and enforced in many decisions of this Court."

In a libel suit against the members of a board of education, based upon charges of incompetency, the plea of res judicata was held good, where it appeared that the issue of plaintiff's competency as a teacher had already been submitted in a mandamus proceeding brought by the plaintiff as relator against the

board. Mr. Justice Pitney, speaking for this Court (Nalle v. Oyster, 230 U. S. 165, 180), said:

"The established rule is that if the parties in the former action are the same as in the present, then every matter and question of fact and of law that was necessarily involved in the consideration and determination of the former issue shall be conclusive upon the present."

In Outram v. Morewood, 3 East 346, cited by Mr. Justice Field in the majority opinion and by Mr. Justice Clifford in the dissenting opinion in Cromwell v. Sac County (94 U. S. 351, 353, 368), Lord Ellenborough laid down the rule as follows:

"And it is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact, which, having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been in such issue joined, solemnly found against them."

In Aurora City v. West, 7 Wall. 82, 103 (opinion by Mr. Justice Clifford), it was said:

"The better opinion is that estoppel, where the judgment was rendered upon the merits, whether on demurrer, agreed statement or verdict, extends to every material allegation or statement, which, having been made on one side and denied on the other, was at issue in the cause and was determined in the course of the proceedings."

In a patent case the two parties, Eldred and Kessler, each owned patents on cigar lighters. Eldred, who owned the Chambers patent, brought suit against Kessler on the ground that Kessler's cigar lighters infringed each and all the claims of the Chambers patent. This Court, speaking through Mr. Justice Moody (Kessler v. Eldred, 206 U. S. 285, 288), said:

"On the issue thus joined there was final judg ment for Kessler. This judgment, whether it proceeds upon good reasons or upon bad reasons, whether it was right or wrong, settled finally and everywhere, and so far as Eldred, by virtue of his ownership of the Chambers patent was concerned, that Kessler had the right to manufacture, use and sell the electric lighter before the Court. The Court having before it the respective rights and duties in the matter in question of the parties to the litigation, conclusively decreed the right of Kessler to manufacture and sell his manufactures free from all interference from Eldred by virtue of the Cham-

bers patent, and the corresponding duty of Eldred to recognize and yield to that right, everywhere and always."

In Lumber Co. v. Buchtel, 101 U. S. 638-9 (opinion by Mr. Justice Field) it was said:

"This finding (that no false representations had been made) having gone into the judgment, is conclusive as to the facts found in all subsequent controversies between the parties in the contract. Every defense requiring the negation of this fact is met and overthrown by that adjudication."

Every right asserted by Gaines which requires the negation of Hellman's priority of adoption and continuous use in good faith of the same mark upon whisky made and sold by the Hellmans, is met and overthrown by the Eighth Circuit Court of Appeals finding and decision.

To employ an expression aptly used by Mr. Justice Nelson in Stockton v. Ford, 18 How. 418, Gaines is seeking "to agitate" again and to reopen the questions determined by the Eighth Circuit Court of Appeals, namely, the right of the Hellmans to use the words "Old Crow" in connection with the figure of a crow upon whisky ad libitum (Rec., p. 980), free from interference by Gaines by reason of the Hellmans' prior adoption and continued use in good faith.

The Sixth Circuit Court of Appeals intimates that while in the former case, under the then pleadings Gaines could claim back to 1867, nevertheless now Gaines can claim title back to 1835 (Rec., p. 1021). That, however, under the authorities, can not be done. Nor should there be any desire to permit Gaines to do so.

It is no hardship on Gaines to hold that firm strictly to the date 1867 as the utmost limit to which it can trace title of any kind, and the year 1870 as the year in which it began the use of the words "Old Crow".

According to all the evidence 1867 is the true date in which the house of Gaines was established. The Eighth Circuit Court of Appeals so found and further found that Gaines has no privity of title or estate, by contract or otherwise, with any one prior to that year.

Gaines chose its ground in the amended bill in the Eighth Circuit litigation with the utmost deliberation and with full knowledge of the defense of the Hellmans. Early in 1904 Gaines' then counsel, the late E. S. Robert, exchanged with the late Judge Jacob Klein, then of counsel for the Hellmans, affidavits looking to a possible amicable adjustment of the Gaines-Hellman controversy then brewing (Rec., pp. 496, 636-7). The affidavits of Heron and Liemke which were given in March, 1904 (introduced in this record on cross-examination by Gaines' counsel [Rec., pp. 495-6 and 506-7]) show use of the mark by the Hellmans prior to 1867. It is only fair to state that

affidavits of other witnesses, including that of the late A. M. Hellman, were delivered to Gaines' counsel at this time (March, 1904).

Thereafter, on the 5th day of May, 1904, Gaines, by its present counsel, Mr. Hopkins, filed a new application in the Patent Office for registration, claiming title and use from the year 1835. Registration was issued June 28, 1904 (Rec., p. 696). Thereafter, in September, 1904, Gaines filed in the State Circuit Court of the City of St. Louis a suit for damages against the Hellmans and claimed title from 1835 (Rec., p. 938). Thereafter, on the 6th day of October, 1904, while the said suit was still pending in the State Court, the deposition of Charropin, a witness for the Hellmans, was taken, setting forth in great detail the facts as to the Hellmans' use prior to 1867 (Rec., pp. 596-608). Thereafter, on the 11th of November, 1904, the State Court suit having been dismissed, the original bill in the Eighth Circuit litigation was filed, claiming title and use from 1835 (Rec., pp. 931-937). The year 1867 first occurs in the said original bill. It there appears in connection with the averment that from 1855 until 1867 William F. Mitchell continued the distillation of the whisky designated as "Old Crow" on Glenn's Creek and that on or about the 1st day of January, 1867, Gaines, Berry & Co. obtained possession of the distillery

where Mitchell had worked and continued to produce the same whisky (Rec., p. 932).

On the 12th day of December, 1904, on the urgent insistence of the late A. M. Hellman, one of the original defendants in the Eighth Circuit litigation, who was apprehensive lest some of the witnesses in the case, then well along in years, might die and their testimony be lost, depositions were begun, although the case was not only not then yet at issue, but time for pleading had not yet matured (Rec., p. 466). In the midst of the taking of these depositions (Rec., pp. 466, 488, 499) the late A. M. Hellman, on the 14th of December, 1904, died, and the benefit of his testimony was lost to the case (Rec., p. 207).

Exceptions in the nature of a demurrer were interposed and vigorously pressed before Judge Elmer B. Adams against the original bill, and said exceptions were, in part, sustained by Judge Adams, who held that Gaines "had failed to state any of the facts which by law secured to it the exclusive use of the words 'Old Crow' as a trade-mark" (Rec., pp. 662-664). Thereafter, on March 3d, 1905, with full knowledge of all the foregoing proceedings and facts, Gaines filed the amended bill in the Eighth Circuit case claiming title only from 1867, and that the words being then open for adoption as a trade-mark (Rec., pp. 208-212) were in 1867 adopted by Gaines. The averments in the amended bill apparently were drawn in an attempt to

follow closely the opinion of the Kansas City Court of Appeals in the case of W. A. Gaines & Co. v. E. Whyte Grocery Co., 107 Mo. App. 507.

But, as the Eighth Circuit Court of Appeals found, "the evidence, especially on the part of defendants in the case under review, is so materially different in character and effect from that in the case tried in the Jackson County Circuit Court (W. A. Gaines & Co. v. E. Whyte Grocery Co., 107 Mo. App. 570), as also in that of Gaines & Co. v. Leslie, 54 N. Y. Supp. 421, cited by complainant's counsel, as to render them of no controlling force on the facts involved in and the principles of law applicable to this case" (Rec., p. 981).

#### II.

# The Court Below Erred in Its "Interpretation" of the Former Judgment and in the Method Which It Employed to Ascertain the Thing Adjudged.

Apparently the Sixth Circuit Court of Appeals reexamined the evidence and made a new finding of facts, and in the light of the new facts thus found, the Eighth Circuit Court of Appeals' opinion was read and "interpreted". The facts thus found were like those found by Judge Dyer in the trial court in the Eighth Circuit and unlike those found by the Eighth Circuit Court of Appeals. Not unnaturally the result of the "interpretation" thus undertaken was to find as the "thing adjudged" something quite different from that which was actually adjudged by the former decree.

The method pursued by the court below was wrong. In the early case of Bank of U. S. v. Beverly, 1 How. 134, 149 (opinion by Mr. Justice Baldwin), this Court said:

"Whatever, therefore, our opinion might now be as to the facts adjudicated in the former case, the judicial power is incompetent to revise the evidence on which the decree was rendered on any ground now set up in the answer of the defendants or apparent in the present record, and they must be taken to be beyond all controversy in this or any future case between the same parties."

Mr. Justice Baldwin's language is almost prophetic of the very thing which the Sixth Circuit Court of Appeals has undertaken to do, for as surely as it is possible to do so, it has attempted to "review" and "revise" the evidence which was before the Eighth Circuit Court of Appeals, and with most startling results. Not without extreme difficulty would the Eighth Circuit Court of Appeals be able to recognize any considerable resemblance between the Sixth Circuit Court of Appeals' "interpretation" of the former decision, and the former decision itself.

In Last Chance Mining Co. v. Tyler Mining Co., 157 U. S. 683, 691, Mr. Justice Brewer said:

"The essence of estoppel by judgment is that there has been a judicial determination of a fact, and the question always is, has there been such a determination, and not upon what evidence or by what means was it reached."

But the Sixth Circuit Court of Appeals approached the problem of determining "the thing adjudged" by considering primarily the evidence in the former suit (Rec., p. 1014), a task of considerable proportions, since the evidence proper in that case included over four hundred pages and the exhibits nearly three hundred. It is not surprising that in restating that evidence the Sixth Circuit Court of Appeals found facts which the Eighth Circuit Court of Appeals found were not facts.

# Even Though All the Evidence Be Sent Up in the Record, It Is Improper to Retry the Former Case.

The Sixth Circuit Court of Appeals has in effect retried the Eighth Circuit Court of Appeals case on the record in that case which is in evidence in this. This Court has ruled adversely to such a course.

In Franklin County v. German Bank, 142 U. S. 93, 99, 100, 101, Mr. Justice Brown said:

"The defendant's position in this connection is, that as the entire record taken together shows that these bonds were void, this court ought not to treat the decree of the court below, adjudging them to be valid, as res judicata." \* \* \*

"But we know of no case which goes to the extent of holding that where a court having complete jurisdiction of the case has pronounced a decree upon a certain issue, such issue may be retried in a collateral action, even although the evidence upon which the case is heard is sent up with the record. If this were possible, then in every case where a judgment or decree is pleaded by way of estoppel, and the record shows the evidence upon which it was rendered, the court in which the estoppel was pleaded would have the power to retry the case, and determine whether a different judgment ought not to have been rendered."

### (b) The Nature and Extent of the Former Decree Is Not to Be Determined by Separating Parts and Passages of the Opinion Rendered.

The Sixth Court of Appeals frankly states the method it pursued (Rec., p. 1055):

"We intended only to determine what was the real thing decided in the former suit, and so what was the thing adjudicated; and it became necessary to separate as BEST WE COULD, those conclusions of the Court upon which its action was based, from those recitals of the

JUDGE WRITING THE OPINION, in some of which, at least, the other Judge sitting apparently did not concur. Further than this, we had neither the right nor the disposition to go."

Notwithstanding this assurance of the Sixth Circuit Court of Appeals, it seems clear that that court in effect really did go very much further. It has never been suggested, insofar as we are aware, until the Sixth Circuit Court of Appeals spoke, that the Eighth Circuit Court of Appeals' opinion and decision was not the opinion and decision of the Eighth Circuit Court of Appeals. The record clearly indicates that it was the Court that spoke and not the single Judge who wrote the opinion (Rec., p. 975).

In paragraph 5 of the Sixth Circuit Court of Appeals' opinion (Rec., p. 1020) that court also comments on the fact that only two Judges were on the Eighth Circuit Court of Appeals bench at the time the decision of that Court was rendered, stating that "the last paragraph" (of the Eighth Circuit Court of Appeals' decision) "indicates that the two Judges (only two sitting) did not unite in putting the decision on this ground." Insofar as the phrase, "did not unite" may be taken to mean that there was a division of opinion between the members of the Eighth Circuit Court of Appeals, there is nothing in the record to support such a view. Insofar as this observation of the Sixth Circuit Court of Appeals

may be construed as meaning to detract from the force, dignity or binding effect of the Eighth Circuit Court of Appeals' decision, it is not supported, either in law or in fact.

Under the Court of Appeals' act the decisions of a Circuit Court of Appeals composed of two Judges are as binding and effective as are those by a Circuit Court of Appeals when composed of three Judges (Act March 3, 1891, Secs. 2, 3, 26 Stat. 826-7).

In point of fact, when the case was called for hearing in the Eighth Circuit Court of Appeals, three Judges were sitting, but Judge Elmer B. Adams, having passed upon demurrers in the trial court, withdrew from the case, and in open court it was agreed between counsel that if the Court deemed it necessary, the case might be submitted to a third Judge on the printed record and briefs (Rec., p. 973). An opinion and decision by a court composed of Judge Walter H. Sanborn and Judge John F. Philips would be entitled to very great consideration, even if it were not, as in this case, by stipulation binding on the parties in controversy.

Even if evidence had been offered tending to show Judge Sanborn's non-concurrence in the findings of fact made by the Court, it would have been rejected (Fayerweather v. Ritch, 195 U. S. 307). The judgment is the judgment of the Court and is conclusive and binding in every respect upon every question in-

volved in the case (Durant v. Essex Co., 7 Wall 107). We are convinced that the verity imported by the record is true in fact, and that Judge Sanborn did unite with Judge Philips in the findings of fact as well as the conclusions of law and judgment rendered by the Court.

The "recitals" of the Judge writing the opinion are the "recitals" of Judge Sanborn just as much as they are the "recitals" of Judge Philips, but what is more to the point and is vital to this case, they are the "recitals" of the Eighth Circuit Court of Appeals. They are findings of fact. It is not permissible in considering the Eighth Circuit Court of Appeals' decision to cut off and completely sever the concluding paragraph of the opinion from the very careful review of the evidence and the finding of facts made in the body of the opinion. The conclusions of law at the end are the result of the findings of fact made by the Court in reviewing the case. In an equity case on appeal the Appellate Court will review the entire evidence, and while deferring to the findings of the Chancellor who passed on the case in the trial court, it will not be bound by his findings.

We are not specifically informed by the Sixth Circuit Court of Appeals as to what portion of the Eighth Circuit Court of Appeals' decision it regarded merely as "recitals of the Judge writing

the opinion," but the inference is that the entire review of the evidence and the findings of fact in the Eighth Circuit Court of Appeals' decision (Rec., pp. 975-981) were regarded by the Sixth Circuit Court of Appeals as such "recitals". This would leave as constituting "the conclusion of the Court upon which its action was based" the last paragraph of the Eighth Circuit Court of Appeals' opinion (Rec., pp. 981-982).

The Eighth Circuit Court of Appeals in considering the Hellman use of the words "Old Crow" in connection with the figure of a crow, states (Rec., pp. 977-980): "The evidence, without contradiction, establishes the following facts:" (And the facts so found are set out, showing use from 1862 on.) Is this a mere "recital of the Judge writing the opinion," or is it a finding of facts by a court of equity at the conclusion of a long and vigorously contested litigation? The Eighth Circuit Court of Appeals treated it as a finding of facts. Gaines, in two petitions for certiorari to this Court to review the judgment of the Eighth Circuit Court of Appeals has treated these "recitals" as findings of fact. (Petition for certiorari, W. A. Gaines & Co. v. Max Kahn, No. 455, October Term, 1908, pp. 15, 17, 18, 19; petition of W. A. Gaines & Co. v. Hellman Distilling Co. for certiorari, No. 902, October Term, 1915, United States Supreme Court, pp. 7-8.)

The Eighth Circuit Court of Appeals found the facts as to Gaines' adoption of the words "Old Crow" (Rec., pp. 976, 977, 980) showing use from 1870 only.

We submit that the findings of fact in the portions of the opinion of the Eighth Circuit Court of Appeals noted can not fairly be "separated" as mere "recitals of the Judge writing the opinion," but are findings of fact by the Court without which "the conclusion" would have no foundation, and that except for these findings, the original decree would not have been reversed, but the decision of Judge Dyer would have been affirmed as to the injunction, even though an accounting had been denied.

This Court, speaking through Mr. Justice Day, in Vicksburg v. Henson, 231 U. S. 259, 273, said:

"The nature and extent of the former decree is not to be determined by seizing upon isolated parts of it or passages in the opinion considering the rights of the parties, but upon an examination of the issues made and intended to be submitted and what the decree was really designed to accomplish."

In Deposit Bank v. Frankfort, 191 U. S. 499, 510, (opinion by Mr. Justice Day), it is said:

"When a plea of res judicata is interposed based upon a former judgment between the parties, the question is not what were the reasons

upon which the judgment proceeded, but what was the judgment itself, was it within the jurisdiction of the Court, between the same parties and is it still in force and effect? would undermine the foundation of the principle upon which it is based if the Court simply inquired into and revised the reasons which led the Court to make the judgment. In such case nothing would be set at rest by the decree; but the matter supposed to be finally adjudicated. and concerning which the parties had had their day in court, could be reopened and examined. and if the reasons stated were in the judgment of the Court before which the estoppel is pleaded insufficient, a new judgment could be rendered because of these divergent views and the whole matter would be at large. In other words, nothing would be settled, and the judgment, unreversed, instead of having the effect of forever settling the rights of the parties, would be but an idle ceremony."

We do not urge that the Sixth Circuit Court of Appeals consciously so intended, but we do insist that the inquiry which the Sixth Circuit Court of Appeals has conducted into the evidence in the Eighth Circuit Court of Appeals record has had the effect, if permitted to stand, of unsettling the rights of the parties and converting the former judgment into an idle ceremony.

(c) The nature and extent of a former decree is

to be determined by examining the issues made and intended to be submitted and what the decree was intended to accomplish.

In Graham v. Railroad Co., 3 Wall. 704, 709-711 (opinion by Mr. Chief Justice Chase), it was held that a decree will be construed with reference to the issue it was meant to decide and in construing a decree reference will be had to the pleadings and particular attention will be paid to the allegations of the bill.

It has frequently been held that the pleadings will be examined as to the issues raised and determined, and if from the general nature of the pleadings there is doubt as to the precise issue upon which the prior judgment was rendered, parol evidence may be introduced to show the issue (Campbell v. Rankin, 99 U. S. 261, 262; Young v. Block, 7 Cranch. 565, 567; Packet Co. v. Siekles, 24 How. 333).

The Sixth Circuit Court of Appeals apparently reexamined the evidence in the former case in the first instance (Rec., p. 1014), and then separated portions of the opinion of the Eighth Circuit Court of Appeals into "recitals" and conclusions (Rec., p. 1055). The opinion below fails to show an "examination of the issues made and intended to be submitted, and what the decree was intended to accomplish", which is the approved method of determining the extent and scope of a former judgment (Vicksburg v. Henson, 231 U. S. 259, 273). Mr. Justice Brewer, in the Last Chance case (157 U. S. 683, 690), examined the complaint in the former suit and found that it "alleged a priority of location," and examined the findings and discovered that they were express as to priority, and contained no suggestion of defect in the opposing claim.

In Railroad Cos. v. Schutte, 103 U. S. 118, 143, the Court, speaking through Mr. Chief Justice Waite, said of an attempt to avoid the effect of a former judgment:

"The point was directly made by the pleadings and as directly passed on by the Court. It can not be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the Court as was that on any other of the several matters on which the case as a whole depended."

In *Hubbell v. U. S.*, 171 U. S. 203, 208, this Court, speaking through Mr. Justice Brown, said:

"It is insisted by the claimant that in the former action the main contention arose upon the manufacture and use of what was known as the 'cup-anvil cartridge,' together with a certain reloading cartridge, which had been experimentally manufactured, and that no claims for the 'cupanvil cartridge' or for the reloading cartridge in that suit are at issue in the case at bar. The suit, however, was upon the same patent, and it was found by the Court of Claims to have been upon the same facts, and we think the estoppel operates upon everything which was, if not upon everything which might have been, put in issue in the former case."

So here Gaines now insists that no claims as to the use of its mark upon blended whisky (although in point of fact Gaines has used its mark on blended whisky since the present registration was issued [Rec., pp. 98, 99, 59, 188, 189]), are involved in this suit, just as Hubbell urged that no cup-anvil cartridge claims were involved in that suit (171 U. S. 203, 208). But the District Court at Owensboro (Judge Evans) found that Gaines' second suit was upon the very same trade-mark and on the same facts, just as the Court of Claims had found that Hubbell's second suit was upon the same patent and the same facts.

#### (d) The Former Judgment Will Be Upheld in a Second Suit, Even Though the Court May Believe It Would Have Reached a Different Conclusion.

Light is shed upon the course which the Sixth Circuit Court of Appeals pursued in dealing with the Eighth Circuit Court of Appeals decision, by considering the course which Gaines urged the Sixth Circuit Court of Appeals decision, by considering the course which Gaines urged the Sixth Circuit Circuit Court of Appeals decision, by considering the course which Gaines urged the Sixth Circuit Circuit Court of Appeals decision, by considering the course which Gaines urged the Sixth Circuit Court of Appeals decision, by considering the course which the Sixth Circuit Court of Appeals decision, by considering the course which the Sixth Circuit Court of Appeals decision, by considering the course which Circuit Court of Appeals decision, by considering the course which Circuit Court of Appeals decision, by considering the course which Circuit Court of Appeals decision, by considering the course which Circuit Court of Appeals decision court of Appeals decision.

cuit Court of Appeals in its brief before that Court (p. 8) to pursue, namely, "to disregard altogether the former decree as inequitable and contrary to good morals."

That the Sixth Circuit Court of Appeals was almost persuaded to do in terms the very thing urged by Gaines is strongly intimated in its opinion, where it is said:

"The thus described nature and character of the Hellman early use might not always be thought sufficient to initiate and support even a defensive right; but they were so regarded in the former decree, and it is immaterial whether we would independently reach that conclusion" (Rec., p. 1021).

And thereupon the Sixth Circuit Court of Appeals finds that Gaines was the prior appropriator, and that the Hellman use was a fraud.

The Eighth Circuit Court of Appeals finding and decision was eminently fair and just, but even if the Sixth Circuit Court of Appeals felt otherwise, it were nevertheless bound by it.

This Court, speaking through Mr. Justice Strong, in Case v. Beauregard, 101 U. S. 688, 692, said:

"Nothing that can now be done in another suit can take away the legal effect of that decree. Even were we of the opinion that the case was erroneously decided, it would still be res judicata, a bar to the complainant, a protection to the defendants."

In Gunter v. Atlantic Coast Line 200 U. S. 273, 290-1 (opinion by Mr. Justice White), it was held that a decree adjudging a right of exemption from taxation would be effective against subsequent attempts by the successors of the same taxing officers to collect for taxes for later years, and that to contend or admit that "if the truth had been established" in the former suit "a different decree would have been rendered," would be to "destroy the thing adjudged."

In Goodrich v. City of Chicago, 5 Wall. 566, 573-4 (opinion by Mr. Justice Swayne), it was held that a final judgment of the Supreme Court of Illinois holding the city free from liability in a suit for damage done to a vessel that had run upon a sunken wreck in the mouth of the Chicago River, was a bar to a libel in admiralty in the Federal Court seeking reparation for the same loss.

The decree there appealed from had been entered in the Federal Circuit Court for the Northern District of Illinois upon an opinion wherein Mr. Justice Davis sitting on Circuit (*Goodrich v. Chicago*, 10 Fed. Cas. No. 5,542, pp. 604, 605; 4 Bliss. 18) said:

"If this question were an open one, I should have no hesitation in holding that the legal obligation (to remove obstruction in the river) does so rest (on the city), and that the city is bound

to make full redress to a party who is injured by neglect of that duty."

But he held that he was bound by the former decision in the Illinois Supreme Court.

Mr. Justice Campbell, in Jeter v. Hewitt, 22 How. 352, 363-4, described the principle of res judicata as requiring that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth. "No other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy."

In Elliott v. Peirsol, 1 Pet. 328, 340, this Court, speaking through Mr. Justice Trimble, said:

"When a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment until reversed is regarded as binding in every other court."

In Hubbell v. U. S., 171 U. S. 203, 208, Mr. Justice Brown said:

"Whether the reasons given by the Court of Claims for dismissal of the petition are correct or not; whether, indeed, the judgment were right or wrong upon the facts presented, is of no importance here."

Kessler v. Eldred, 206 U. S. 285, and numerous other authorities are to the same effect.

#### III.

## The Thing Adjudged in the Former Case as Found by the Sixth Circuit Court of Appeals Was Not the Thing Adjudged by the Eighth Circuit Court of Appeals.

The basis for the conclusion of the Eighth Circuit Court of Appeals is not laches, but the finding of fact that Gaines was not, as it had claimed to be, the prior appropriator of the words "Old Crow", but that the Hellmans had adopted and used the same in good faith several years prior in time to Gaines. As support for the correctness of this "interpretation" of the Eighth Circuit Court of Appeals decision, we appeal to no less an authority than Gaines itself, for through its then counsel, Mr. Hopkins and Gen. Lindsey (who are still its counsel) and the late John G. Carlisle, it filed in this court on July 6, 1908, a petition for certiorari to the Eighth Circuit Court of Appeals in which the following "interpretation" of the Eighth Circuit Court of Appeals decision is contained:

"The judgment of the Circuit Court was reversed on the *sole ground* that the respondent (Hellmans) had used the words 'Crow' and 'Old Crow' before the petitioner (W. A. Gaines & Co.) had adopted the words 'Old Crow' as a trade-mark."

The issue in the Eighth Circuit case was priority of adoption and use in good faith by the Hellmans. The original decree was upon that issue. The final decree reversing the original decree was upon that issue, and that issue alone. It is therefore binding upon the parties to that litigation and their privies in this controversy subsequently arising where the same fact is clearly put in issue. The Sixth Circuit Court of Appeals states that it gives full recognition to this principle. "Of course, if this assumption was true (namely, that it had made a new finding of facts inconsistent with the finding made by the Court in the Eighth Circuit Court of Appeals) our opinion would be wrong. We intended only to determine what was the real thing decided in the former suit, and so what was the thing adjudicated" (Rec., p. 1055).

The Sixth Circuit Court of Appeals, in the fourth section of its opinion on the merits, states (Rec., p. 1019):

"For the purposes of this case, and without intimating any opinion (on the geographical division theory) we give the first appropriator the benefit of the doubt and assume that his title is prima facie country wide and exclusive against all others, and that as against all who have no special and superior equity, he is entitled to carry his trade into the new territory and there to enforce his exclusive right.

"Under these considerations and upon refer-

ence to the pleadings and the proofs in the Hellman case, we conclude that the latter case is of the class where the refusal to give an injunction to the *first appropriator of the mark* may be justified upon the ground of his laches or estoppel."

In other words, the Sixth Circuit Court of Appeals finds that the Eighth Circuit Court of Appeals, in the Hellman case, decided that Gaines was the first appropriator of the words "Old Crow" as a trademark for whisky; that the Hellmans were the later users, and that the Eighth Circuit Court of Appeals denied relief to Gaines only because of Gaines' laches.

But the Eighth Circuit Court of Appeals, as we have noted, found that the Hellmans had used the mark from 1862 on and that Gaines, Berry & Co. (the original house of Gaines) did not come into existence until 1867 and did not in its pleading claim to have adopted the mark until 1867, did not in its first applications to the United States Patent Office, claim to have adopted the mark until 1870, and in point of fact had not used it until 1870. It is difficult to imagine how Gaines under those circumstances could have been prior appropriators or as prior appropriators could have been guilty of laches as to Hellmans' use from 1862.

This Court, in Baker v. Cummings, 181 U. S. 117, 126, having before it a somewhat similar claim of laches, speaking through Mr. Justice Peckham, said:

"Some expressions may be found in the opinion tending to show that the Court was proceeding upon the ground merely of the complainant's laches in failing to resort early enough to the Court for relief. But an examination of the whole opinion will show that the Court was not confining itself to any such narrow ground, and on the contrary, was examining the whole conduct of complainant, both his omissions and his affirmative and positive acts, for the purpose of determining whether the complainant had any cause of action against the defendant."

Laches was urged before the Eighth Circuit Court of Appeals (Rec., p. 219), but only in connection with the contention of the Hellmans that, in any event, even if the Court should find against them on the ground of priority, nevertheless Gaines, by reason of its laches, was not entitled to an accounting. That Court found the issue of priority in favor of the Hellmans.

If in point of fact the Eighth Circuit Court of Appeals had found that Gaines was the prior appropriator, even though that Court had found that Gaines had been guilty of laches, that Court would have approved the action of Judge D. P. Dyer in the trial court in granting an injunction, but would have denied an accounting (Menendez v. Holt, 128 U. S. 514; McLean v. Fleming, 96 U. S. 245).

# (b) The Distinction Between Straight Whisky and Blended Whisky Was Found by the Eighth Circuit Court of Appeals to Cut No Figure in the Case.

The Eighth Circuit Court of Appeals, in passing upon the issue of unfair competition, found that there was a difference between the whisky made by Gaines and that made by the Hellmans, the one being straight whisky and the other a blended whisky, but further found, as a matter of law and of fact, that that difference cut no figure and did not affect the case. And such is the law. If Gaines had been found to be prior in time in the adoption of the words "Old Crow" as a trade-mark for whisky, the decree entered in the trial court in the Eighth Circuit would have been right, and it would not, as to the injunction, have been reversed on appeal. If Gaines had used the words "Old Crow" first on any kind of whisky, and that were the only issue in the case, then Gaines would have been entitled to an injunction against the Hellmans restraining them from using the words "Old Crow" upon any kind of whisky. But under the final decree Gaines upon the issue of priority of adoption was adjudged to be a subsequent appropriator, not a prior appropriator; the Eighth Circuit Court of Appeals found that the Hellmans were the prior appropriators in good faith of the trade-mark. By parity of reasoning, it would

seem, and the cases so hold, Gaines thus having failed by reason of the adverse finding upon the issue of priority to enjoin the Hellmans from using the words "Old Crow" on any kind of whisky, the Hellmans were privileged to continue using the trademark upon any kind of whisky, and, having the right as against Gaines to use the words "Old Crow" upon any kind of whisky, they had the right to use those words upon all kinds of whisky. The mere fact that the Hellmans had actually used the mark on only one particular variety of whisky did not preclude them from using it upon other varieties of whisky. The Hellmans' right, under the Eighth Circuit Court of Appeals adjudication, was grounded upon priority of adoption. Being so grounded, it extended to all articles coming within the class "whisky." The Hellmans had the right, under the Eighth Circuit Court of Appeals decision, as against Gaines, to use the words "Old Crow" on all whiskies free from interference by Gaines, and with that right to use those words on any other variety of whisky that they might see fit to put out, Gaines could not interfere.

This doctrine is approved in a case (Layton Pure Food Co. v. Church, 182 Fed. 35, 38, 104 C. C. A. 464) in the Eighth Circuit, where Judge Sanborn, Judge Van Devanter concurring, held:

"After one has acquired a trade-mark for one member of a class of goods, in this instance baking soda, another may not acquire the same trademark for another member of the class, in this instance baking powder, although the former has not applied the trade-mark to that member."

The last case cites with approval the decision rendered in the United States Circuit Court for the Southern District of New York by Mr. Justice Blatchford, sitting on the Circuit, in the case of The Collins Co. v. Oliver Ames & Co., 18 Fed. 561, 571.

In that case the Court said:

"The plaintiff having from 1843 the right to make any article of iron, steel or other metal and having gone on from that time, both before and after 1856, extending its manufacture beyond edge tools into digging tools, such as picks and hoes, and having always put the mark 'Collins & Co.' on its best quality of articles, the fact that it did not before 1856 make a digging tool such as the shovels on which in 1856 Ames & Sons put the mark 'Collins & Co.'s,' does not warrant the conclusion that the mark was not in 1856 the mark of the plaintiff's trade in respect to such shovels."

Justice Blatchford's reasoning is apt here. The fellmans had a perfect right as against Gaines in 897 (the year the Federal Bottled-in-Bond law was





enacted) to use "Old Crow" on bottled-in-bond whisky or any other kind of whisky, and Gaines, under the decisions, did not and could not take it away. That right continued unimpaired, even though the Hellmans did not actually apply the words "Old Crow" to bottled-in-bond whisky until 1909.

In a New York case (American Tobacco Co. v. Polacsek, 170 Fed. 117, 120), Judge Coxe asked:

"Can the trade-mark of a manufacturer of smoking and chewing tobacco be appropriated by the manufacturer of cigarettes? I incline to the opinion that it can not. \* \* Whether a manufacturer confines himself to smoking tobacco, chewing tobacco or cigarettes, he is still in the tobacco business, just as one is in the clothing business, whether he makes coats, waist-coats, trousers, just as one is in the whisky business whether he makes business whether he makes business whether he makes business."

In a Pennsylvania Federal case (Carroll v. Ertheiler, 1 Fed. 688, 690), Judge Butler, in denying an application for a preliminary injunction, held that the mere fact that the internal revenue law made a distinction between smoking tobacco and cigarettes did not conclusively show that such articles were, so far as the law of trade-marks went, in different classes.

In a case in the Second Circuit (Florence Mfg. Co. v. J. C. Dowd & Co., 178 Fed. 73, 75-6, 101 C. C. A.

565), the defendant argued that a complainant who manufactured toilet brushes and who would otherwise be entitled to an injunction restraining acts of unfair competition by defendant in the sale of total brushes, was entitled to no relief, because complainant had never as yet used its descriptive name on total brushes. Said the Court (Coxe, J., Lacombe and Noyes, JJ., concurring), ruling against that contention:

"The complainant did not abandon the right to make 'Keep Clean' tooth brushes because it did not at the outset make such brushes, as well as other varieties of toilet brushes.

"Test it by an illustration: Suppose a hatter had for years engaged in making silk hats and 'Derbys' and as such had acquired an enviable reputation, but had never made straw hats; could the proposition be successfully maintained that a rival could make straw hats and offer them to the public in circumstances which would lead them to believe they were producing the product of the old established manufactory?"

The Court ruled against the contention, citing Justice Blatchford's decision in the Collins case (18 Fed. 561).

Blended whisky and straight whisky have been held by Judge Colt, in the First Circuit, to be in the same class (White v. Miller, 50 Fed. 277).

The references to the two kinds of whisky that

appeared in the Eighth Circuit case arose out of an intense trade controversy then pending that divided the whole industry in this country into rival camps, and finally was settled only by the decision of President Taft.

At the beginning of the last decade and subsequent to the passage of the bottled-in-bond law of 1897, the natural trade rivalry between the producers and dealers in straight whisky and the blenders developed into a bitter controversy in which the straight whisky camp determined, if possible, to exclude the blenders from the field of competition. This war to the death was on when the Eighth Circuit litigation began, and not unnaturally, perhaps, Gaines, belonging to the straight whisky camp, by pleading and proof denounced the Hellman product as a "spurious liquor", "an imitation", a "compound" (Rec., pp. 211-2, 273-284). And in turn the Hellmans answered their charge by pleading and proofs, asserting that the Hellman whisky was a blended whisky made by blending highly refined spirits from which the impurities had largely been removed with straight whisky (Rec., pp. 218, 225, 560, 565), and that Gaines' whisky had been subjected to no process of vatting or blending and contained a large and dangerous percentage of fusel oil, a deadly poison, and was a fraud upon the public (Rec., pp. 220, 228, 249). This last charge was the basis for the charge of

false representation by the Hellmans against Gaines, had it been found necessary to press that defense (Worden v. California Fig Syrup Co., 187 U. S. 516).

But the "whisky war" was terminated by the very sweeping and conclusive decision of President Taft (decision, "What Is Whisky," under Federal Pure-Food Law, December 27, 1909), deciding squarely in favor of the blenders, holding that blended whisky was "whisky", and that the term "whisky" could not lawfully be confined solely to "straight whisky", and that all other whisky could not be regarded as "adultered" (as contended by Gaines, Rec. p. 284).

The interchange of crossfire between the combatants in the Gaines-Hellman contest as to the respective merits and demerits of the two kinds of whisky, was noted by the Eighth Circuit Court of Appeals as follows:

"The bill stigmatizes the defendants' business as fraudulent in imposing upon the public a blended whisky, impure and deleterious. And what it lacks in proof of this its counsel has undertaken to supply by invective and epithets" (Rec., p. 980).

(We are frank to admit that the passage of the years has not dulled the edge of the blade of denunciation in Gaines' hands.)

A necessary consequence of the rule, in Collins v.

Ames (18 Fed. 561) and the other cases cited must be that where one who claims to be the sole and exclusive owner of a trade-mark by reason of priority of adoption seeks to restrain another party from using a trade-mark upon any article in the class, is adjudged to have adopted the mark, not prior in time, but subsequent in time to the party whom he is seeking to enjoin, and, for that reason, and that reason alone, injunction has been denied, then such successful defendant who has prevailed by reason of the finding that he is the prior appropriator in good faith, has the right, by virtue of such finding and decree, to use the mark, as against the other party to the litigation, on all articles in that same class.

The distinction between "straight bourbon and rye" and "blended whisky" claimed by Gaines as a basis for its 1909 registration is fanciful and is unsupported by any of the decided cases. Furthermore, the record clearly demonstrates that it was an afterthought. "The Circuit Court of Appeals," said Gaines in its first petition for certiorari to this Court (No. 455, October Term, 1908, p. 15) found that the liquor prepared and sold by the respondents, with the labels and brands herein described was a blended whisky, but attached no importance to that fact, merely saying: "Whether this" (blending) "made it better or

worse than that manufactured by the complainant does not affect this case."

Gaines then recognized and correctly stated to this Court the ruling of the Eighth Circuit Court of Appeals as to the two kinds of whisky.

# (c) The Forbearance of the Hellmans to Press for Affirmative Relief in the Eighth Circuit Court of Appeals Does Not in Any Way Diminish the Effect of the Adjudication of Priority of Adoption in Their Favor

The contention that the Eighth Circuit Court of Appeals decision determined any rights in favor of Gaines by reason of the fact that the Hellmans declined to insist upon affirmative relief, is without merit. It is true that in the Eighth Circuit litigation Hellmans asked affirmative relief, and under the equity rules as they then existed this could not be done in the answer, as is possible under the new equity rules since adopted, but required a cross-bill. The parties in taking their proofs in the Eighth Circuit case and by express stipulation (Rec., p. 286) treated the bill and cross-bill as presenting "practically the same question." The trial court in its decree (Rec., p. 652) denied relief on the cross-bill and granted an injunction restraining the Hellmans from using the words "Old Crow" on any whisky not made by

Gaines. The Hellmans appealed from that decree and that decree was reversed in toto. It thereupon became a nullity and had no more force and effect than if it had never been rendered. It is true that during the hearing in the Eighth Circuit Court of Appeals, at the completion of the statement of the case by counsel for the Hellmans, upon inquiry by Presiding Judge Sanborn as to the cross-bill, the Hellmans, through their counsel, announced that they would not insist upon affirmative relief. But that in no way militates against the facts found adverse to Gaines. The Eighth Circuit Court of Appeals in its opinion states: "This (cross-bill) need not be considered, as at the hearing defendant's counsel declined to insist upon any affirmative relief" (Rec., p. 976). Judge Dyer, in the trial court in the Eighth Circuit, correctly stated that "the bill and cross-bill present practically the same question" (Rec., p. 669). That question was "priority of adoption". That question the Eighth Circuit Court of Appeals found in favor of the Hellmans.

The final decree entered in the Eighth Circuit litigation, after the mandate from the Eighth Circuit Court of Appeals had come down, not only reversed the original decree in toto, but directed the payment of all costs by Gaines. Insofar as we are advised Gaines made no effort to secure modification of this decree in any respect. If, as is now contended,

Gaines had believed that it did have substantial rights adjudicated in its favor under that decree, Gaines would have been entitled to ask for a division of the burden of costs. We submit that it is hardly to be imagined that Gaines, under those circumstances, would have paid all the costs without question or permitted the final decree to stand in its present shape.

Gaines was fully advised long before this suit was filed and before its latest certificate of registration was issued, that the Hellman Distilling Company was the real party in interest and that Rock Spring was merely acting as its agent, and that the whisky bottled in bond at the Rock Spring Distillery under the Hellman label bearing the figure of a crow, together with the words "Old Crow", was shipped direct to the Hellman Distilling Company at St. Louis.

The fact that Gaines did not rely upon the former adjudication in the Eighth Circuit, but applied for and secured a new registration may be considered as having significant force in connection with Gaines' contention that rights were preserved to it under the final adjudication in the Eighth Circuit. So also the fact that Gaines brought this suit in Owensboro within the Sixth Circuit, where there had been no adjudication, instead of at St. Louis, within the Eighth Circuit, where there had been an adjudication, where it was convenient for Gaines to file suit

(Gaines' leading counsel in trade-mark causes lived at St. Louis), may be considered as of significant force against Gaines' contention that the Eighth Circuit final adjudication preserved affirmative rights in Gaines against the Hellmans.

In the most impressive way possible the Eighth Circuit Court of Appeals disposed of Gaines' attempt to exclude the Hellmans from the right to use the trade-mark claimed by the Hellmans. Whether or not the Hellmans now can, or then could, exclude Gaines from using the words "Old Crow" as a trademark upon whisky is not now in issue. The former adjudication in favor of the Hellmans is now relied on, and, under the decisions, the former adjudication is a complete bar to Gaines' present suit.

The Sixth Circuit Court of Appeals, by way of further separating the "recitals" from the "conclusions", reviews the evidence in the Eighth Circuit Court of Appeals case and makes a finding of facts substantially in accord with the finding of facts made by Judge Dyer in the trial court in the Eighth Circuit, but the decision of the trial court in that case was reversed, for the very reason that the Eighth Circuit Court of Appeals found that the trial court was in error in making such finding of facts, and the Eighth Circuit Court of Appeals therefore made a new finding of facts. Not only does the Sixth Circuit Court of Appeals find that Gaines and not the

Hellmans were the prior appropriators, but it finds that the adoption and use by Hellmans was fraudulent. Now the good faith of the Hellmans in their adoption and use was one of the points in issue and vigorously contested by Gaines in the Eighth Circuit litigation, and Judge Dyer, in the trial court, found that issue against the Hellmans and in favor of Gaines, but the Eighth Circuit Court of Appeals reversed the trial court and found that issue in favor of the Hellmans and against Gaines.

In fairness to the Sixth Circuit Court of Appeals, it should be stated that it apparently proceeded on the assumption that the methods in vogue in the distilling and whisky business as carried on today also prevailed in the period covered by this record.

The Court frankly states:

"We assumed that the distinctions between straight whisky and blended whisky and their attendant market conditions had existed, substantially as at present, from the commencement of the period under consideration. Undoubtedly this assumption somewhat colors the discussion in the opinion" (Rec., p. 1053).

Had that court not viewed the facts of the Eighth Circuit Court of Appeals decision through the "coloring of the assumption" of present-day conditions and thereby come to see facts as "through a glass darkly", it would not have found as proven facts which did not exist.

The assumption "so colors the discussion" that the Sixth Circuit Court of Appeals apparently assumed that in 1862, and prior thereto for twenty years, a large, modern Twentieth Century distillery was running full capacity on Glenn's Creek, aging its whisky in charred barrels, and sending it forth branded "Old Crow" to a large interstate trade. Such was not the fact.

The distilleries referred to in the Eighth Circuit litigation as having existed in Kentucky prior to the Civil war, were small affairs, accommodating a home or local need, using grain grown on the farm. "Small concerns made of logs, using hand tubs and very few of them" (referring to the Pepper Distillery, Rec., p. 295). "You would haul a load of corn down and take the whisky home" (Rec., p. 292).

Farmers had their own distilleries; distillers went from one of those small distilleries to another to operate a run. The capacity was small, 20 to 25 bushels, a barrel or two a day. If any whisky made during this period in Woodford County, Kentucky, was sold or shipped outside of the immediate neighborhood, the record fails to disclose it. There were no brands in those days (Rec., pp. 335, 1044).

This was before the United States Internal Revenue laws were enacted. There was no Federal tax

on whisky. There was no government supervision as to the extent of output, nor were there any stamps. The United States Internal Revenue law which is the basis of our present system, was not enacted until July 20, 1868 (15 Stat. 125).

Prior to the Civil War the process of storing whisky in charred barrels and aging it was unknown. At that time the methods of distilling were crude. Whisky as it came from the distillery was "raw" whisky. During the Civil War conditions were unsettled in Kentucky, and even if modern methods of distilling had then prevailed, the unsettled conditions in that state would have made it almost impossible to establish a large business. The distilleries of any consequence supplying more than a merely local trade continued to be north of the Ohio River until after the close of the Civil War, and the restoration of normal conditions in Kentucky and Tennessee.

Before the wholesale trade in the larger centers put whisky on the market, they rectified and refined it by means of redistilling apparatus and leaching tubs or vats fitted with charcoal to remove the impurities and unpalatable taste and added flavoring and coloring to give it the conventional amber or brown color which whisky made in Scotland derived from added caramel or storage in sherry casks.

The Sixth Circuit Court of Appeals, in its decision

on the merits apparently assumed that there was only one, and never had been but one kind of "genuine" whisky entitled to the name "whisky". This was the position taken by Edson Bradley, for 35 years managing director of Gaines' business. "Whisky is a perfectly well-understood term," said Bradley. "It means only one thing. It means a pure, straight whisky; it don't mean an adulterated product" (Rec., p. 284; July 31, 1905). Gaines and its officers were anxious to see the Federal pure-food law so administered as to denounce as misbranded any whisky other than straight whisky which was shipped in interstate commerce under the name of whisky.

The Sixth Circuit Court of Appeals overlooked the fact that "straight whisky" is a comparatively recent product, as far as the general consuming public is concerned; that whisky as it comes from the distillery "straight" and not subjected to any process of rectification or refining was unknown to the general public prior to the Civil War, and did not figure to any considerable extent until some time after the Civil War. Not until 1869 (Act April 10, 1869, 16 Stat. 41, 42), did the United States Internal Revenue law permit distillers to rectify by continuous process in their distilleries in connection with the original distillation. Prior to that it was unlawful to carry on any process of rectification by continuous process, or otherwise, within 600 feet of a distillery. Not until the

'70s did the distiller's product as straight whisky have any considerable sale, and not until then did distillers' brands come into vogue.

The controversy referred to arising under the Federal pure-food law, after submission upon elaborate arguments, briefs and proofs before President Taft, was settled by a decision rendered by President Taft December 27, 1909, which decision has been acquiesced in by the government, the courts, the trade and the public ever since. Had the Sixth Circuit Court of Appeals not overlooked this finding of facts by President Taft with reference to the development of the whisky and distillery business in this country, it unquestionably would not have fallen into such errors of fact as assuming that distillery brands existed in Kentucky prior to 1870, or that the "raw whisky" of the farm distilleries had a wide market or any market outside of the immediate neighborhood, or that whisky made by James Crow was shipped beyond the confines of Woodford County. A portion of President Taft's opinion (Rec., pp. 1031, 1033) was reproduced in the statement supporting the motion for rehearing. It is referred to as indicating some of the errors in the findings of fact which necessarily resulted from the Court's "assumption" that Twentieth Century conditions prevailed in the middle and first half of the last century. The distiller's produet then "was raw whisky or high wines", and in

order to be marketed required purification by the rectifier and blender in order to make it the whisky of commerce of that day and generation.

In line with the finding and decision by President Taft as to the then method of making whisky ("What Is Whisky", December 27, 1909), is a decision by District Judge Miller in the Federal Court in Wisconsin, in 1867, in the case of U. S. v. Eight Barrels of Whisky, 25 Fed. Cas. 15028, p. 982, wherein the Court, describing the process of making whisky, says:

"The high wines being inspected, gauged and branded by the inspector were poured, as is usual in rectifying, into an open vat, stationary and fixed, and were rectified." " " "Pouring the wines into the vat was the first act towards rectification, which was followed by the rectifying process, thereby changing the wines into whisky."

The Sixth Circuit Court of Appeals, in criticising as fraudulent the method which the Hellmans used in making their whisky in 1862 and 1863, criticises the only method then known in this country for making whisky for the general trade, namely, by rectifying and refining the raw product as it came to the rectifier from the distilleries. It was the prevailing method and the genuine method at that time.

#### IV.

#### Gaines' Registration Is Invalid.

The prior adjudication is fatal to the present suit, notwithstanding Gaines' bill is now grounded on Federal registration under the Act of February 20, 1905 (33 Stat. 724). The proceedings before the Patent Office were purely *ex parte*. The present Trade-Mark Act (Sec. 16), like the Act of 1881 (21 Stat. 503, Sec. 7), made the certificate issued *prima facie* evidence of title and conferred Federal jurisdiction where otherwise it would not be available.

(a) Federal registration creates no new title.

In a recent decision in the Southern District of New York, Judge Learned Hand (Waldes v. International Mfrs. Agency, 237 Fed. 502, 506), said:

"Registration confers no right and limits none; it is a mere procedural advantage, depending upon common-law 'ownership' which can exist quite as well without it. It is not, like the issuance of a patent, the condition and the limitation of the owner's right."

The rule was stated by Judge Amos M. Thayer in another case (U. S. v. Braun, 39 Fed. 775, 776), as follows:

"The certificate of registration granted by the

Commissioner is only prima facie evidence of that fact, but it does not conclude a third party. The certificate is not a grant of any right or privilege; it is simply a recognition on the part of the Government of the existence of an asserted exclusive right to affix a certain mark, symbol, word or device on certain goods as a trademark."

Said Judge Rogers in the Second Circuit Court of Appeals (Stephano Bros. v. Stamatopoulos, 238 Fed. 89, 91):

"The right to an exclusive trade-mark is not one created by Act of Congress."

In a decision in the Third Circuit by Judge Bradford (John T. Dyer Quarry Co. v. Schuylkill Stone Co., 185 Fed. 557, 575), it was said:

"While registration is made 'prima facie evidence of ownership' and confers certain other benefits upon the owner of the registered trademark, it does not make a trade-mark either more or less exclusive than it would have been without registration. The question of its exclusiveness is not in the least affected by registration."

In a decision in the Ninth Circuit by Judge Hawley (Hennessy v. Braunschweiger, 89 Fed. 664, 668) it was said:

"Under the provisions of the Act of 1881 the registration of a trade-mark is only *prima facie* evidence of ownership and is not conclusive or binding upon the courts as to the right of a party to its exclusive use."

Under the Act of 1905 (33 Stat. 724, 727, Sec. 9) appeal is allowed from the decision of the Commissioner of Patents to the Court of Appeals of the District and that court is a court of last resort (save for the supervisory power of this Court by writ of certiorari) in trade-mark registration proceedings. That Court has been constantly engaged in construing the act since it went into effect.

In Steinwender-Stoffregen Coffee Co. v. National Grocer Co., 44 App. D. C. 493-4, the Court of Appeals of the District of Columbia held that registration alone, in the absence of other proof, is insufficient to overcome proof of prior use by a later applicant (1913) antedating (1906) the date of the first registration (1910).

(b) The application, though narrowed to "straight bourbon and rye whisky only", was contrary to the statute.

By the terms of section 2 of the act the application for registration,

"In order to create any right whatever in favor of the party filing it, must be accompanied by a

written declaration verified by the applicant or a member of the firm or an officer of the corporation or association applying, to the effect that the applicant believes himself or the firm, corporation or association in whose behalf he makes the application to be the owner of the trade-mark sought to be registered, and that no other person, firm, corporation or association, to the best of the applicant's knowledge and belief, has the right to use such trade-mark in the United States, either in the identical form or in such near resemblance thereto as is calculated to deceive."

33 Stat. 724-5, Sec. 2.

#### Section 5 provides:

"That trade-marks which are identical with a registered or known trade-mark owned and in use by another, and appropriated to merchandise of the same descriptive properties, or which so nearly resemble a registered or known trademark owned and in use by another, and appropriated to merchandise of the same descriptive properties as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers, shall not be registered."

33 Stat. 725-6, Sec. 5, paragraph b.

Gaines' 1909 application was for registration based upon use of its mark on straight bourbon and rye whisky, whereas its former registrations had been for use on "whisky". In 1908 the Eighth Circuit Court of Appeals' final judgment had been rendered in favor of the Hellmans. Registration procured *ex parte* under these circumstances contravenes the provisions of the Trade-Mark Act.

The protective features of the statute quoted have frequently been construed by the Court of Appeals of the District of Columbia.

In a case (Anglo-American Incand. L. Co. v. General El. Co., 43 App. D. C. 385, 386-7) involving interference between similar trade-marks for electric lamps and gas mantles, the Court said:

"It is our duty to give the act such a practical interpretation as will effectuate its obvious intent.

"We think Congress in using the words, 'descriptive properties', intended that they should be given their popular signification. Giving them that signification, no trade-mark may be registered when it is appropriated to goods of the same general qualities or characteristics as those of the goods to which another trade-mark already has been appropriated."

In Ky. D. & W. Co. v. Old Lexington C. D. Co., 31 App. D. C. 223, 228, the rule was stated to be that:

"Confusion is not only forbidden between registered marks, but between a registered mark and a mark known to be in use."

And in Phoenix Paint & Varnish Co. v. Lewis, 32 App. D. C. 285, 288, it was said:

"The purpose of the act being to prevent and not to permit fraud and mistake, we would not feel inclined, even in a doubtful case, to grant registration to a claimant where it appeared as here that when he adopted the mark he knew of its prior adoption and use by another firm in connection with goods of the same general character and properties."

In Walter Baker & Co. v. Harrison, 32 App. D. C. 272, 274, the Court stated:

"The intent of the statute is to protect the rightful owners of trade-marks in their valuable property rights, and it seems to tax the Court to the utmost to protect those rights against the ingenuity of counsel and the designs of sharp competitors. A mark should be denied not only when used upon goods of the same descriptive properties as a similar registered trade-mark, but when used on goods belonging to the same general class."

In N. Wolf & Sons v. Lord & Taylor, 41 Appeals D. C., pp. 515-16, the Court said:

"It is contended by appellant that appellee's use must be limited to stockings, and therefore its use upon knitted underwear, drawers and union suits deprives appellee of no rights. It is unnecessary to indulge in nice distinctions as to the exact meaning of the term 'hosiery'. If appellee had never applied the mark to underwear, appellant's position would not be improved. The classes of goods are so similar as to bring appellant's right to registration within the inhibition of the Trade-Mark Act.

"We think the word 'class', as used in the statute, means broadly a genus including as species any goods upon which the use of the same mark, when the goods are exposed side by side, would tend to mislead the purchasing public."

If there were any legal sanction for the subterfuge that Gaines has sought to employ in the nature of a disclaimer of all other whiskies except straight bourbon and rye, such disclaimer would prove of little practical effect.

In a case in the Court of Appeals of the District of Columbia (Fishbeck Soap Co. v. Kleeno Mfg. Co., 44 App. D. C. 6, 9), that Court, after noting that the two articles then under consideration (metal polish and washing powder) were adapted to the same uses, said:

"Appellant, therefore, may legitimately extend its trade, if it has not already done so, to include the specific uses to which appellee's polish is adapted.

"The fact that the appellee has filed a disclaimer is of no consequence. The disclaimer would slumber in the archives of the Patent Office while the mark would be registered. That is to say, the disclaimer would make no difference to the public. Such a subterfuge ought not to be permitted."

In this connection it may be recalled that since the 1909 registration was issued, Gaines (as it contends), to comply with the Federal Food Law, has used its Old Crow label on blended whisky (Rec., pp. 59, 99, 126, 188).

#### Gaines' Affidavit.

Not only must the applicant believe that he is the owner and state that belief under oath, but he must also make affidavit that to the best of his knowledge and belief no other person, firm, corporation or association has the right to use the same mark in the United States (Sec. 2, 33 Stat., 724). Furthermore, "a trademark shall not be registered which is identical with or so nearly resembles a registered or known trade-mark owned and used by another appropriated to merchandise of the same descriptive qualities as to be likely to cause confusion" (Sec. 5, 33 Stat. 724).

Similar provisions, possibly less sweeping in scope and less drastic in effect, were contained in the Federal Trade-Mark Act of March 3, 1881 (Sec. 2, 21 Stat., p. 503), and the Act of July 8, 1870 (Sec. 77, paragraph seventh, 16 Stat., pp. 210-1).

With the finding and decree of the Eighth Circourt Court of Appeals in full force and effect, Gaines was not, as against the Hellmans, in any legal sense the owner of the trade-mark, and in point

of fact Gaines had been adjudged to have no right to exclude the Hellmans from the use of the mark upon whisky. Both at common law and under the statute ownership of a trade-mark imports exclusiveness of title. If the plaintiff who claims to be the owner of a trade-mark is judicially found by reason of another firm's priority of adoption of the same mark to be incapable of excluding such other firm from employing the same mark on the same class of goods, then such plaintiff, by reason of such finding and decree, can not be said to be "the owner", insofar as such other firm using the mark is concerned. Here Gaines had been judicially determined to be not the owner as against the Hellmans. The adjudication of priority of adoption and good faith in favor of the Hellmans is as conclusive in this litigation between Gaines and the privies of the Hellmans as it is in the former litigation. Regardless of what rights, if any, Gaines may have against the rest of the world, it has been adjudged that insofar as the Hellmans are concerned, Gaines is not the owner of the words Old Crow as a trade-mark for whisky.

In Seubert v. Senataella & Co., 36 App. D. C. 447, 449, it was held that if the mark offered for registration is similar to another in use upon the same class of goods it will be refused registration, even though the applicant did not know of the existence or use of such other mark.

In a late case (Canton Culvert & Silo Co. v. The

Consolidated Car Heating Co., 44 App. D. C. 491, 493), the Court said:

"It is familiar doctrine that the owner of a trade-mark will not be hampered or embarrassed in the legitimate extension of his business by the registration of the mark to another."

The right of the Hellmans to the legitimate extension of their business, free from interference by Gaines, will not be permitted to be hampered by Gaines' 1909 attempt at registration.

## (c) Gaines' 1909 Registration Is Invalid as Against the Hellmans, Even if the Hellman Use Were Restricted to Blended Whisky.

Manifestly, as the Sixth Circuit Court of Appeals found (Rec., p. 1023), Gaines was endeavoring to frame its application so as to avoid the effect of the Eighth Circuit Court of Appeals decision.

Clearly "blended whisky" and "straight whisky" have the same descriptive properties. They have been so adjudicated (White v. Miller 50 Fed. 277, Opinion by Circuit Judge Colt). The same is just as true if you compare "whisky" and "straight rye and bourbon", or if you compare "whisky" and "blended whisky". The two marks, one used by the Hellmans and the other by Gaines, are for the purpose of the Trade-Mark Act identical. The one mark is in

use by the Hellmans and the right to use that mark, insofar as interference by Gaines is concerned, has been adjudicated in favor of the Hellmans and is owned by the Hellmans. Whether or not the right of the Hellmans to use the mark to the exclusion of Gaines would be adjudicated in favor of the Hellmans were such an issue to be presented and tried, it is not now necessary to determine. The fact remains that inasmuch as the ownership of a trade-mark is the right to use the mark upon goods sold in line of business, the Hellmans, insofar as Gaines might desire to be heard to complain, are the owners of the words "Old Crow" in connection with the figure of a crow as a trade-mark upon whisky (Collins v. Ames, 18 Fed. 561). So far as the registration statute is concerned, it matters not at all whether we say that the Hellmans own and are using the words "Old Crow" as a trade-mark on whisky in general, or on blended whisky only. Blended whisky has the same descriptive properties as straight whisky and other kinds of whisky under Section 5 of the Trade-Mark statute. With this right to use the mark on whisky or any kind of whisky outstanding in favor of the Hellmans, Gaines' registration of the words "Old Crow" as a trade-mark for straight bourbon and rve whisky is contrary to the terms of the statute and is invalid.

Not only is Gaines' registration invalid as being in direct violation of the terms of section 5 of the statute, but it is invalid because of its violation of Section 2 of the statute.

In the case of Simplex Elec. Heating Co. v. Gold Car H. & L. Co., 43 App. D. C. 28, 30, 31, 32, arising out of interference proceedings in connection with the trade-mark "Simplex" upon thermostatic steam traps, the opposition mark was used upon a thermostatically operated relief valve. The Court, after stating the points of similarity in the two devices, said:

"Thus it will be observed that the product of appellant is within the same general class as that of appellee (l. c. 30).

"It is no answer that appellant has not manufactured a steam car-heating system upon which thermostatic steam traps are used or even that its trade-mark has not been applied directly to the thermostatic device in use. They are a part of its system to which the mark is applied and it is at any time within their power to apply it to any appliance of that kind they may manufacture; and this is true should they extend their manufacture to electrically heated steam heaters."

Among the many articles adjudged to be in the same class are "pale ale" and "half and half" (Bass v. Feigenspan, 96 Fed. 206, 211), "whisky" and "gin" (P. J. Bowlin Liquor Co. v. Eager, 148 O. G. 571), "gasoline stoves" and "wood stoves" (American

Stove Co. v. Detroit Stove Co., 31 App. D. C. 304, 307), "soap cake" and "washing powder" (Morgan's Sons Co. v. Ward, 152 Fed. 690, 693, 81 C. C. A. 616, 619), "steam-heated pasteurizing apparatus" and "electric-heated pasteurizing apparatus" (Burrell v. Simplex Electric Heating Co., 44 App. D. C. 452), "coffee" and "cocoa" (Walter Baker & Co. v. Harrison, 32 App. D. C. 272, 275), "metal polishing powder" and "washing powder" (Fishbeck Soap Co. v. Kleeno Mfg. Co., 44 App. D. C. 6, 8-9), "amber bead" and "beer" (In re Independent Breweries Co., 39 App. D. C. 118).

The court below (Rec., p. 1023), in a foot-note, cites as supporting its view that an applicant may, if he wishes, confine his registration and its effect to such classes, or sub-classes, of the article of the same descriptive properties that he may select, three cases, namely, Kohler Mfg. Co. v. Beeshore, 59 Fed. 572, 8 C. C. A. 215, opinion by Mr. Justice Shiras; Richter v. Reynolds, 59 Fed. 577, 8 C. C. A. 220, opinion by Judge Dallas; and Pittsburg Crushed Steel Co. v. Diamond Steel Co., 85 Fed. 637, opinion by Judge Elmer B. Adams. All three of these cases are to the effect that where an applicant has described his mark in a particular way and secured registration on the basis of such application and description, he will be restricted thereafter in a suit based upon Federal

registration to the mark as described in his application, and the omission from such application of a feature of the mark theretofore used will be regarded as an abandonment of such feature.

Each of these cases refers to the mark itself and not to the articles or class of articles on which the mark is to be used.

(In connection with Gaines' registration for use upon "rye" whisky, it might be noted that that use is a decided extension over the early Crow use, with which the Sixth Circuit Court of Appeals seems to connect Gaines. "Crow never made a gallon of rye [Rec., p. 321]; nor did Gaines in 1867 and for some time thereafter" [Rec., p. 321]).

Whether we view the Hellman use as extending to all whisky by virtue of the Eighth Circuit Court of Appeals decision, as we earnestly insist should be the case, or as restricted to blended whisky, as the Sixth Circuit Court of Appeals seems to hold, it is equally fatal to Gaines' present registration. "Blended whisky", no less than whisky itself, is of the same general class as straight bourbon and rye, and inasmuch as there was an outstanding, adjudged right in the Hellmans to use their mark and they were using it, and Gaines knew they were using it, Gaines by virtue of the terms of section 2 and section 5 of the trade-mark statute could not acquire any rights under the Registration Act.

# The Hellman Right to Use Their Mark in Any Portion of the United States is Fatal to Gaines' Registration.

It is further suggested by the Sixth Circuit Court of Appeals that Gaines' 1909 registration may be upheld on the fractional geographical theory (Rec., pp. 1021-23-24)—that is to say, that Gaines' title as prior appropriator was found by the Eighth Circuit Court of Appeals to be complete except as to a fractional use which Gaines may be said to have lost to the Hellmans through laches in failing to assert exclusive rights against the Hellmans, and that, inasmuch as it appeared in the Eighth Circuit Court litigation that the Hellmans had a trade in the South and Southwest in blended whisky, the 1909 registration will be regarded as valid for the reason that it confines itself to "Straight Bourbon and Rye." (As already noted, the Eighth Circuit Court of Appeals did not find Gaines to be the prior appropriator, but, on the contrary, found that the Hellmans were.) We urgently insist that, in any view of the case, the geographical division theory of trade-marks has no application whatever to the Hellmans. even if it had, it would not help Gaines in this case. The Federal Trade-Mark Act of 1905 plainly contemplates that no mark shall be registered under that act if any other firm or corporation is rightfully using the same mark on goods of the same descriptive qualities

anywhere in the United States. The phrase "in the United States" did not appear in section 2 of the original act (33 Stat. 724), but was inserted by an xmendment adopted February 18, 1909 (35 Stat. 627). The effect of the amendment is to prohibit the registration of a mark if the same mark is owned and in use on the same class of goods anywhere in the UNITED STATES. This was the law when Gaines' 1909 registration was issued. It was the law when the 1909 application was filed. There was at that time in the United States another "Old Crow" mark rightfully used upon whisky, namely, the Hellman mark, used in connection with the figure of a crow, and, by the very language of the statute, under these conditions, registration to Gaines was forbidden; and, if granted, such grant was contrary to the express terms of the statute and was invalid.

So far as Gaines' 1909 registration is concerned, it makes no difference whether the Hellman use extended over one state or forty-eight states, or whether it included a few states up and down the Mississippi River, as Gaines has heretofore contended, or included a wide area (in point of fact, the record shows trade in Indiana, Illinois, Missouri, Nebraska, Kansas, Colorado, Texas, Tennessee, Kentucky, Arkansas, Louisiana, Mississippi and other states).

Gaines is not asserting an unregistered commonlaw trade-mark, as were the parties in the case of Hanover Milling Co. v. Metcalf, 240 U.S. 403, but a registered trade-mark, and upon registration, and registration alone, jurisdiction in this case depends. Gaines, in this case, has prayed an unlimited and unrestricted injunction restraining Rock Spring from applying the Hellman mark to any whisky not made by Gaines. Gaines sought and obtained in the Eighth Circuit litigation an unlimited and unrestricted injunction restraining the Hellmans from using their mark upon any whisky. That unrestricted and unlimited decree was reversed by the Eighth Circuit Court of Appeals and set aside and for naught held, and the Eighth Circuit Court of Appeals not only adjudged priority of adoption in good faith in favor of the Hellmans and against Gaines, but decided that

"neither can their right to use it (the words 'Old Crow' upon whisky), ad libitum, be destroyed by the overshadowing comparative amount of the complainant's sales under the designation of 'Old Crow Whisky', nor by the asserted superiority of its product' (Rec., p. 980).

## The ''Magnitude of the Gaines Business'' Is Insufficient to Overcome Hellmans' Established Rights.

Emphasis has been laid by Gaines, in this Court, as at all times in the past, upon the extent of its advertising and the vastness of its investment and trade.

Mr. Justice Brown, then a District Judge in the
Eastern District of Michigan, in O'Rourke v. Central
City Soap Co., 26 Fed. 576, 579, speaking of the possibilities of such a course, said:

"" " " If it be once conceded that a person may acquire a good title to a trade-mark by appropriation, without the consent of the lawful owner, it would enable a manufacturer, by the use of large capital or superior energy, to drive competitors out of business by seizing their trademarks and using them for that very purpose, provided the lawful owner is unable or unwilling to assert his rights by resort to the courts. We think that no court would hesitate to pronounce against a title so obtained."

The Eighth Circuit Court of Appeals has adjudged that the Hellmans, notwithstanding the claimed overshadowing importance of the Gaines trade, have the right to use their mark ad libitum, free from interference by Gaines anywhere in the United States, and, under the statute, if in February, 1909, the Hellmans had and continued to have the right to use the mark in any portion of the United States, Gaines' registration is invalid.

It is contended that Gaines' 1909 registration may be upheld under the authority of the case of Davids Co. v. Davids, 233 U. S. 461 (Rec., p. 1016), for the reason that in any event Gaines' use of the words "Old Crow" has been for a longer period than ten years.

But, in order to entitle an applicant to registration of a non-technical mark under the ten-year clause, it is imperative that he show exclusive use for a period of ten years. Not only does the record fail to show that Gaines was the exclusive user of the words "Old Crow" on whisky for a period of ten years preceding registration, but, on the contrary, it affirmatively appears that, in a vigorously contested case, Gaines had already been adjudged to be powerless to exclude another firm, namely, the Hellmans, from using the same mark upon whisky, and, furthermore, that this adjudication was on the merits and was based upon the vital ground of priority of adoption. Inasmuch as the right to use the same mark had been judicially determined in favor of the Hellmans and against Gaines, it can not be said, by any fair use of language, that Gaines was the exclusive user, or had been for a period of ten years.

The court below seems to have been influenced by the decision of Judge Lacombe in the Baltimore Club case, in the Second Circuit Court of Appeals (Thomas J. Carroll & Sons v. McIlvaine, 183 Fed. 22), but a close examination of that decision and the decision of the trial court in the same case (171 Fed. 125) persuades that that case is an authority against Gaines rather than in favor of Gaines. Certainly, if the facts set out in the Baltimore Club case had been before the Patent Office in connection with the application of either the Carrolls or the McIlvaines for registration under the Act of 1905, registration would have been refused. (There were other elements, such as deliberate deception, which were specifically found by the Second Circuit Court of Appeals and on which its decision was based.)

### (d) The Present Suit Can Not Be Maintained.

The statute required affidavit as an indispensable prerequisite to acquiring "any rights whatever" based upon registration under the act, and Gaines, through its managing director and vice-president, who had full knowledge of all the facts, made affidavit that, to the best of his knowledge and belief, no other firm or corporation had the right to use this mark, and registration was thereafter issued accordingly. It must be regarded, in an ex parte proceeding of this kind, that registration was issued upon the strength of the assumption that no such outstanding right existed against Gaines' claimed exclusiveness and that had the facts, as they really existed, been revealed to the Patent Office, registration would not have issued. Registration, therefore, which was granted upon the assumption that such facts did not exist, must be treated

as null and void when it develops that such facts did exist and the applicant had full knowledge of their existence at the time the affidavit was made and the application filed. Particularly will this be so where all the circumstances plainly indicate that the application for registration was drawn with the deliberate purpose of obviating the effect of the adjudication whose existence was suppressed by the applicant.

The suppression of material facts known to the affiant makes a case of legal fraud.

The statute, section 21 (33 Stat. 729), provides "that no action or suit shall be maintained upon any certificate of registration fraudulently obtained."

#### V.

### Gaines Is Not in Equity With Clean Hands, and Is Entitled to No Relief.

Under Sections 19, 21 and 23 of the Trade-Mark Act (33 Stat. 729, 730), injunction proceedings brought under that act are prosecuted according to the principles of equity and no action shall be maintained on a certificate of registration fraudulently obtained. Gaines was enabled to come into the Federal Court in this case solely by reason of registration, and this registration was based upon a declaration verified by an affiant, who knew he was suppressing material facts, which, if revealed, would prove fatal to his application.

Gaines' bill of complaint in this cause is verified by another affiant, who, notwithstanding full knowledge of the Eighth Circuit litigation and final decree (Rec., p. 59), swore that said words, "Old Crow", have never been applied to any whisky but that produced by complainant company and its predecessors and distilled by them at their distillery in the County of Woodford, in the State of Kentucky (Rec., p. 5).

The evidence in this case discloses that on May 24th, 1909, some three months after Gaines' application for registration had been filed in the United States Patent Office, and nearly two months before the certificate of registration was issued, Rock Spring, then under contract with the Hellman Distilling Company for bottling in bond whisky made and owned by the Hellmans, wrote the letter of May 24, 1909, to Gaines (Rec., pp. 95, 96), stating the receipt of a "rumor" that Gaines was contemplating an action against Rock Spring based on their bottling Hellmans' Old Crow in bond; stating that Rock Spring had no desire to do any unfair act; that they were acting under contract with the Hellmans and in reliance upon the Eighth Circuit final decree. The letter further inquired what objection Gaines had to the label.

Again, on June 7th, Rock Spring wrote Gaines a second time, inclosing a copy of the first letter. Both letters were duly received by Gaines, but under the advice of counsel Gaines refrained from answering (Rec., p. 188). Gaines knew that Rock Spring had no connection with the case except as agent of the Hellmans, knew that the Hellmans were furnishing all the labels, bottles, cases, corks, etc., knew that all the whisky so bottled for the Hellmans by Rock Spring was shipped to St. Louis direct to the Hellmans, knew its own application for registration was pending in the United States Patent Office. Notwithstanding all these facts, Gaines made no reply to Rock Spring but waited until its registration was issued, July 20, 1909, and on September 28 filed the suit in this cause against Rock Spring in Owensboro, not against the Hellmans at St. Louis.

By reason of Gaines' conduct in the premises we submit that the certificate of registration was fraudulently obtained and no action can be maintained upon it; that Gaines did not deal fairly with Rock Spring; that Gaines has made or procured to be made affidavits both as to the application for registration in the United States Patent Office and to the bill herein, which through their suppression of material facts are in effect false; that under well-established principles Gaines is not in a court of equity with clean hands and is entitled to no relief from a court of equity (Worden v. California Fig Syrup Co., 187 U. S. 516; W. A. Gaines & Co. v. Turner Looker Co., 204 Fed. 553,

558-9; 123 C. C. A. 79, 84-5; Manhattan Medicine Co. v. Wood, 108 U. S. 218).

#### VI.

#### In Conclusion.

In 1908 Gaines announced to this Court that the litigation would go on and diverse decisions would be rendered, unless this Court granted its then petition for *certiorari* to the Eighth Circuit Court of Appeals (Petition No. 455, October Term, 1908, p. 18).

The litigation has gone on and the Sixth Circuit Court of Appeals has been persuaded to disregard the facts found by the Eighth Circuit Court of Appeals.

The very same arguments that were urged in the Sixth Circuit Court of Appeals were urged in haec verba upon the Eighth Circuit Court of Appeals and upon Judge Dyer in the Eighth Circuit trial court.

The "Mida" registration, the "Magnolia" fraud (Kidd v. Johnson, 100 U. S. 617 "Magnolia" was not a straight whisky, but a rectified whisky containing a large proportion of highly refined spirits—rec-

ord before President Taft, pp. 120, 340, 662) and the other "grounds" to show fraud on the part of the Hellmans, were urged by Gaines before all of these courts.

Notwithstanding the fact that the Eighth Circuit Court of Appeals' decision foreclosed further inquiry as to the correctness of its findings, as to the detailed facts as well as the main issues, the Sixth Circuit Court of Appeals, yielding to Gaines' persuasion reopened the inquiry as to all the facts in evidence in the Eighth Circuit Court. We have felt that the specific facts found by the Sixth Circuit Court of Appeals contrary to those found by the Eighth Circuit Court of Appeals are far too numerous to set out in detail, nor is it important to do so, in view of the binding force of the Eighth Circuit Court of Appeals' decision and decree. But the conflict is so striking that we feel justified in noting a few instances of the differences in findings as illustrating the perils involved in making such a "separation" of "recitals" from "conclusions" (Rec., p. 1055) as the Sixth Circuit Court of Appeals has undertaken to do in this case.

Referring to the use of glass sign (Rec., p. 978), the Eighth Circuit Court of Appeals finds:

"The evidence further shows that as early as 1865, they (the Hellmans) had signs in frames prepared, displayed in the windows of their storehouse, like Exhibit No. 6, represented by the following cut, large numbers of which were used in connection with their whisky trade' (then follows photograph of the sign) (Rec., p. 978).

On the other hand, the Sixth Circuit Court of Appeals finds:

"From the record, we must doubt whether these signs ante-dated 1870" (Rec., p. 1020).

Where the Sixth Circuit Court of Appeals secured the date 1870 in connection with the signs, we are at a loss to discover from the record. No less than five witnesses in the Eighth Circuit Court case testified as to those signs at dates ranging from 1865 to 1869, and on down to later dates (Rec., pp. 475, 490, 501, 560, 549).

The Sixth Circuit Court of Appeals continues as to the signs, "but if they did reach back to 1863, and if they referred to the blend or mixture which the Hellmans produced, it was neither 'Celebrated', nor 'Old', nor 'Crow', nor, unless by chance, 'Bourbon'."

Reference to the photographic reproduction of the glass sign (Rec., p. 978) reveals that it did not contain or purport to contain the word "Old" at all; and there is no basis for the finding that the other terms were incorrectly used.

The Sixth Circuit Court of Appeals (Rec., pp. 1020-21), influenced by the "assumptions" which it has frankly stated "colored somewhat its opinion", treats the Hellman brand as false, as follows:

"In considering whether their use was of a trademark character, the peculiar nature of their business and their markings must not be overlooked. The brands or marks on whisky are usually those of the original manufacturer. The dealer or jobber many handle many well-known brands and may mark his own name upon the packages or advertisements, but this does not indicate that he claims the brands as his, or that he is acquiring a trade-mark right therein. While the stencils on the barrel and the glass signs carried the name 'Hellman & Co.', they did not say 'Manufactured by', or that Hellman & Co. were manufacturers or distillers, nor were they in any way inconsistent with mere sale by Hellman as jobber of a well-known brand made by some one else."

The Eighth Circuit Court of Appeals finds that the brands dated back to 1862 and the glass sign to 1865. At that time the Hellmans were making whisky by the only method by which whisky then could be made and sold to the general trade. Distillers could not and did not at that time undertake to reach the general consuming public. Distillers did not at that time and did not until the seventies have distillers' brands.

There was no whisky, as that term was understood by the general trade, being made under the name of "Old Crow" at that time in Kentucky. The "raw" product of the small log distilleries in Woodford County was not the whisky of commerce; it was not sold under brands (Rec., pp. 1044, 355), and from 1855 to 1867 none of this raw whisky made in Kentucky was called "Old Crow" (Rec., pp. 210, 288).

If any whisky from Woodford County, Kentucky, ever came to St. Louis or ever left Woodford County during the fifties or early sixties, the record does not disclose it.

In point of law the use of the name I. & L. M. Hellman, without any modification on the brand or sign, carries the implication that I. & L. M. Hellman are the makers of the whisky, and that they are not mere distributors of another person's product. This implication was true.

In the administration of the Federal Pure Food Law the principle is clearly established that the name of a firm on a package unmodified carries the conclusion or conveys the meaning that that firm is the maker of the article contained in the package (opinion of Attorney-General Knox, [24 Op. Atty.-Gen. 695-7]).

Not only is there no foundation in law for the assertion of the Sixth Circuit Court of Appeals in respect to the use of the Hellmans' name, but there is no foundation in fact as to any such usage. Gaines has filed in this case 28 labels (Rec., pp. 31 to 58) used by firms that are now engaged in selling whisky distilled by Gaines. Inspection of those 28 labels reveals that not a single one was printed without the name of "W. A. Gaines & Co." on it. The law and the practice with reference to distillers' brands at the present time is, and since distillers' brands first came into use always has been, exactly the opposite of that stated by the Sixth Circuit Court of Appeals.

Furthermore, this very same contention (namely, that the name of Hellman on the glass sign and brands indicated that Hellman was a mere distributor) was urged upon the Eighth Circuit Court of Appeals by Gaines, and failed to find favor with that Court, for it found that the Hellmans had acted in good faith. This point, like the others discussed by the Sixth Circuit Court of Appeals, is res judicata.

The Sixth Circuit Court of Appeals (Rec., p. 1014) states "this whisky" (made by Crow) "came to be called by his name as "Crow", or, as it aged, 'Old Crow' whisky, and it acquired, by that designation, a reputation for good quality".

The Sixth Circuit Court of Appeals is in error as to the use of the word "Old" in the phrase "Old Crow" carrying any implication of age. The fact is that James Crow was familiarly called by various names in which the word "Old" formed a homely element, as, for example, "Old Man Crow" (Rec., pp. 327, 331, 339); "Old Crow" (Rec., pp. 331, 336, 350); "Old Jim Crow" (Rec., p. 334); "the Old Scotchman" (Rec., p. 303); "the Old Crow" (Rec., p. 304).

Furthermore, the aging of whisky in storage by distillers in preparation for the market was not known and did not begin until long after this period, namely, some time during or after the Civil War (President Taft's decision, December 27, 1909).

The Eighth Circuit Court of Appeals had found that there was no secret in the process of distilling employed by James Crow and also had found that there was some evidence that Gaines now employs machinery in material respects in making its whisky, whereas Crow's method had been entirely by hand (Rec., p. 981).

The Sixth Circuit Court of Appeals apparently assumes that there was a secret formula and finds that Gaines employed it and still uses it.

The Sixth Circuit Court of Appeals (Rec., p. 1020) criticises the character of the evidence as to the Hellmans' trade in early days. The oral evidence of sales from 1862 on was ample and was not contradicted. If book entries alone are to be considered as evidence of sales, then Gaines' case completely fails, for Gaines has failed to introduce a single book entry. This matter was fully considered by the Eighth Circuit

Court of Appeals, both as to book entries and oral evidence (Rec., pp. 977-9).

The Sixth Circuit Court of Appeals is impressed with the fact that the Eighth Circuit Court of Appeals alludes to the Hellman use of "Old Crow" as a descriptive term (Rec., p. 981), and deduces that for that reason the Eighth Circuit Court of Appeals intended to hold that the words might be regarded as having come to be indicative of a class or type of product and not as having trade-mark significance.

The Eighth Circuit Court of Appeals was careful throughout its opinion to avoid passing upon the question as to whether or not the words "Old Crow" as used by Gaines constituted a valid trade-mark. In its opinion that Court said:

"Passing by the criticism made by defendants' counsel of the words 'Old Crow' as a trade-mark, on the ground that in its origin it referred merely to the name of 'Crow' as the compounder of that grade of whisky, and that its later use was merely designative of the quality of the article, and, therefore, it might not constitute a technical trade-mark if the complainant employs the words 'Old Crow' and 'Crow' in its trade as designating the quality of the whisky sold by it, the defendants are not guilty of an invasion of the asserted exclusive monopoly of the complainant' (Rec., p. 980).

It will be recalled that Judge Elmer B. Adams, in

passing upon the demurrers to the original and amended bills, in two opinions expressed grave doubts as to whether the words "Old Crow" as applied by Gaines could be said to constitute a technical trademark (Rec., pp. 663, 664-6), and the demurrer to the amended bill was overruled by Judge Adams only on the theory that the averments of the bill made out a case of unfair competition within the Pillsbury flour case because of the averments that the words "Old Crow" meant "whisky made on Glenn's Creek, Woodford County", and "by James Crow's secret process" (Rec., p. 665). Throughout the Eighth Circuit case the Hellmans vigorously contested that position, and it was unquestionably for that reason that the Eighth Circuit Court of Appeals used the phrases, "claimed trade-mark" (Rec., p. 982), "descriptive terms" (Rec., p. 981), "designative words" (Rec., p. 980), "trade name" (Rec., p. 980), "conception of a trade-mark" (Rec., p. 977), "designation" (Rec., p. 980), "exclusive right to the use of 'Crow' or 'Old Crow' in business" (Rec., p. 977), instead of the more direct term "trade-mark".

The Sixth Circuit Court of Appeals finds thus:

"And we must think that whatever was adjudicated regarding plaintiff's title to its trademark applies to its use on both kinds of whisky" (Rec., p. 1018).

This is equally true in regard to the Hellmans' title. Priority of adoption having been adjudicated in favor of Hellmans against Gaines, applies to the Hellman use on all kinds of whisky. The Sixth Circuit Court of Appeals has found that

"The 'Crow' or 'Old Crow', which in 1863 had been manufactured in Kentucky for twenty years or more was at least considerably known in the market" (Rec., p. 1020).

The record is barren of any evidence as to any dates prior to the 50's and as to any sales or market outside of Woodford County at any time prior to 1867.

But, in any event, all of these matters were fought out in the Eighth Circuit litigation, and the finding of the Eighth Circuit Court of Appeals is conclusive, that by reason of priority of adoption and continuous use the Hellmans have the right to use, ad libitum (Rec., p. 980), the words "Old Crow" upon whisky made and sold by them, free from any interference by Gaines.

Stated graphically, Gaines' own claim of priority and its charges that the Hellmans' use was fraudulent, were urged in detail before the following courts, with the results noted:

- (1) Before Judge Dyer (trial court, Eighth Circuit)—sustained as true upon the facts as found by him.
- (2) Before Eighth Circuit Court of Appeals—denied as untrue on new finding of facts made by that court.
- (3) Before Judge Evans (trial court, Sixth Circuit)—denied as having been foreclosed by Eighth Circuit Court of Appeals' finding and decree.
- (4) Before Sixth Circuit Court of Appeals—sustained as true, and Eighth Circuit Court of Appeals' decision "interpreted" in the light of new facts found by the Sixth Circuit Court of Appeals, in harmony with the facts found by Judge Dyer.

To the end that the litigation may stop and the salutary principles laid down by this Court in Kessler v. Eldred, 206 U. S. 285; Hopkins v. Lee, 6 Wheat. 109, 113-4; Lyon v. Perin & Gaff Mfg. Co., 125 U. S. 698, 700, and cases herein cited, the decree of the Sixth Circuit Court of Appeals should be reversed with directions to affirm the decree of the District Court.

And it is no less important for the purpose of upholding the protective features of the Trade-Mark Act of 1905, that the vigorous construction given that act by the Court of Appeals of the District of Columbia should be upheld. If the Act of February 20, 1905, properly construed, confers the power on an ex parte registrant to deprive a trade-mark user of rights theretofore adjudicated in his favor, it takes away property without due process of law and is void.

Fifth Amendment, U. S. Constitution.

The registration is invalid. The suit is barred. Gaines is entitled to no relief.

If there is no valid registration, there is no federal jurisdiction.

Leschen Rope Co. v. Broderick, 201 U. S. 166.

All of which is respectfully submitted,

W. T. ELLIS, LUTHER ELY SMITH. SUPPLEME COURT OF THE UNITED STATES.

Corosus Tuna. 1916.

# No. 4158

BOOK SPRING DISTILLING COMPANY AND SILAS BOSENFELD, PERMISSIS,

W. A. GAINES & COMPANY, Berroudenz.

ON THE OF CONCRORUS TO THE CONTROL OFFICE CONCUR.

BRIEF FOR RESPONDENT.

Rescure P. Teabur, Daniel W. Linder, James L. Horging, Ostensol for Respondent,

### TRADE-MARK

W. A. GAINES & COMPANY, STRAIGHT BOURBON AND RYE WHISEY. APPLICATION FILED FEB. 98, 1909.

74,537.

Registered July 20, 1909.

Old Crow

Proprietor H. A. Geines Vermany Y James L. Hophins Atty

### UNITED STATES PATENT OFFICE.

W A GAINES & COMPANY, OF FRANKFORT, KENTUCKY.

#### TRADE-MARK FOR STRAIGHT BOURBON AND RYE WHISKY

No. 74.537

Statement and Declaration. Registered July 20, 1909.

Application filed February 96, 1909. Berial Wo. 40,801.

#### STATEMENT.

To all whom it may concern. Be it known that W. A. GAINES & COM-Be it known that W. A. GAINES & COM-PANY, a corporation duly organized, existing, and doing business under and by virtue of the laws of the State of Kentucky, and hav-ing its principal office and place of business in the city of Frankfort, in the county of Frankfin, in said State of Kentucky, has adopted and used the trade-mark which con-cited of the mords 2004 Come." sists of the words "Old Crow."

Said trademark has been continuously used in the business of ourselves and our predecessors since, to wit, January 1st, A. D.

The class of merchandise to which the trademark is appropriated is Class 49. Distilled alcoholic liquors and the particular description of goods comprised in said class upon which the said trademark is used is

straight Bourbon and try whisky.

The trademark is displayed on the packages containing said whisky by being imprinted upon labels, or stamped, printed or branded upon wooden containers.

[4. 4.]

W. A. GAINES & COMPANY, By EDSON BRADLEY, Pice-President.

#### DECLARATION.

City of Washington District of Columbia. ss. EDSON BRADLEY of lawful age being duly sworn deposes and says that he is the vice-president of the corporation (W. A. GAINES & COMPANY), the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trademark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief, has the right to use said trademark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trademark is used by said City of Washington District of Columbia. ss. |

corporation in commerce among the several States of the United States, and between the



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## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

# No. 311.

ROCK SPRING DISTILLING COMPANY AND SILAS ROSENFELD, PETITIONERS,

vs.

W. A. GAINES & COMPANY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

### BRIEF FOR RESPONDENT.

### History of the Litigation.1

I. This cause is here upon a writ of *certiorari* to the United States Circuit Court of Appeals for the Sixth Circuit, granted December 20, 1915, 239 U. S. 647 (Rec., p. 1058).

The Sixth Circuit Court of Appeals (226 Fed. Rep.

¹The trade-mark involved has also been adjudicated in W. A. Gaines & Co. v. Leslie, 54 N. Y. Supp. 421, and in W. A. Gaines & Co. v. Whyte Grocery, Etc., Co., 107 Mo. App. 507.

533, 141 C. C. A. 287), in reversing the decree of the court below (202 Fed. Rep. 989), made the following statement of facts:

"Appellant, Gaines & Co., is a Kentucky corporation. Appellee Rock Spring Distilling Company is also a Kentucky corporation, and appellee Rosenfeld is the licensee and operator of its distillery, and is a citizen of Kentucky. The appellant will be referred to as plaintiff; the appellees as defendants. The litigation involves a controversy over the words 'Crow' or 'Old Crow' as a trade-mark for whisky. Plaintiff filed its bill in the court below, alleging its trade-mark right in these words, and claiming that defendants were infringing. The answer denied the existence of the right claimed, and set up as a bar a decree rendered against plaintiff in the United States District Court at St. Louis, under mandate of the Circuit Court of Appeals for the Eighth Circuit. The answer claimed privity between the Hellmans -the defendants in that case—and these defendants. A plea of former adjudication was held good (C. C., 179 Fed. 544). After replication filed, proofs were taken, including, by stipulation, all proofs in the Hellman case; and, on final hearing, the bill was dismissed (202 Fed. 989). From the pleadings and proofs, these facts appear, either without dispute or beyond fair question:

Woodford County, Kentucky, is not far from Bourbon County, and is in the heart of the limestone formation, 'blue grass' country. This general region has always been and is the center of the distilling business for the best known Ken-

tucky whiskies. The water from the limestone springs-whether or not it is really better than other waters for making whisky-in the early days was thought to be of unique purity and essential to the highest grade of the distilled product. Three brands, among those most advertised and so most widely known now for a generation, are made within a few miles of each other, in Woodford County, along Glenn's Creek-'Taylor'. 'Pepper' and 'Crow'. For a long period before 1855, James Crow was a practical distiller in the Glenn's Creek neighborhood. He did not have a distillery of his own, but was employed by various distillers-for some years before Crow's death. in 1855, by Oscar Pepper (except for the last year or two, and even then Crow retained some supervision for Pepper). He was reputed to be the first man in Kentucky to make a sour mash whisky, and he had a high reputation as a skillful distiller. During his years at the Pepper distillery, he made a large quantity of whisky. This whisky came to be called by his name as 'Crow'. or, as it aged, 'Old Crow', whisky, and it acquired, by that designation, a reputation for good quality. At his death a considerable quantity was in existence, both where it had been scattered upon the market and where it was aging in the distiller's possession. During the succeeding years it continued to have a market reputation and represent a high standard, under one or the other of these names. After Crow's death, Oscar Pepper, at the same distillery and with the same formula, continued to make a whisky which some witnesses say he continued to call 'Crow'. He died about

1865. In 1866 or 1867, the Pepper distillery was bought by Gaines, Berry & Co. They employed, as distiller, a man who had been a foreman for Crow, and who knew his formula and methods, and their product they called 'Crow', or 'Old Crow'. They were succeeded in the business by W. A. Gaines & Co., first a partnership and then the plaintiff corporation. Since such adoption by Gaines, Berry & Co., these words have been continually used by plaintiff and its predecessors as a trade-mark, vast sums of money have been expended on advertising the brand and the trademark, and the brand, under that name, has for many years been one of the best known in the country. All the other distilleries where Crow worked, and which so might have had special rights in the name, have now, for sixty years or more, not questioned the exclusive rights of the Pepper distillery and its successor; and while, doubtless in the '70's, and perhaps in the '80's, there were some instances of trespassing which were not attacked, plaintiff's right was even then generally observed, and now, for twenty-five or thirty years, has not been seriously challengedsave for the Hellman use.

The witness Mida, who conducts the bureau of registration for brands and trade-marks, regarded as authoritative by all the liquor trade, and who has published, since 1878, 'Mida's Criterion', the recognized price list of 'all brands and all ages' of liquor, testifies that 'Old Crow' has always and everywhere been considered the Gaines brand, and is universally understood to refer to whisky made at the Gaines Old Crow distillery. This

testimony is undisputed-excepting the Hellman use, if that is an exception. It further appears that Gaines & Co., in 1882, registered, as a trademark, 'Old Crow', alleging its use as a trademark 'since 1870'. Again, in 1904, plaintiff duly registered as a trade-mark the words 'Old Crow'. alleging its continuous use, by plaintiff and its predecessors, since 1835. Again, in 1909, and under the act of 1905, plaintiff duly registered the same trade-mark, alleging that it had been used since 1835, that the class of merchandise to which it was appropriated was 'distilled alcoholic liquors', and that the particular description of goods comprised in the class upon which the trademark was used is 'straight bourbon and rve This last registration is the only one whisky'. alleged in the bill in this cause, and upon it jurisdiction depends, since there is no diverse citizenship.

Since it is admitted that defendants are using the name 'Celebrated Old Crow' upon whisky not made by plaintiff, the right to an injunction would be clear, except for the defense and counterclaims made in the Hellman case, taking effect here either by virtue of the inherent force of the facts there and here appearing, or through the operation of the rule of adjudication. In that case the defendants Hellman filed a cross-bill, alleging their own prior and superior right to the trade-mark 'Old Crow', and asking for appropriate relief. By the proofs it appeared that prior to 1867, and perhaps as early as 1863, the Hellmans had made some shipments of whisky which they invoiced under the name of 'Crow', and which were con-

tained in barrels stamped with the picture of a erow, and with the words 'P. Crow' or 'J. W. Crow': that they had distributed to their customers signs advertising 'Celebrated Old Crow Bourbon': that they were not distillers, but were wholesalers or jobbers; and that the whisky which they sold under that name had no connection with the Kentucky 'Old Crow', but was a 'blend', and made by them on their own premises, while the plaintiff's product was a straight whisky, and its trade-mark was never applied, with its approval. to anything else than its product. Upon this general situation, the District Court, at St. Louis, found the facts and the law in plaintiff's favor, awarded to it the usual injunctional relief, and dismissed the cross-bill of defendants Hellman (Gaines v. Kahn, C. C., 155 Fed. 639). Both parties appealed; but the Hellmans dropped their appeal from the dismissal of their cross-bill, whereby whatever adjudication was carried by such dismissal became final. The opinion of the Court of Appeals is reported in Kahn v. Gaines, 161 Fed. 495, 88 C. C. A. 437. Its precise effect, we must hereafter consider. It directed that the decree be reversed, and that plaintiff's bill be dismissed; and this was done."

NOTE.—Crow's full name was James C. Crow. See testimony of his relative, Richard H. Whittington, record, p. 333. This is important in judging the conduct of an irfringer who marks his spurious liquor "P. Crow" or "J. W. Crow".

### The Trade-Mark Registration in Suit Valid Under Ten-Year Proviso, Act 1905.

II. The registration sued upon is Certificate 74,537, registered July 20, 1909, by W. A. Gaines & Co., the respondent. The trade-mark consists of the words "OLD CROW", and in conformity with the classification then in effect in the Patent Office, the application of the trade-mark is thus described in that registration:

"The class of merchandise to which the trademark is appropriated is Class 49, Distilled alcoholic liquors and the particular description of goods comprised in said class upon which the said trade-mark is used is straight Bourbon and rye whisky.

"The trade-mark is displayed on the packages containing said whisky by being imprinted upon labels, or stamped, printed or branded upon wooden containers."

The date of first use of the said trade-mark is given as, to-wit, January 1st, A. D. 1835.

As indicated by the court below, this registration is doubtless valid and effective under the ten-year proviso of the Act of February 20, 1905, 33 Stat. at L. 724. The opinion recites (226 Fed. Rep. at p. 535, R., p. 1016):

"(1) 1. The first objection which plaintiff's alleged trade-mark rights must meet is that the

words are descriptive, and so incapable of becoming a true trade-mark. If nothing were involved except the effect of the 1909 registration, this objection might be passed without decision, since the application for registration indicates use for more than ten years before 1905, thus perfecting rights which might have been imperfect when the use began, and would have so continued except for the statute (Davids Co. v. Davids, 233 U. S. 461, 34 Sup. Ct. 648, 58 L. Ed. 1046; Nashville Co. v. Coca Cola Co., 215 Fed. 527, 529, 132 C. C. A. 39); but it is impossible wholly to separate the force of this registration from the underlying broader question, because rights prior to this registration are indirectly involved."

# The Words "OLD CROW" Susceptible to Exclusive Appropriation.

III. We have nothing to add to what was said upon this phase of the case by the court below, except that each and every conclusion of fact is sustained by the record, not only by a preponderance of evidence, but by proof beyond a reasonable doubt. The record references by which the truth of these facts can be established are to be found in the appendix at the end of this brief, post, p. 83.

The Court says (226 Fed. Rep. at p. 535):

"(2) During the lifetime of the distiller, Crow, it seems clear enough that to call his product by

his name could not amount to the adoption of a valid trade-mark; the use of the name was descriptive, rather than arbitrary, and a manufacturer can not thus exclude all others. Such use might give rise to quasi-exclusive rights on the secondary meaning theory; but this theory is not alleged. The same situation, apparently, must continue after Crow's death, and in reference to whisky which had been manufactured by him during his life. The necessary meaning of the words, as merely describing the article or stating the name of the maker, would seem to merge and destroy any otherwise possible implication that they were an arbitrary symbol of origin. As the making of whisky after Crow's death, but by the same formula and methods, was continued by Pepper or by Gaines, and as it continued to be called 'Old Crow', this appellation would gradually change its character. It at once ceased truly to personify the maker; it did not immediately become merely arbitrary. As the trade lost the sense of Crow's personality, as he became less real and more traditional, as no one else of the same name challenged the growing right, and as with Crow's personality fading there must also fade the vague descriptive effect of using his formula, the words 'Old Crow' would become less descriptive and more arbitrary, and after a period of such unchallenged use they would become dominantly and substantially a mere symbol of origin. Whether this right of exclusive appropriation as a trade-mark had matured in 1866 or 1867, when Gaines, Berry & Company began the use, or matured in 1870, the date named in their

first trade-mark registration, or matured at some other date, is not now material. The facts seem to show an unbroken development of the type which the courts had recognized, but which had not been effectuated by statute until the Law of 1905. Words which were at first essentially incapable of exclusive appropriation were continually used as descriptive by the only one who could truthfully make such use, until, by change of circumstances and by long acquiescence, they had come to indicate, and indicate only, a particular product of a particular manufacturer. It might be otherwise, if the words had originally been more purely descriptive of quality or method; and it may be that some person named Crow would even vet have a measure of right to call his product 'Crow'. We do not meet either of these questions; and, in what has been said regarding the capability of the name for exclusive appropriation, we have, for the time being, disregarded whatever force the St. Louis use by Hellman may have."

### Privity of Parties.

IV. It is a question of pure law whether there can be privity between successive tort-feasors. That question has, so far as we have been able to ascertain, never been ruled by this Court. The former suit, like the present, sounded solely in tort. The same reasons which have led this Court in a patent case to hold that a defendant who had successfully resisted a charge of infringement did not have a "transferable immunity", which could be used as a sheltering aegis by another defendant subsequently sued for infringing the same patent (Rubber Tire Wheel Co. v. Goodyear Tire & Rubber Co., 232 U. S. 413, 419), seem to negative the existence of privity here. Privity would seem to import some property right to which various interests may attach. It would seem strange that there could be any succession in interest in the privilege of committing fraud upon the public by infringing a trade-mark.

So we do not agree with the court below on that question of law. However, the determination of that question contrary to our views of the law, and contrary to our understanding of the doctrine of "transferable immunity" as applied by this Court, 232 U. S. 419, does not defeat the plaintiff; the merits of the case are with us no matter which way this question is decided.

The court below (226 Fed. Rep. at p. 536) said:

"(3) 2. When we consider the claim that the Hellman decree is a bar to any relief in this suit, we first meet the objection that there is no privity of parties. We must think that privity sufficiently appears. The parties defendant in that case, at the time of its commencement, had been the two Hellmans, who were partners. Pending the suit, one partner died, and his administrator, Kahn, was substituted. Later, but still

pending the suit, the entire business of the Hellman Brothers was transferred to the just-organized corporation, the Hellman Distilling Company, and by supplemental bill this corporation was made defendant. The corporation was, therefore, a party to the suit at the time of the final During the existence of the partnership of Hellman Brothers, it had leased the distillery of the Rock Spring Distilling Company, near Owensboro, Kentucky, and as lessee it had manufactured whisky there in 1904. The Hellman Distilling Company, as such lessee, continued such manufacturing in 1905, 1906 and 1907. all this remained in bond in the distillery warehouse. In 1909, and after the final decree in the Missouri case, the Hellman Distilling Company contracted with the Rock Spring Company, and with Rosenfeld, as its lessee, for the further manufacture of whisky, and for the bottling in bond of the 1904 stock, and for the use upon such bottles of the brand or label 'Hellman's Celebrated Old Crow'. The Hellman company gave to defendants a bond of indemnity to protect them against plaintiff's claims; in using this brand or label, defendants are acting for and in behalf of the Hellman Distilling Company; and the right of that company to use this brand on this article is the very thing in controversy. former decree must be given the same force and effect as if the Hellman Distilling Company were the nominal, as it is the real, defendant here (Kessler v. Eldred, 206 U. S. 285, 27 Sup. Ct. 611, 51 L. Ed. 1065)."

# Distinction Between Straight and Blended Whisky.

V. In the Missouri case the Hellmans set up in their answer that they used the infringing mark upon a blended (rectified) whisky. The distinction between straight and blended whisky is well known and generally recognized. The Court of Appeals of Kentucky has clearly recognized this distinction, and has expressly held that blended whisky is not sold in competition with straight whisky; which decisions are referred to in detail later in this brief (post, pp. 42, 43).

However, upon this point the court below (226 Fed. Rep. at p. 537) said:

"(4) 3. Plaintiff next urges, by way of escape from the claimed force of the Hellman decree, and even if that decree is to be considered as an adjudication that the plaintiff had no lawful title to the trade-mark, vet that, since the only use there involved was upon a blended whisky, while the use here involved is upon a straight whisky, a judgment that plaintiff had no trade-mark valid against a blended whisky would not be a judgment that plaintiff had no trade-mark valid for straight whisky. Disregarding for the present such limitations as for the purposes of this suit must be thought to have been imposed on plaintiff's rights by the peculiar form of the 1909 registration, and with reference only to the general question and the general rule, we can not be satisfied with the theory which would thus interpret and then limit the effect of the Hellman decree. The general rule is clear that a common-

law trade-mark for one article extends to another article of the same descriptive properties; the difficulties come in applying this limitation, 'of the same descriptive properties'. The distinctions between a straight whisky and a blended whisky have given rise to much controversy in other legal fields; but it seems to us clear that. whatever the extended classifications and subclassifications of the Patent Office practice may contemplate, neither the common law nor the registration statute can intend such confusion as must result from recognizing the same trademark as belonging to different people for different kinds of the same article. Established trademarks directly indicate origin; but, if they have any value, it is because they indirectly indicate kind and quality, and to say that the seller of a blended whisky might properly put upon it a mark which was known to stand for a straight whisky, or vice versa, would be to say that he might deceive the public, not only as to the origin, but also as to the nature and quality of the article. The decided cases do not permit a trademark like this to be thus divided as to its subject-matter;1 and we must think that whatever was adjudicated regarding plaintiff's title to its trade-mark applies to its use on both kinds of whisky."

<sup>1</sup>Coffee and cocoa, Baker v. Harrison (Ct. App. D. C.), 138 Off. Gaz. 770; toilet brushes and tooth brushes, Florence Co. v. Dowd (C. C. A. 2), 178 Fed. 73, 101 C. C. A. 565; soda and baking powder, Layton Co. v. Church (C. C. A. 8), 182 Fed. 35, 104 C. C. A. 475, 32 L. R. A. (N. S.) 274; axes and shovels, Collins v. Ames Co. (C. C.), 18 Fed. 561 (Mr. Justice Blatchford); tobacco and cigarettes, American Co. v. Polacsek (C. C.), 170 Fed. 117 (Coxe, Circuit Judge).

#### Territorial Limitations

VI. At the last term this Court considered some aspects of the question of territorial limitation of trade-mark rights, in Hanover Star Milling Co. v. Metcalf, 240 U. S. 403. The opinion of the court below does not appear to conflict with any of the principles announced in that Hanover case.

The Court (226 Fed. Rep. at p. 537) says:

"(5) 4. It is next urged that the Eighth Circuit decree may be reconciled with granting the relief now sought, and upon the theory that trade-mark rights may be limited in territory, and that plaintiff might have the right to this trade-mark for whiskies throughout the country generally, while the Hellmans might have an exclusive right to the same words as a trade-mark for the same article in St. Louis and the Southwest, thus being given the field which they claimed they had first exploited and reduced to possession. This suggestion presents two conflicting theories of trademark origin and right—and we speak now only of marks which are so-called 'technical' trademarks. One theory is that the right arises from adoption-from a kind of creation or discovery followed by appropriation. Whether the right is perfect at the instant of adoption, or whether there first must be sufficient use upon the goods to create for the mark a meaning among that part of the public which begins to purchase, is a detail which would not usually be important. Accord-

ing to this theory, if the right is once acquired by prior adoption, it is by its very nature exclusive of all later similar rights which might otherwise be acquired by similar adoption; and from that theory it would seem to follow that one who first adopts the mark and applies it to his goods in interstate commerce, and who extends his business into new localities, until, in regular course, his business may cover the country, may prevent the use of the mark by another later user, even though that other has adopted the mark in good faith, and in his particular field has given it identity with his goods. How much diligence on this theory the first user must employ in extending his business to get the full benefit of his initial right need not now be considered. The other theory is that no right is perfected until the mark has been used to such an extent that it has come to have a meaning to the particular purchasing public as to which a controversy arises, and that the duty of courts of equity to enforce such rights depends essentially upon the duty of protecting this public against being misled. From this theory it will follow, or it may follow, that the later adopter, who has brought it about in a given locality that the mark indicates to the public that the goods are of his manufacture, may thereby himself acquire a trade-mark right or its equivalent, affirmatively enforceable in that locality and among that public, even against the first proprietor.

We do not find it necessary to consider or to attempt to decide the question so presented. For the purposes of this case, and without intimating any opinion, we give the first appropriator the benefit of the doubt and assume that his title is prima facie country-wide and exclusive against all others, and that as against all who have no special and superior equity he is entitled to carry his trade into the new territory and there to enforce his exclusive right. However, the existence of this general or prima facie exclusive right is not inconsistent with an inability to enforce it against some persons and under some circumstances. Instances may arise where the affirmative conduct or the laches of the first appropriator, and with reference to what he was at first entitled to call an infringement, has been such that on the principles of estoppel a court of equity can not tolerate that he should enforce against the later user the right which might have been originally perfect. This subject is more fully discussed and the reasons which lead us to this conclusion pointed out, with some reference to the decided cases, in our opinion in the Rectanus Case, 226 Fed. 545. 141 C. C. A. 301, this day decided. Under these considerations, and upon reference to the pleadings and the proofs in the Hellman case, we conclude that the latter case is of the class where the refusal to give an injunction to the first appropriator of the mark may be justified upon the ground of his estoppel; and so this ground of support must be considered in determining what is the true basis of that decree."

"5. Is the Eighth Circuit decree a judgment that the trade-mark, in its general, *prima facie*, affirmative aspect, belonged to the Hellmans by prior appropriation? This is the interpreta-

tion claimed by defendants. The language in the body of the Circuit Court of Appeals' opinion is consistent with that interpretation, but the last paragraph indicates that the two Judges (only two sitting) did not unite in putting the decision on this ground. When we turn to the record for further light, we find, first, that the defendants' cross-bill claiming the trade-mark ownership was dismissed, and that the dismissal became final. If it had been even seriously contended by defendants that their early use of the words was effective to vest a trade-mark right therein, surely there would not have been acquiescence in the dismissal of the cross-bill. It was apparent, then as now, that affirmative title to the trade-mark would have been of great value to defendants, if they could maintain that position. We find, second, that there was in the record practically nothing indicating that the Hellmans ever pretended to adopt or claim these words as their trade-mark. They stamped some barrels with the words 'P. Crow' or 'J. W. Crow'; but no person of this surname had ever been connected with the Hellmans. The Crow. or Old Crow, which, in 1863, had been manufactured in Kentucky for twenty years or more. was at least considerably known on the market. No reason has ever been suggested in this litigation, and we can think of none, why they should put this name on their barrels, unless they intended to indicate that the whisky was that made by Crow of Kentucky. Unless the selection of this name meant that it meant nothing. Witnesses for the defense frankly stated that in those years it was nothing unusual for jobbers or blenders of whisky to use well-known brands belonging to others, and that, if the initial of a proper name was changed, this was thought sufficient in morals to remove any objection to the appropriation. This may be the genesis of the otherwise unexplained use of 'P.' and 'J. W.'2 The Hellmans also used advertising signs of 'Celebrated Old Crow Bourbon'. From the record, we must doubt whether these signs antedated 1870. But if they did reach back to 1863, and if they referred to the blend or mixture which the Hellmans produced, it was neither 'Celebrated', nor 'Old', nor 'Crow', nor, unless by chance, 'Bourbon'." It was made by mixing colors and flavors with neutral spirits or high wines, or, sometimes, straight whisky; but, if the latter, it was whatever they happened to have on hand. Defendants' witness says, 'Any brand would do.' Records which seem to be complete show that during the seven years from 1863 to 1870 the Hellmans sold, of this 'Crow' whisky, an average of less than eight barrels per vear.

"In considering whether their use was of a trade-mark character, the peculiar nature of their business and their markings must not be overlooked. The brands or marks on whisky are

3Assuming that, at that date, "Bourbon" fairly meant a corn whisky from somewhere in Kentucky, even if not from

Bourbon County.

<sup>2</sup>One of the stencils was "J. Crow-Bourbon-Paris, Ky."—a plain declaration that "Crow" was a maker's name, and not a Hellman trade-mark; and as there never was any "Crow" in "Paris, Ky.", the intent seems clear enough.

usually those of the original manufacturer. The dealer or jobber may handle many well-known brands, and may mark his own name upon the packages or upon the advertisements; but this does not indicate that he claims the brands as his, or that he is acquiring a trade-mark right While the stencils on the barrel and the glass signs carried the name 'Helman & Co.'. they did not say 'manufactured by', or that Hellman & Co. were manufacturers or distillers, nor were they in any way inconsistent with mere sale by Hellman as jobber of a well-known brand made by some one else. The thus described nature and character of the Hellman early use might not always be thought sufficient to initiate and support even a defensive right; but they were so regarded in the former decree. and it is immaterial whether we would independently reach that conclusion. It did there appear that the Hellman use thus began and continued for seven years before 1870, or four years before 1867, the earliest date to which, under the pleadings, plaintiff could then resort. and that after 1870 it continued, increasing somewhat, although remaining comparatively small, and continuing without challenge from plaintiff until 1904. It may well be that, even if plaintiff did not know of this use and acquiesce. it was legally chargeable with such knowledge and acquiescence for many years, and that in 1904 the use would have matured into a possession of which a court of equity would not deprive defendant. At any rate, we think that is the theory upon which the former decree should be considered to stand; and, accordingly, it adjudicates such defensive right and nothing more. As interpreted by Judge Lacombe in the Baltimore Club case (Carroll v. McIlvaine C. C. A. 21, 183 Fed. 22, at page 28, 105 C. C. A. 314). this right does not go beyond what has actually been 'reduced to possession' by defendant, and does not extend to any whisky not mixed or blended, so as to be of the same general type as that which defendants had been making, or to trade or territory which they were not selling when that bill was filed. Such difficulties as there may be in drawing the exact line of its effect are not here involved, because the infringement here sought to be enjoined is in another locality and of another character. This limitation-to blended whisky as distinguished from straight—thus imposed on defendants, is not inconsistent with our earlier holding that a trademark can not be so divided. This limitation is not of the trade-mark right itself, but of the fraction thereof which has been lost."

# Validity of the Registration in Suit.

VII. Upon this branch of the case the opinion of the court below sets forth fully and clearly the contentions of the defendant, and it applies the law to those contentions (226 Fed. Rep., at p. 540) as follows:

"(6,7) 6. The validity of plaintiff's registration under the act of 1905 is attacked upon two

grounds: First, that the registration was forbidden by Section 5, because the mark was identical with a 'known trade-mark owned and in use by another and appropriated to merchandise of the same descriptive properties', viz, the Hellman trade-mark; and, second, that it would be invalid under that provision of Section 21 which relates to certificates of registration fraudulently obtained.

"We pass by the plaintiff's contention that the validity of registration can not be collaterally attacked, but must be directly reached under the provisions of Section 13, which provides for the cancellation of the certificate if it is made to anpear that the registration was unlawful; and we do so because we conclude that the registration of a word capable of exclusive appropriation has no effect upon the substantive rights of the parties. excepting its evidential force to make a prima facie case of title. We find nothing in the act purporting to cut off or impair any substantive defense which would have been open to the defendant if there had been no registration, except in so far as it perhaps may affect the character of registrant's title to a descriptive word of a secondary meaning (Nashville Co. v. Coca Cola Co., 215 Fed. 527, 529, 132 C. C. A. 39), and this effect is not now involved. If, then, the law does not otherwise indicate the intention to cut off or embarrass ordinary defenses by one who has not been heard in the registration proceedings, that intention can not be inferred merely from the insertion of a provision by which a hostile party can secure the cancellation of a certificate and so destroy even its evidential force and its effect upon questions of jurisdiction as between different courts.

"The first objection is that because the trademark 'Old Crow' belonged to the Hellmans for use upon blended whisky, and because this is an article of the same descriptive qualities as plaintiff's straight whisky, the registration was forbidden. This objection must fall, when it is found, as we have held, that upon the basis of the former decree the adjudication does not establish the ownership of the trade-mark by the Hellmans, but only a defensive right sufficient to protect them against the remedy then sought, and that, if we go behind the adjudication and into the facts, the Hellman right is not enlarged."

## The Registration Not Fraudulently Obtained.

VIII. In holding adversely to the defendants' contention that the plaintiff's registration of its trademark was fraudulently obtained, the court below (226 Fed. Rep. at p. 541) said:

"(8) It is next said that the registration was 'fraudulently obtained' because, before the application was made the Eighth Circuit litigation had been finished, and yet the application falsely stated two things, the untruth of which had then been judicially established: (1) That the trade-mark had been continuously in use by registrant and its predecessors since 1835; (2) that no other person had the right to use the mark. The statement that the trade-mark had been in use since 1835 is

not shown to be untrue to such extent and with such certainty as would be necessary to fix a fraudulent character on the application, within the meaning of 'fraudulent' as used in this connection. The proof does not carry the use of the word back to a definite beginning. At Crow's death, in 1855, the name had been long used. No one undertakes to say how long. It was not important for plaintiff to prove that the use did extend back of say 1850, and defendant did not undertake to prove that the use did not go as far as 1835. The period between 1835 and 1850 was not important. either for the purpose of registration or for the purpose of this suit. It is true that the use was of a character analogous to a descriptive use, rather than a strictly trade-mark use, for a period which did not expire until an indefinite date, perhaps 1870, perhaps earlier; but this fact, with these surroundings, is plainly insufficient to make 'fraudulent' the statement that the trade-mark had been continuously used since an earlier period."

# Plaintiff Rightfully Claimed Exclusive Use.

IX. Upon this point the reasoning of the court below is, in its entirety (226 Fed. Rep. at p. 542) as follows:

"(9) The application says 'that no other person \* \* \* has the right to use the trademark'. It had then been decided that, as against plaintiff's claimed exclusive right, the Hellmans could continue to use the words as they had been

doing, viz, in their trade and territory and upon their blended product. The registrant thought to avoid this apparent conflict by limiting the registration to straight whisky only, and undoubtedly the application, when read together, is only a statement that no one else has the right to use the words upon straight whisky. We have expressed our opinion that a trade-mark can not be so limited; but we see no reason why an applicant may not, if he wishes, confine his registration and its effect to such classes or subclasses of the article 'of the same descriptive properties' as he may select,4 or why he thereby necessarily abandons such rights as he may have to the use of the mark upon other sub-classes of the same article. It is true that the jurisdiction in this case depends upon this registration; but the decree sought is confined strictly within the limitations of the registration, affects straight whisky only. and it is no concern of defendants if the registration might have been broader. The application, obviously, did not state the whole truth regarding the mark; but, as far as it stated anything in this respect, it was carefully accurate. It claimed only that exclusive right of use which remained unimpaired by the Hellman decree.

"(10) It is also said that the registration was fraudulent because the Hellmans' well-known interests were, by silence, concealed, whereby they were not summoned as adverse claimants, and

<sup>4</sup>Kohler v. Beeshore, 59 Fed. 572, 8 C. C. A. 215; Richter v. Reynolds, 59 Fed. 577, 8 C. C. A. 220, and Pittsburgh Co. v. Diamond Co. (C. C.), 85 Fed. 637, pertain to the word itself, not to its use.

lost their chance to be heard. The registration statute contemplates that adverse claimants, when known, shall have notice and an opportunity to oppose. There is little reason to doubt that this application was carefully so shaped as to avoid any necessity for such specific notice, and if the effect of the registration was to take away any right of use which the Hellmans actually owned, it might well be that any intentional failure to disclose facts which might give another the right to be heard, would be fatal to the proceeding; but, with due regard for the limited effect of the registration, there is no occasion for so strict a rule in determining 'when the certificate is fraudulently obtained'. Whatever new rights, of evidence or of forum, plaintiff was getting, were confined to its trade-mark used upon straight whisky; in that use, the Hellmans had no concern. Their failure to receive notice impaired no right of theirs; and it follows that the deliberate limitation and shaping of the registration so as to avoid conflict with their claims was not fraudulent as against them or as against the public."

## The Decree Sought to Be Reviewed.

X. The opinion of the court below embodies (226 Fed. Rep. at p. 542) the following conclusion:

"(11) We think the plaintiff was entitled to an injunction against the continuance of what defendants were doing, viz, using the names 'Crow' or 'Old Crow' in connection with straight whisky not made by plaintiff. Extending the injunction in the broad terms of the prayer of the bill might not only cause confusion with rights secured by the Eighth Circuit decree, but might go beyond our jurisdiction in this case. jurisdiction is confined to protecting the class of merchandise specified in the certificate of registration, 'straight Bourbon or rye whisky'; and if, upon the principles herein declared, plaintiff would be entitled to any broader measure of relief, this limitation of the injunction will not prejudice proceedings therefor in a court whose jurisdiction does not depend solely upon the registration. The difficulty of distinguishing between the results of defendants' wrongful use of these names as compared with the results of a rightful use make the case inappropriate for an accounting (Ludington Co. v. Leonard [C. C. A. 2], 127 Fed. 155, 157, 62 C. C. A. 269).

"The decree below is reversed, with costs, and the case is remanded for the entry of a new decree consistent with this opinion."

We desire to call attention to the inadequacy of the relief which grows out of the denial of the accounting. The difficulty attending such an accounting is insignificant by comparison with Westinghouse v. Wagner, 225 Fed. Rep. 604, and other cases of patent infringement. The plaintiff moved promptly against the defendant, but, notwithstanding that fact, the defendant had sold a large quantity of the fraudulently marked whisky, and the profits thereon belong to the plaintiff and not to the defendants.

Of course, on every gallon of the whisky sold by means of this fraud, the Hellman Distilling Company of St. Louis profited more than the defendant Kock Spring Distilling Company; but we are not concerned in the instant case with the fraudulent acts of strangers to this case. What profits the present defendants have made belong to us, and we are clearly entitled to the order for accounting in addition to relief by way of injunction.

#### ARGUMENT.

XI. In attempting to add anything of value to the argument contained in the opinion of the Court of Appeals for the Sixth Circuit, we almost feel as if trespassers upon this Court's time, but because of the immensity of the record a very brief discussion of the points involved may be of assistance to this Court.

It is convenient to discuss this case under four divisions:

First. That in a case involving a technical trademark the public interest, i. e., the interest of the public to be protected against imposition and fraud by the counterfeiting of a trade-mark, is paramount to the private interest of the parties to a litigation, and that in protecting this public interest this Court is not concluded by the error or mistake committed by any subordinate court in an adjudication in regard to the validity of the infringement of the trade-mark.

Secondly. That the decision in the Eighth Circuit case did not conclude any of the issues in the instant

case because that decision simply denied plaintiff's (respondent's) claim that defendants (petitioners) had infringed its trade-mark through the sale of rectified whisky bearing a counterfeit of it;

Thirdly. That the decision in the Eighth Circuit refusing the injunction prayed by respondent against the Hellman Distilling Company did not confer upon that defendant a "transferable immunity" (232 U. S. 419), through which it could clothe a subsequent tort, feasor with a ready-made defense; and,

Fourthly. That the decision of the Circuit Court of Appeals for the Sixth Circuit is impregnable upon the merits of the controversy.

#### A.

XII. In Shaw Stocking Co. v. Mack, 12 Fed. Rep. 707, 710, the Court (Coxe, J.), said of the trade-mark:

"Its object is twofold; first, to protect the party using it from competition with inferior articles; and, second, to protect the public from imposition."

In Humphreys' Med. Co. v. Wenz, 14 Fed. Rep. 250, 252, the Court (Nixon, J.), said, speaking of trademarks:

"Courts of equity have two objects in view in granting injunctions against their imitation: 1. To secure to the individual adopting one the profits

of his skill, industry and enterprise; 2. To protect the public against fraud."

In Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 489, this Court, in declaring the weight to be given to the doctrine of comity, said:

"It is scarcely necessary to say that when the case reaches this Court we should not reverse the action of the court below if we thought it correct upon the merits."

The principle for which we contend is suggested by the decision in *Hill v. Wooster*, 132 U. S. 698, where, although the question of the patentability of the device in controversy was not raised by the pleadings, nor considered by the Circuit Court, nor argued by counsel, nevertheless, this Court said that it would not overlook that question, and upon examination of the record reached the conclusion that the claims in controversy were not patentable and directed the dismissal of the bill.

Petitioners sought, and presumably obtained, the writ of *certiorari* from this Court upon the ground that it was necessary in order to remove conflict between the doctrines obtaining for the two circuits, but insists that the remedy must be, not the annulment of the doctrine which is unsound, but of the doctrine last announced, sound or unsound. Of course, this contention is untenable because there would be presented no

case of conflict, but simply a case of prior adjudication. Such case might exist as well between judgments in the same circuit, or even in the same court, as between judgments of different circuits. Indeed, it would exist in every case where res judicata might be pleaded. When, therefore, this Court grants its writ of certiorari upon the assumption of the duty to remove conflict between decisions in the two circuits, it is granting the extraordinary remedy of certiorari for a public purpose, viz, to settle the doctrine between circuits correctly, i. e., by announcing the true doctrine for both circuits. This involves, of course, this Court's determination of the merits of the controversy in each circuit.

It was upon this assumption that we petitioned this Court for writ of certiorari, 241 U. S. 668, after the instant writ was granted, and doubtless this Court refused our application upon the ground that the writ granted to petitioners was for the purpose of settling, and settling right, the question upon which the two circuits were not in accord, if it were found by this Court that they were not in accord (see record from page 204 to page 983, inclusive). Accordingly, we shall briefly indicate the controversy in the Eighth Circuit, and the record in the Eighth Circuit case is contained in the record in this Court (Rec., pp. 204 to 983).

There certainly can be no doubt where the public interest in this contest lies. Respondent, ever since

1867, has manufactured in Woodford County, Kentucky, a straight whisky ("Old Crow") of such excellence and so reliable that it has become standard all over the United States and in Canada (Rec., p. 189, Test. of Thomas S. Jones). It is often sold upon its reputation without even the necessity of producing a sample (Chas. H. Herman, Rec., p. 355).

Plaintiff's "Old Crow" is one of the most celebrated brands made in Kentucky.

"\* \* It is the highest type of whisky produced in Kentucky—sour mash whisky. It is a straight Kentucky whisky. It is distributed from the Atlantic to the Pacific and from the Northern to the Southern boundary of the United States. It is made near Frankfort, Kentucky, in the Blue Grass region, embracing ten or twelve counties of which the witness names Henry, Woodford, Franklin, Harrison and Bourbon counties, the Old Crow distillery being in Woodford County" (Thos. S. Jones, Rec., p. 189).

Edmund H. Taylor, Jr., whose whisky has no superior (Rec., pp. 317, 318), swears that

"James Crow was the first man, as I recollect, who ever distilled sour mash in Kentucky, and it was the best whisky known in the counties Woodford, Fayette, Franklin."

Q. Prior to that time (1866, 1867) what significance did the words "Old Crow" have in the whisky trade in Kentucky?

A. The significance that attached to it was that it was manufactured by James Crow at the distillery I have mentioned in a former question and under his established formula."

An extended history of the trade-mark is given in 226 Fed. 533, Denison, J.

Wm. Mida, editor of Trade Journal Criterion of Wholesale Liquor in St. Louis, testified (Rec., p. 364) that his connection with the liquor trade extended all over the United States and that

"''Old Crow' is recognized as a brand of one of the finest whiskies made in the country; and has been so recognized since I have been connected with the wholesale liquor interest, either in the capacity of a representative or as a broker'' (Rec., p. 365).

Q. "To whose product are those words understood by the liquor trade of the United States to refer?"

A. "It refers to the product of W. A. Gaines & Company of Frankfort, Kentucky."

The testimony of Jones, Taylor and Mida is corroborated overwhelmingly by the testimony in the Eighth Circuit record by many witnesses (post, p. 83 et seq.).

In 1897 respondent began to *bottle* Old Crow whisky in *bond*, and in the autumn of 1897 and spring of 1898 bottled between 10,000 and 15,000 cases,

and by 1913 it was bottling 100,000 cases per year, a case containing 12 quarts or 12/5 of a gallon (Geo. F. Berry, Rec., pp. 187, 188).

Before this suit was instituted respondent had spent \$232,000 in advertising its brand "Old Crow" (Wm. J. Gorman, Rec., p. 306), and its excellence was so established that while "Old Crow" sold for 75 cents per gallon, petitioners' straight whisky manufactured by the Rock Spring Distillery ranged from 30 cents to 45 cents a gallon (Berry, Rec., p. 187).

The cost of producing whisky under normal conditions is 30 cents per gallon (Jones, Rec., p. 187).

In 1910 "Old Crow" of 1905 sold for \$1.50; of 1904, \$1.60; of 1903, \$1.70; of 1908, 78 cents to 87½ cents; while the highest price of the Rock Spring Distillery whisky was 48½ cents (Jones, Rec., p. 190). The Rock Spring whisky actually bottled as "Crow" sold for 35 cents per gallon (Rec., p. 1001).

If, therefore, petitioners were permitted to sell their cheap whisky at the high prices commanded by respondent's "Old Crow", the public would be cheated of the difference, as well as being defrauded by the passing off of the spurious for the genuine article.

Let us contrast the whisky and the conditions of petitioners and their assumed predecessors, with the whisky and conditions of respondent as appears in this record, including the Eighth Circuit record.

Petitioners, alleged predecessors and privies in the scheme, had been counterfeiting respondent's brand, "Old Crow", under divers suggestive imitations of "Crow", "Old Crow", "J. W. Crow" and "P. Crow" before the institution of the Eighth Circuit suit only on a rectified whisky, compounded of neutral spirits. In the same way they had counterfeited other famous brands, such as "Magnolia", established in Kidd v. Johnson, 100 U.S. 617; and "Bowen", which was the trade-mark of Frieberg & Workum (Mida, Rec., p. 364) to none of which brands had they any title except by piracy, and when sued by respondent, W. A. Gaines & Company, they not only undertook to claim priority of use of respondent's brand and trade-mark, but unblushingly made the false pretense of claiming the right to enjoin respondent from the use of its own brand and trade-mark-a pretense which was promptly abandoned on the trial.

In their cross-bill, which was abandoned as afore-said, petitioners averred (Rec., p. 228) that respondent's (genuine Old Crow) whisky contained a large and dangerous percentage of fusel oil, a deadly poison, and was unwholesome, and respondent therefore guilty of fraud upon the public; that by using such brands respondent had damaged petitioners' trade and diminished its sales, and that the public had purchased respondent's whisky in the false belief that it was petitioners' (Rec., p. 229); and petitioners

prayed, in said cross-bill, an injunction against respondent's using the words "Crow" or "Old Crow", etc., etc. In the same breath petitioners admitted that respondent was engaged, through its agents in St. Louis and "elsewhere at numerous points throughout the United States and in foreign countries" in selling its whiskies (Rec., p. 228).

When the truth, as divulged by the record, is considered, it appears not only that the averments in said cross-bill were unblushingly fabricated in furtherance of the endeavor to perpetrate a commercial theft of an advantage gained by another through thrift, labor and expense, but that this was so thoroughly recognized by petitioners themselves that in the Court of Appeals they declined to pursue their claim and expressly abandoned it.

While respondent was selling its whisky under its trade-mark, "Old Crow", throughout the United States, and, as petitioners admit, in foreign countries, and while it had spent \$232,809.35 in advertising its whisky and brands, and its trade-mark, "Old Crow", was worth not less han \$500,000 (Rec., p. 247)—the "Crow", "Old Crow", "J. W. Crow", "P. Crow" and the other "Crows" employed by petitioners' alleged privies, the Hellmans, as shown by their own books, totaled 2361 gallons or 59 barrels in seven years; or 8 3/7 barrels per year from March 18, 1863, to December 18, 1869, the time of the so-called priority

of use of the divers species of Crows handled by petitioners (Rec., p. 947).

The tabulation shows that on March 18, 1863, one barrel, 38½ gallons, was sold; that December 28, 1866, three years and nine months afterward, another barrel, 40½ gallons, was next sold; that April 20, 1867, 82½ gallons were sold; that there were in 1867 seven other sales; in 1868, ten sales, these being all the sales made upon which even petitioners claim to have put the "Crow" mark prior to the year 1869, when respondent adopted its trade-mark.

The trade-mark, however, was already well known by reason of James C. Crow's Woodford County distilling, which was begun in 1835 (155 Fed. Rep. 645, opinion of Dyer, J.)

It was a well-known brand in St. Louis as early as 1869. Wm. Mida so testified, and had been acquainted with "Old Crow" for thirty-six years (Rec., p. 364), the time he had been engaged in business. During that time respondent's "Old Crow" was recognized as one of the finest brands, and had been so recognized for thirty-six years (Rec., p. 365, 226 Fed. Rep. 539).

Mida says that he never heard of "Old Crow" being offered, sold or claimed by petitioners. He became acquainted with the liquor business in 1869, and "Old Crow" was then bought and sold in the St. Louis market as respondent's whisky (Rec., p. 365).

John O. Urner, petitioners' bookkeeper, swears

(Rec., p. 512) that he knew of no man named P. Crow ever connected with petitioners, nor engaged in the liquor business, and testified similarly as to J. W. Crow.

He remembers of no distillers except high wine distillers of whom petitioners made purchases in 1865 and 1866, and none of those high wines were purchased under the brand "Crow", "J. W. Crow", "P. Crow" (Rec., p. 514). All the goods sold under the "Crow" brand were prepared on the premises. Among those made was "Magnolia". It was rectified there, and the Magnolia brand put upon the barrel. "Magnolia", too, was a celebrated brand, established in Kidd v. Johnson, 100 U. S. 617, as this Court knows. Petitioners made "Magnolia" of high wines. See, further, the testimony of Urner (Rec., p. 514 et seq.) as to other brands which were pirated by the Hellmans. Were petitioners the "proprietors" of all these pirated brands?

The Court of Appeals for the Sixth Circuit justly says (226 Fed. 539, Rec., p. 1020):

"If it had been even seriously contended by defendants that their early use of the words was effective to vest a trade-mark right therein, surely there would not have been acquiescence in the dismissal of the cross-bill. It was apparent, then, as now, that affirmative title to the trade-mark would have been of great value to defendants, if they could maintain that position. We find, second,

that there was in the record practically nothing indicating that the Hellmans ever pretended to adopt or claim these words as their trade-mark. They stamped some barrels with the words 'P Crow', or 'J. W. Crow', but no person of this surname had ever been connected with the Hellmans. The Crow, or Old Crow, which, in 1863, had been manufactured in Kentucky for twenty years or more, was at least considerably known on the market. No reason has ever been suggested in this litigation, and we can think of none, why they should put this name on their barrels, unless they intended to indicate that the whisky was that made by Crow of Kentucky. Unless the selection of this name meant that, it meant nothing. Witnesses for the defense frankly stated that in those years it was nothing unusual for jobbers or blenders of whisky to use well-known brands belonging to others, and that if the initial of a proper name was changed, this was thought sufficient in morals to remove any objection to the appropriation. This may be the genesis of the otherwise unexplained use of 'P' and 'J. W'. The Hellmans also used advertising signs 'Celebrated Old Crow Bourbon'. From the record, we must doubt whether these signs antedated 1870. But if they did reach back to 1863, and if they referred to the blend or mixture which the Hellmans produced, it referred to the blend or mixture which the Hellmans produced, it was neither 'Celebrated', nor 'Old', nor 'Crow', nor, unless by chance, 'Bourbon'. It was made by mixing colors and flavors with neutral spirits or high wines, or, sometimes, straight whisky; but, if the latter, it



was whatever they happened to have on hand. Defendants' witness says, 'any brand would do'.''

Not a scintilla of evidence was offered by petitioners to show either any damage to them nor that any one ever purchased whisky of respondent under the impression that it was petitioners' whisky. Such claim was, of course, knowingly false. Otherwise an attempt would have been made to prove it. The concoction sold by petitioners was so unlike straight whisky that the ground upon which petitioners prevailed in the Eighth Circuit case was that its whisky was so different from respondent's that mistake was out of the question. The Eighth Circuit Court of Appeals' opinion, upon which petitioners rely, shows that they were engaged in business on Pine street, St. Louis, as early as 1862, 1863. That (161 Fed. 502) the only evidence touching the character of the whisky sold by the Hellmans is that it was rectified whisky-a mixture of so-called straight whisky with refined spirits from which, the rectifiers claimed, the largest possible percentage of impurities was removed.

It is obvious that the inevitable result of petitioners escaping punishment for their attempt to pilfer the property of respondent would be the principle involved in the Gresham Law, viz, that the inferior article would run the other out of the market and the public be the loser accordingly.

Wherefore, we submit that the public interest in the question now submitted to this Court is such that this Court in adjudicating a question of national import will not hold itself concluded by any error committed by a subordinate court acting upon a litigation between two private parties.

Also, we submit that when petitioners' alleged privies, the Hellmans, having successfully escaped an injunction upon the ground that their acts were not an infringement of respondent's trade-mark, come to this court to procure it to extend the effect of such adjudication to other circuits upon the ground of a conflict between circuits, this Court will treat the application of petitioners as a submission of the merits of the controversies in both circuits and determine every right as between the parties de novo; this Court now having plenary jurisdiction of the subject-matter and (on the theory of privity between petitioners and the Hellmans) over the parties.

R

## What the Eighth Circuit Case Decided.

XIII. All that the Eighth Circuit Court of Appeals decreed was a dismissal of the Gaines bill to enjoin the Hellmans from selling a blended whisky under the trade-mark "Old Crow". That blended whisky was compounded on the Hellman premises in the City of

St. Louis. The Kentucky Court of Appeals has probably a greater familiarity and larger experience with questions involving the difference between straight whisky and blended; rectified or adulterated whisky, than any other English speaking court. What blended whisky is that court has defined in Brown-Foreman Co. v. Com., 125 Ky. Rep. 418, as follows:

"It is a matter of common knowledge that a large part of the whisky used in the United States is rectified; that is, that a barrel of whisky as it comes out of the distillery is adulterated by the rectifiers, so as to make five or six barrels of whisky out of it (see Taylor v. Taylor, 85 S. W. 1085, 27 Ky. Law Rep. 628). And it is this business of multiplying the whisky which is distilled that the Legislature imposed the license tax upon."

In the instant case the subject of blended whisky is not involved. The acts of defendant Rock Spring Company have been strictly limited to the bottling in bond of a nameless whisky made by some unknown and unnamed process. In the former case the Hellmans were permitted to continue their trade in a limited territory loosely referred to as the Lower Mississippi Country, under the name of "Old Crow", under which name they sold the blended, rectified or adulterated whisky and never sold a regularly distilled or straight whisky.

Precisely this situation has a precedent in Kentucky in the case in which E. H. Taylor, Jr., & Sons, distillers of Old Taylor Whisky, sought to enjoin a defendant also named Taylor, from dealing in a bottled whisky under the name "Kentucky Taylor". The Court of Appeals of Kentucky held that the defendant might be permitted to continue his bottling and sale of blended whisky, upon the theory that it was not in competition with the plaintiff's straight or regularly distilled whisky, and merely required that the defendant mark his product as a blend to prevent imposition and fraud upon the public. As the Court says in E. H. Taylor, Jr., & Sons Co. v. Taylor, 124 Ky. Rep. 181:

"The defendant may properly sell his brand of 'Old Kentucky Taylor', provided he so frames his advertisements as to show that it is a blended whisky, but he can not be allowed to impose upon the public a cheaper article, and thus deprive appellant of the fruits of its energy and expenditures by selling his blended whisky under labels or advertisements which conceal the true character of the article, for this would destroy the value of the appellant's trade."

### Effect of Dismissal of the Hellman Cross-Bill.

There was a decree dismissing the cross-bill (Rec., pp. 652-653), and that pleading contained the only assertion of title to the mark they were infringing

ever made by the Hellmans. Their appeal from the decree enjoining them embraced an appeal from that decree dismissing the cross-bill.

The Sixth Circuit Court of Appeals says (226 Fed. Rep. 535) "the Hellmans dropped their appeal from the dismissal of their cross-bill, whereby whatever adjudication was carried by such dismissal became final"; and at page 539, "When we turn to the record for further light we find, first, that the defendants' cross-bill claiming the trade-mark ownership was dismissed, and that dismissal became final." \* \* \* "We find in the record practically nothing indicating that the Hellmans ever pretended to adopt or claim these words as their trade-mark." In passing upon the petition for rehearing the Court further said (226 Fed. Rep., at p. 544):

"(13) (e) The petition points out that the opinion, after stating that the Hellmans appealed from the St. Louis decree dismissing their crossbill asking affirmative relief, then erroneously states that they dropped this appeal 'whereby whatever adjudication was carried by such dismissal became final'. The facts are that the decree below directed an injunction against the Hellmans on the original bill and the dismissal of their cross-bill; that they appealed from each portion of the decree; that in the Court of Appeals their counsel announced that they would not ask affirmative relief, and the Court of Appeals did

not consider that subject; and that the decree below was reversed, and a new decree was entered below, simply dismissing the bill. It is not of controlling importance in what technical situation this final dismissal left the rights claimed by the cross-bill. The persuasive thing is that the Hellmans abandoned any claim to relief on the theory that they had any trade-mark; and it is this conduct that helps to interpret the Eighth Circuit litigation, and tends to support our conclusion that such litigation should not be taken as an adjudication that the Hellmans had adopted and had become the owners of the trade-mark."

Petitioners' brief characterizes the abandonment of the appeal as "forbearance by the Hellmans" (p. 15). This Court has defined forbearance as a "suspension of a legal demand" (Goodman v. Simonds, 20 How. 370). Doubtless petitioners had in mind some colloquial significance in employing this singularly inapt word in this connection.

## The Former Case and Case at Bar Compared.

XIV. It will facilitate our examination of the question of former adjudication to analyze the present and former cases as to parties and subject-matter; for convenience we will employ parallel columns.

#### Case at Bar.

## Eighth Circuit Case.

#### As to the Parties.

Plaintiff,

W. A. Gaines & Company.

Defendants.

Rock Spring Distilling Co. and Silas Rosenfeld, both citizens of Kentucky (Rec., p. 1). Plaintiff,

W. A. Gaines & Company.

Defendants.

Abraham M. Hellman and Moritz Hellman, copartners as A. M. Hellman & Co. (Rec., p. 208).

Abraham M. Hellman dies pending suit, Max Kahn brought in as his administrator (Rec., p. 207). All citizens of Missouri.

# As to the Subject-Matter.

Infringement of the registered trade-mark OLD CROW, Certificate No. 74,-537, registered July 20, 1909, by the defendants in putting out, after July 21, 1909, in Kentucky, a bottled-in-bond whisky under the same name, Old Crow (Rec., p. 5). Defendants distilled this nameless whisky at their distillery in Kentucky, sold it to the Hellman concern, and bottled it in bond in Kentucky, under labels marked OLD CROW (Rec., p. 97).

Infringement of the common law trade-mark OLD CROW upon a compound made by defendants in St. Louis, Mo. (Rec., p. 211), prior to March 3, 1905 (Rec., p. 208). These defendants were wholesale liquor dealers, and the goods sold by them as OLD CROW whisky were compounded by them-"it was blended whiskya mixture of so-called straight whisky with refined spirits" (Rec., p. 981).

#### As to Jurisdiction.

Solely dependent on the registration of the trademark and place of infringement, and use of the infringing mark in interstate commerce.

Dependent upon diversity of citizenship and amount in controversy.

#### Never Any Trade-Mark Use by Hellmans.

XV. The use of the words Old Crow by the Hellmans is characterized by the petitioners as a trademark use. That is not true; indeed, it is in conflict with the undisputed facts. Referring to the tabulated sales of defendant's whisky, beginning with one barrel sold March 18, 1863 (R., p. 955), we find that the mark indicated is "P. Crow". This was clearly a fraud. The name of the Kentucky distiller was James Crow. There was no person named P. Crow. Looking through the transcript from the Hellman books on pages 955-970, we find that the Hellmans never made a single sale of Crow whisky (i. e., spurious whisky marked as Crow), in the City of St. Louis, in which they lived and had their place of business. Every sale was made to a small town, and most of those sales were to towns on the lower Mississippi, reached only by an occasional steamboat. The same fraud was being practiced as to the Arnold brand, the Bowen brand, the Magnolia brand and others.

Even the opinion of the Eighth Circuit Court of Appeals, to which we are referred by petitioner, by the page references 977, 982, does not claim there was a trade-mark use. At page 977 the Court says that the Hellmans employed the word Crow in their trade; at the conclusion of that opinion (p. 981), the Court finds that the Hellmans employed the word Crow, or the words Old Crow as "descriptive term" in connection with their business. On page 982, line 3, the Court finds that the Hellmans "are not guilty of infringing on complainant's claimed trade-mark'. There is no showing that the Hellmans ever used the mark as a trade-mark. They never advertised it. They never sold goods under it in their own home city. They sold only in small, obscure and remote towns. Their use was stealthy and concealed. Their conduct was rather that of the thief in the night than of the honest trader. Finally, their entire business was fraudulent, as its great bulk, shown in the record, consisted in piracy of four of the leading established brands, to none of which the Hellmans ever lay claim of title. This Court has considered the subject of the acquisition of trade-mark rights in Hanover Milling Co. v. Metcalf, where it is pointed out (240 U.S., p. 414). that the trade-mark is merely a protection for the good will, and at page 420, that to take the trade and good will which one company has built up at much expense and confer it upon another who has not acquired by appropriation and occupancy of territory the right to use the mark "would be a complete perversion of the proper theory of trade-mark rights". In that case the Court was dealing with mere inaction on the part of one of the claims for the use of a mark. In the present case we have a use by the Hellmans which can not be argued to have been anything but fraudulent in its inception, for the mark then used was P. Crow, or J. W. Crow; there were no such persons in existence, and as pointed out in the opinion of the court below, the only object in using those words was the accomplishment of fraud.

The whisky sold by the Hellmans was not sold on its merits, but as genuine "Old Crow", to customers who thought they were getting the genuine article, and a straight whisky, not a blend. Their own witness, Schaefer, of Yazoo City, Miss., testifies (Rec., p. 544):

"Q. You don't know who it was distilled by?

A. No, the finest whisky I handled was that whisky and I bought it from I. & L. M. Hellman, and it was graded 'Old Crow'; I don't know who made it.

Q. You bought it believing it to be straight highgrade bourbon whisky?

A. That is it; yes, sir.

Q. And you paid a very high price for it?

A. Yes, sir; my recollection is that it always cost me \$3.00 and upwards."

In passing upon the petition for rehearing the Sixth

<sup>&</sup>lt;sup>1</sup>See note, p. 6; 155 Fed. Rep. at p. 645; <sup>2</sup>6 Fed. Rep. at p. 539,

Circuit Court of Appeals said (226 Fed. Rep., at p. 544):

(12) (d) The opinion is criticised because we hesitated to accept, at its face value, the Hellman testimony regarding the extent of their Old Crow sales, the use of their advertising signs, etc., before 1867. There is a considerable volume of this testimony, but it consists almost wholly of unaided recollections of dates forty years old; and it is that class of testimony which, by decisions familiar in patent cases, the Supreme Court has refused to accept. True, there is in a trade-mark case no initial presumption of validity to be overcome; but the principles for determining the evidential value of testimony can not differ according to the subject-matter of the case.

The decision in the Eighth Circuit is not res judicata of the instant case. The contest is radically different. In the Eighth Circuit case respondent (Gaines) sued for an injunction against petitioners infringing respondent's trade-mark. The injunction was denied. Under the opinion of the Court of Appeals the denial may have rested upon any of three grounds, viz, (a) respondent's laches; (b) that petitioners had used the devices complained of before respondent adopted its trade-mark, although the trade-mark had been used upon the same manufacture, at the same place, of the same whisky, and (c) that the respondent's trade-mark was confined to straight whisky, while petitioners' use

of the devices in question was confined to a rectified compound of neutral spirits and other articles.

The abandonment, however, by petitioners of their cross-bill wherein they asserted title to the trade-mark, absolutely clinches the point that the Eighth Circuit decision is not res judicata of the question in the instant case.

The condition of the Eighth Circuit record, therefore, is that respondent sued to enjoin petitioners from infringing its trade-mark "Old Crow" used by respondent solely upon a straight whisky, petitioners filed answer and cross-bill and in the latter claimed title to the trade-mark; the Circuit Court granted the injunction prayed by respondent and dismissed petitioners' cross-bill and petitioners appealed; the Court of Appeals reversed the judgment in respondent's favor granting the injunction, but accepted the abandonment by petitioners of the appeal from the judgmen of the Circuit Court dismissing their cross-bill. The Court of Appeals said (161 Fed. 497):

"The defendants filed a cross-bill, claiming the trade-mark in question and asking for an injunction. This need not be considered, as at the hearing the defendants' counsel declined to insist upon any affirmative relief."

The adjudication, therefore, in the Eighth Circuit is that respondent had not the right to enjoin the Hellmans from continuing to do what they were already doing, but that the Hellmans were adjudicated in the Circuit Court not to be the owners of the brand and trademark, and to have no right to any injunction against respondent, and that such judgment became final and unreversible by reason of the abandonment by petitioners of their cross-bill.

The position now taken by petitioners is, consequently, absolutely inconsistent with the adjudication in the Eighth Circuit, because they not only claim the right to transact business as theretofore, viz, to use the words "Crow", "Old Crow", "P. Crow", "J. W. Crow", etc., on a whisky rectified on Pine street, St. Louis, but although defeating respondent's suit for injunction upon the ground that their method of transacting business was not an interference with respondent's sales of "straight bourbon and rye whisky", they have now grown so bold as to emigrate to Kentucky and lease a distillery under contract with the owner to manufacture a straight bourbon whisky to be sold to the public as "Old Crow".

The result of petitioners' contention as to the effect of the Eighth Circuit decision is that it leaves respondent at full liberty to use its trade-mark on straight whisky as it has done for fifty years, but that it gives petitioners the right to do exactly the same thing, viz, to use the same trade-mark on straight whisky in Kentucky and elsewhere upon Kentucky

manufacture. That this is an unsound interpretation of the law is well shown by the Court of Appeals for the Sixth Circuit. Petitioners' contention as to the meaning of the Eighth Circuit decision creates a dilemma, viz, that both petitioners and respondents own the trade-mark with unlimited use of it, or respondent owns it, but because of the facts developed in the Eighth Circuit record is not entitled to an injunction against the continuance by petitioners of the acts complained of in that suit.

The immoral attitude of petitioners is demonstrated by their having contended in the Eighth Circuit suit that their use of the words and devices upon a rectified whisky, in the limited territory named. which was outside Kentucky, did not infringe respondent's trade-mark because it was used by respondent on straight whisky only, and emanated from Kentucky, and they are now contending for the right to come to Kentucky, respondent's home, and use the trade-mark "Old Crow" upon a straight whisky manufactured in Kentucky. Of course, it was not the valueless trade-mark (?) on petitioners' rectified concoction which petitioners proposed to use upon a straight whisky manufactured in Kentucky, but what they proposed to do necessarily meant a misrepresentation that the whisky to be manufactured and covered by the trade-mark was the famous whisky of respondent. Petitioners' conduct in undertaking to misappropriate respondent's trade by coming to Kentucky is akin to their original conduct in attempting to use the words "P. Crow", "J. W. Crow", etc., as expounded by the Court of Appeals for the Sixth Circuit (226 Fed. 538; Rec., p. 1019).

In the Sixth Circuit respondent contended, but the Court of Appeals rejected the contention (226 Fed. 538; Rec., pp. 1018, 1019) that the true construction of the Eighth Circuit decision was that petitioners might use their devices as theretofore upon a whisky rectified in St. Louis (but not sold nearer St. Louis than Pilot Knob), and sold in a limited territory, because such use would not infringe respondent's trade-mark on straight whisky, but the Sixth Circuit Court denies respondent's contention upon the ground, first, that there can be no distinction taken in trade-marks between different species of the article covered, and, secondly, that the question of territorial limitation is one unnecessary to be discussed.

The second question has since been discussed by this Court in *Hanover & Co. v. Metcalf*, 240 U. S. 403. But the Sixth Circuit Court's position upon the first point is unsound, because it matters not whether a trade-mark can be divided between species of the article covered, if the Court whose judgment is considered made such a decision, for the question under discussion is how did the Eighth Circuit Court of Appeals decide this question of law? The only question is, what was the decision?

C.

#### Privity Between Tort-feasors.

XVI. It is asserted in the peitioners' brief that the respondent has conceded that there was privity between the Hellmans and Rock Spring Company. Such a concession has never been made. It is true in this litigation that the District Court and the Court of Appeals have both held that privity existed; but upon what theory privity exists has not been elaborated by either Court, and we believe that their conclusion in this regard is in conflict with the ruling of this Court in Rubber Tire Co. v. Goodyear Co., 232 U. S. 419, where one who had successfully resisted a bill for patent infringement was held not to be vested with a "transferable immunity" which he could pass on to another charged with infringing the rights of the same plaintiff.

We have always insisted that there could be no privity between successive tort-feasors.

However, this point is not decisive of the present case, as is demonstrated by the fact that the Court of Appeals for the Sixth Circuit decided it against us, although determining the merits of the case in our favor.

D.

### OF APPEALS WAS RIGHT AND THERE-FORE SHOULD NOT BE DISTURBED.

XVII. The Evidence That the Words "Old Crow"
Have Always Signified in the Whisky Trade of the
United States the Whisky Produced by Complainant or Its Predecessors in the Use of the Process
of James Crow.

The testimony is unequivocal and uncontradicted, that when the words "Old Crow" are used in periodicals, price lists and other whisky publications, and in the liquor trade of the United States, they mean the whisky of W. A. Gaines & Company. Documentary evidence of that fact is offered by entries in the price currents of the whisky trade which have been introduced in evidence, and which are published as follows:

H. W. Voss & Co., Cincinnati, O.

Wm. C. Biles & Co., Cincinnati, O.

J. W. Biles & Co., Cincinnati, O.

Specimens of these lists are in evidence (R., pp. 930-931).

About twenty years ago in the City of Chicago the

compilation of a publication containing the whisky trade-marks used in the United States was commenced by William Mida. The result of his efforts was the publication of Mida's Trade-Mark Register, which has been referred to by Judge Colt as "the recognized trade publication known as 'Mida's Register.'"

Heublein v. Adams, 125 Fed. Rep. 782-783.

The editor and publisher of this publication, William Mida, was called as a witness by the complainant, and testified to his familiarity as a broker in whiskies and as a publisher of periodicals dealing with the whisky trade, to the effect that during the period of thirty-six years past, his transactions with the wholesale liquor trade have covered every section of the country; in the capacity of a broker his transactions have been extended all over the United States, and as a publisher his paper circulates in every section of the country. He was then asked the following questions:

"Q. 13. Please state what the words 'Old Crow,' as applied to whisky, signify in the wholesale trade of the United States with which you are acquainted.

A. 'Old Crow' is recognized as a brand of one of the finest whiskies made in the country; and has been so recognized since I have been connected with the wholesale liquor interest, either in the capacity of a representative or as a broker.

Q. To whose product are those words understood by the liquor trade of the United States to refer?

A. It refers to the product of W. A. Gaines & Company, Frankfort, Kentucky.

Q. 15. Has this been true during all of the period to which you have referred, covering your experience?

A. Yes.

Q. 16. What would be the effect of offering to the public a whisky not produced by Gaines & Company, under the trade-mark 'Old Crow'?

A. It would be regarded as a substitution or infringement." (R., p. 365).

Mr. Mida was a whisky broker in the City of St. Louis thirty-six years ago (R., p. 221); engaged in the whisky business in St. Louis in 1869, at which time the "Old Crow" whisky of W. A. Gaines & Company was being bought and sold in the St. Louis market. The witness testifies, "I never heard of 'Old Crow' being either offered, sold or claimed by I. & L. M. Hellman to use in connection with their whisky as their own brand" (R., p. 365).

CHARLES H. HERMANN, secretary of Chapin & Gore, of Chicago, testified:

"Q. 12. What does the brand 'Old Crow', as applied to whisky signify?

A. I should take it that it signifies a certain

grade of whisky and a trade-mark. We can sell 'Old Crow' whisky without showing samples of it by merely saying it is 'Old Crow,' because 'Old Crow' means a certain grade of whisky.

Q. 14. Whose whisky does it indicate?

A. W. A. Gaines & Company, of Frankfort, Ky.

Q. 15. Have you ever known or heard of any 'Old Crow' whisky which was not the 'Old Crow' whisky of W. A. Gaines & Company?

A. I never heard of any whisky named 'Old Crow' unless it was the whisky of W. A. Gaines & Company of Frankfort, Kentucky.

Q. 17. If it was a better whisky than that of W. A. Gaines & Company, what would be the effect?

A. I repeat that I think it would be a great loss to Gaines & Company, also to all whole-salers who handle the genuine article, and I would consider it a great swindle upon the consuming public" (R., p. 355).

The witness also identified a photograph of an advertisement of "Old Crow" whisky in the Chicago Times of Saturday, December 15, 1877; quoting "Old Crow," of 1872 (R., p. 682).

With reference to the whisky price lists in evidence, Edson Bradley, Vice-President of W. A. Gaines & Company, has testified that where the words "Old Crow" occur in those price lists they mean the "Old Crow" whisky of W. A. Gaines &

Company, distilled at their Old Crow Distillery in Woodford County, Kentucky. He says no other whisky than W. A. Gaines & Company's distillation could be meant, as none other was ever quoted in any broker's price list in the country (R., p. 631).

The firm of I. & L. M. Hellman, from whom the defendants claim to have acquired their right to use the mark "Old Crow," was located in the City of St. Louis and had no place of business anywhere else so far as the record discloses.

They are assumed, but not proven, by any competent evidence on the part of the defendants, to have applied the words "P. Crow" or the name "J. W. Crow" to some sort of distilled spirits or compound of which the formula or ingredients are not given, made on their premises in the City of St. Louis. The record evidence shows that the Hellman concern, under one title or another, has been in business in St. Louis during a number of years. It has therefore become expedient to inquire into what their method of using the name "Crow" was: whether it was an open assertion of a right, or a stealthy, obscure use which was not known to any of their competitors in the City of St. Louis. Accordingly, the testimony of the following persons, including the representatives of practically every wholesale liquor house in St. Louis doing business at the present time, was taken.

DAVID NICHOLSON of the house of DAVID NICHOLSON, testifies that the house of David Nicholson was founded in 1843 in the City of St. Louis and that he has been connected with the house since 1867, during all of which time the house has handled liquors. He has been acquainted with the "Old Crow" whisky of W. A. Gaines & Company about twenty-five years, and his house bottles it (R., p. 388) under a label which is shown at R., page 694. He was acquainted with Abraham M. Hellman for about twenty years. Concerning the assertion of any claim of A. M. Hellman & Company to the trade-mark in issue, he says:

"Q. 17. During that time did you ever hear of the firm of A. M. Hellman & Company asserting any claim to right or title of the trademark 'Old Crow' for whisky?

A. Except as their own bottling.

Q. 18. Please explain your last answer.

A. They had a piece of bottled goods on the market which they called 'Old Crow' whisky, but it was supposed to be Gaines' whisky. Gaines was the only man we knew that made 'Old Crow' whisky.

Q. 19. Did you ever hear of A. M. Hellman & Company making any claim that they owned the trade-mark for whisky consisting of the words 'Old Crow'?

A. No" (R., p. 389).

HERMAN A. STEINWENDER, of H. A. STEIN-WENDER & COMPANY, 65 years of age, has resided in St. Louis for fifty years, and has been engaged in the liquor business in St. Louis for about forty years (R., p. 395).

For thirty-eight years he was connected with the firm of Steinwender & Sellner (R., p. 396).

At the present time H. A. Steinwender & Company bottle W. A. Gaines & Co.'s "Old Crow" whisky under the label appearing at R., page 692. He has handled W. A. Gaines & Co.'s "Old Crow" whisky for twenty-five years (R., p. 396). During that time the words "Old Crow" have always indicated to his mind the whisky of W. A. Gaines & Company (Q. 14 and Ånswer, R., p. 396).

The witness has sold his own bottling of W. A. Gaines & Co.'s Old Crow whisky throughout the States of Missouri, Illinois, Iowa, Nebraska, Texas and Colorado.

He was acquainted with the firm of A. M. Hellman & Company for about thirty years and knew its predecessor, the firm of I. & L. M. Hellman. During all of that time he never heard of either of those firms claiming to own the trade-mark for whisky consisting of the words "Old Crow" (R., p. 397).

ALBERT C. SELLNER, 65 years of age, and a resident of St. Louis since 1870, is Treasurer and

Manager of STEINWENDER & SELLNER MER-CANTILE COMPANY. Has been acquainted with W. A. Gaines & Company in a business way since 1870. During the past fifteen years his corporation and its predecessors, Steinwender & Sellner, have bottled the "Old Crow" whisky of the complainant under the label shown on R., page 693, and have sold that bottling in New York, Indiana, Illinois, Idaho, Wyoming and Colorado (R., p. 404).

Witness was acquainted with the late Abraham M. Hellman and his firm and did some business with the firm. He knew Hellman for the past thirty years (R., p. 405).

He first heard about three or four years ago that the Hellman house made a claim to the trade-mark "Old Crow." During the time that the witness has been engaged in business in St. Louis the words have indicated to his mind the whisky of W. A. Gaines & Co. (R., pp. 405-406).

LOUIS IDLER, Secretary and Treasurer of the A. MOLL GROCER COMPANY of St. Louis, has been familiar with the "Old Crow" whisky of W. A. Gaines & Company for twenty years. Ever since he has been connected with the concern they have bottled it under the labels shown at R., pp. 690-691. During all of that period the name "Old Crow" has meant to his mind the whisky of W. A. Gaines & Company. He was acquainted with A. M. Hell-

man in his lifetime and the firm of A. M. Hellman & Company and never heard of A. M. Hellman claiming or using the name "Old Crow" previous to the institution of this suit (R., p. 417).

AUSTIN CARTER, Manager of JOHN W. HOW-ARD LIQUOR COMPANY of St. Louis, has resided in St. Louis since 1887, and has been engaged with John W. Howard for the past fifteen years, and during that time the words "Old Crow" have indicated to his mind the whisky of Gaines & Company (R., p. 460).

Having thus examined practically all the prominent wholesale liquor dealers of St. Louis, the complainant called a number of representatives of the better class of restaurants, hotels and bars. Their testimony is as follows:

LYMAN T. HAY, manager of the JEFFERSON HOTEL, St. Louis, and of the ARLINGTON and EASTMAN HOTELS, of Hot Springs, Arkansas, has been engaged in the hotel business for twenty-two years and has had charge of the bars since March, 1893, and has a general supervision of the buyers for his houses. In buying large quantities they submit the prices to the witness before buying (R., p. 379).

Has been acquainted with the "Old Crow" whisky of W. A. Gaines & Company for ten or twelve years, and has bought a good deal of it. The whisky has been sold at all three of his hotels. During that time he has never known of any "Old Crow" whisky produced or claimed to be produced by A. M. Hellman & Company of St. Louis (R., p. 379).

GEORGE J. KNAPP, manager of the bar of the LIPPE RESTAURANT in the Chemical Building, St. Louis, has been manager of that bar for the past eight years and has been in the liquor business in Cincinnati, Ohio, Put-in-Bay, Ohio, Detroit, Mich., and St. Louis for fifteen to seventeen years, all told. Wherever he has been he has handled the "Old Crow" whisky of W. A. Gaines & Company, and during the past sixteen or seventeen years the words "Old Crow" have always indicated the whisky of W. A. Gaines & Company to his mind. In his language, "I never heard of any Crow but Gaines' Crow" (R., p. 437).

JAMES H. McTAGUE, proprietor of McTAGUE'S RESTAURANT, Century Building, St. Louis, 47 years of age, lived in St. Louis nine years past. Prior to that time he was in the restaurant business in Omaha for about eleven years. The witness has dealt directly or indirectly in "Old Crow" whisky since 1876. During the past twenty years the words "Old Crow" have indicated to his mind W. A. Gaines & Company. He never heard of A. M. Hellman & Company making any claim to the ownership of the trade-mark "Old Crow" (R., p. 433).

JOHN A. SPECHT, restaurant proprietor, 114 North Fourth street, was engaged in the liquor business beginning along in the seventies. Went into business for himself in 1891. Has been acquainted with the "Old Crow" whisky of W. A. Gaines & Company for twenty years past. During that time the name "Old Crow" has indicated to his mind the "Old Crow" whisky of W. A. Gaines & Company. Never heard of any claim of ownership to the mark "Old Crow" by Hellman & Company (R., p. 429).

PATRICK J. CARMODY, 70 years of age, resident of St. Louis, has been in the liquor business for forty years. Was at Moberly, Mo., for about thirteen years and has been acquainted with the "Old Crow" whisky of Gaines & Company about thirty years. When asked whose whisky the name "Old Crow" has indicated to his mind during that period, the witness says:

"I have never known any except Gaines & Company, W. A. Gaines & Company, I believe it is. It was understood that they were the legitimate makers of that goods. I never handled the goods myself, but I have known those who have handled, and I never knew of any one having the 'Old Crow' except W. A. Gaines & Son, or W. A. Gaines & Co.; I don't know which it is' (R., p. 422).

Witness was visited by the traveling salesmen of A. M. Hellman & Company and thinks he bought a bill of goods from them once, but never heard of any claim being made by A. M. Hellman & Company of owning the trade-mark "Old Crow" (R., p. 422).

JOHN T. McMAHON, 46 years of age, residing in St. Louis and having his place of business at 724 Olive street, has been engaged in the retail liquor business in the City of St. Louis for the past two years, and prior to that was engaged in the same business in Kansas City, Mo. During the past twenty years he has been engaged in the liquor business in the State of Missouri and has been acquainted with the "Old Crow" whisky of W. A. Gaines & Company all of that time. The words "Old Crow" have indicated the whisky of Gaines during all that time. "Gaines' Old Crow is all that I ever knew" (R., p. 412). He has handled the "Old Crow" whisky in his business and has never known of any other "Old Crow" whisky except that of W. A. Gaines & Co. (R., p. 412).

The present meaning of the words "Old Crow" as applied to whisky is uncontradicted in the evidence, and, in fact, it is affirmatively shown by the defendants' own witnesses that the words "Old Crow" have come to mean, always and everywhere, the whisky of W. A. Gaines & Company, produced at its distillery on Glenn's Creek in Woodford

County, Ky. (See testimony of Charles H. Hermann, R. p. 355, William Mida, R. p. 365, David Nicholson, R. p. 389, Herman A. Steinwender, R. p. 396, Albert C. Sellner, R. p. 406, John T. McMahon, R. p. 412, Louis Idler, R. p. 416, Patrick J. Carmody, R. p. 422, John A. Specht, R. p. 429, James H. McTague, R. p. 433, George J. Knapp, R. p. 437, Austin Carter, R. p. 460; and the testimony of the following witnesses for the defendants: William N. Hobart, R. p. 578, Abraham Rheinstrom, R. p. 594, and see the cross-examination of John S. Morrin, R. p. 622, as to the meaning of the words "Old Crow" in the whisky trade).

Thus Hobart, as a witness for defendants, testifies:

"XQ. 10. Are you familiar with the leading price lists of the whisky trade?

A. Now! Oh, yes.

XQ. 11. Please name the principal ones.

A. Those in Cincinnati, you mean? They are in Cincinnati, anyhow. I don't know of any large price lists—there are circulars—but the only regular price lists, I think, come from Cincinnati, H. W. Voss & Co., W. C. Biles & Co., and the J. W. Biles Co., and M. Durner & Co.

XQ. 12. Do you use those price lists?

A. I refer to them.

XQ. 13. When the words 'Old Crow' appear listed in one of those price lists, whose whisky do they mean?

A. That refers to the whisky made by W. A. Gaines & Co.'' (R., p. 578).

And Rheinstrom, also defendants' witness, testifies:

"XQ. 5. Are you familiar with the manner in which the 'Old Crow' whisky of W. A. Gaines & Co. is listed in the price currents of the whisky trade?

A. I know it to be listed as 'Crow' Whisky.

XQ. 6. You know it to be a fact, do you not, Mr. Rheinstrom, that where the words 'Old Crow' appear in those price currents, that they refer to the W. A. Gaines & Co. whisky?

A. Of course the price currents of today quote that as Crow, of course; but at the time that this book applies there was no such thing as price currents.

XQ. 7. But there have been price currents for many years, have there not?

A. Yes, those price currents go back as far as the eighties.

XQ. 8. What are some of the principal price currents of the trade?

A. Biles, Durner.

XQ. 9. Voss?

A. Voss.

XQ. 10. And where the words 'Old Crow' appear in those price lists, they indicate whisky of W. A. Gaines & Co., do they not?

A. I think so" (R., p. 593).

And John S. Morrin, also defendants' witness, says:

- "Q. Are you familiar with the standard price lists used in the whisky trade in the United States?
  - A. Yes, sir.
  - Q. Can you name some of those price lists?
- A. Yes, there is J. W. Biles' and W. C. Biles' list, Voss' list, and several others.
- Q. Whenever 'Old Crow' is listed in those price lists it means the whisky of W. A. Gaines & Co., does it not?
- A. That is the way I understand it" (R., p. 622).

# The Use of the Words "P. Crow" or "J. W. Crow" by I. & L. M. Hellman, Was Too Trifling to Create Any Right in Them.

XVIII. The reason that underlies the equitable doctrines we are here invoking is that a trade-mark is a mark that means something to the trade in which it is used. The solitary sale of a few gallons of whisky in the year 1863 was relied upon in the Eighth Circuit case to support the claim of title to the trade-mark OLD CROW set up by the Hellmans in their cross-bill. From the decree of the Circuit Court dismissing that cross-bill they dismissed their appeal. What is the significance of these facts?

Is it not an admission that the use of P. and J. W. was evidence of fraud in itself, as found by the Circuit Court?

See list of sales, post, p. 122.

### The Other Contemporaneous Frauds of I. & L. M. Hellman Should Be Considered.

XIX. The Circuit Court of Appeals of the Seventh Circuit has established the rule that in cases of this kind it is proper to consider evidence of the commission of other frauds of the same kind, committed by the defendant at the same time, as evidence of the fraudulent design of the defendant.

Charles E. Hires Co. v. Consumers' Co., 100Fed. Rep. 809, 812, 41 C. C. A. 71.

The Hellman establishment, as Urner testifies (Rec., p. 514), at the same time that it was manufacturing the spurious "Crow" whisky, was making, branding and selling in the same manner a mixture of neutral spirits and other substances under the brand "Magnolia." The Hellmans had the same kind of "title" to the brand "Magnolia" that they had to the brand "P. Crow" and "J. W. Crow," i. e., the title acquired by larceny. In proof of this, we need only refer to the history of the "Magnolia" brand, as narrated by Mr. Justice Field, showing that brand to have been adopted by S. N. Pike of Cincinnati

in 1849, and used continuously by him and his successors ever since.

Kidd v. Johnson, 100 U. S. 617.

#### Effect of the Eighth Circuit Decision.

XX. We confidently assert that it is absolutely demonstrated by the Eighth Circuit litigation that appellant's title to its brands and trade-mark are indubitably established and Hellman's pretentions held a fraud, and it was so decided in the Circuit Court and the Sixth Circuit Court of Appeals, and this Court will not permit the destruction of appellant's property, acquired and realized at an expense of nearly a quarter of a million dollars expended in advertising, etc., in all parts of the territory of the United States and Canada, by a concern which had pirated appellant's trade-marks on a few barrels of rectified stuff distributed over three or four States, unless the fraud be absolutely sanctified by the judgment of the Eighth Circuit Court of Appeals.

#### What Happened After the Eighth Circuit Decision

XXI. Abraham M. Hellman died during the pendency of the former suit. The Hellman Distilling Co. was formed, but when Hellman's heirs licensed the corporation to take over what rights they thought were conferred on them by the Court of Appeals

they did so with some manner of reservation. All the Hellman interests were resolved to get a Kentucky distiller to put up a straight whisky under the infringing Crow brand, and the correspondence in the record is between A. J. Freiberg, a Cincinnati lawyer representing the Hellman heirs, Arthur Rosenfeld, the Rock Spring agent at St. Louis, and the defendant Silas Rosenfeld.

This correspondence throws a flood of light upon the present case.

## Rosenfeld's Cross-Examination Exhibit No. 20 (Rec., p. 1001).

Arthur Rosenfeld
Room 814 Chemical Building
Representing St. Louis, Mo., April 23, 1909.
Rock Spring Distilling Co.
and Owensboro Distilling Co.
of Owensboro, Ky.
The Rock Spring Distilling Company,
Owensboro, Ky.

Gentlemen:-

The Hellman Dis. Co. want 300 or 325 barrels of whiskey made in their name as distillers so they can bottle the goods in bond in their name as distillers. They want the terms on these goods to be four years from date of production and will give their note for one year and pay the interest semi-annually, which is to be 6 per

cent per annum. Of course we would hold the warehouse receipts and whenever they want any of the goods they would have to pay us for them. These goods are to be branded Old Crow. They have been offered this proposition by some other houses and stated they would give us the preference. I am in favor of giving them this time on the goods. Mr. Hirsch has met all the members of this firm personally. They are honest and upright and this brand is very valuable, and I do not see how we can lose if they do not take the goods. They are to pay 35 cents per gallon. Kindly let me know by return mail what you think of their proposition.

(Signed) Arthur Rosenfeld.

#### Rosenfeld's Cross-Examination Exhibit

No. 14 (Rec., p. 999).

A. J. Freiberg Lawyer Union Trust Building Cincinnati

June 19th, 1909.

Rock Spring Distilling Co., Owensboro, Ky.

Gentlemen:-

I have just returned from the Atlantic City meeting and find your letter of June 12th.

The Hellman Distilling Co. have not as yet submitted to me the label which I recommended to them, but I have no doubt they will do so in a few days.

You ask me to inform you the conditions and the duration of the right to use the label given the Hellman Distilling Co. I would be glad to give you all those conditions, and I really see no reason to conceal them. But inasmuch as it is a matter of private contract between the Hellman heirs and the Hellman Distilling Co., I presume I ought not to presume to give out that contract unless they authorize me to do so. You of course appreciate that they have the right to be consulted. You might write to them direct, telling them I have no objection to your knowing fully what the conditions are, and they will probably arrange to let you know in full. So far as I remember, I gave to the Messrs. Rosenfeld a complete resume of that contract verbally. \* \* \*

Very truly yours,

(Signed) A. J. Freiberg.

#### Rosenfeld's Cross-Examination Exhibit

No. 8 (Rec., p. 996).

Jan 27/1910.

Mr. A. J. Freiberg, Cincinnati, O.

Dear Sir:-

Referring to our conversation in reference to the purchase of 3/4 interest in Hellman's Old Crow brand, will say we shall close the option under the following conditions.

A note for \$15000.00—5 per cent interest, endorsed by Silas and Arthur Rosenfeld. Note to be paid when the courts decide that the brand

can be used by Hellman estate on all kinds of whiskey.

In case suit is finally decided against Hellman estate, then the note and interest are to be returned to us.

The bill of sale to be made to such party as we may name, in case the above conditions meet your approval, draw up a contract and note and we shall consummate the deal.

Yours truly, Silas Rosenfeld.

#### Rosenfeld's Cross-Examination Exhibit

No. 13 (Rec., p. 998). A. J. Freiberg Lawyer

Union Trust Building Cincinnati

February 1st, 1910.

Mr. Silas Rosenfeld,

Rock Spring Distilling Co.,

Owensboro, Ky.

Dear Sir:-

On my return from Washington I found your letter of January 27th, with reference to the purchase of the interests I represent in the Old Crow brand.

I do not believe you meant to say just what you did say in your letter, to-wit: "Note to be paid when the courts decide that the brand can be used by Hellman estate on all kinds of whiskey." What I proposed was this.—That you were to pay \$15,000 for our interest in the brand, partly cash and part on time if you wished it so, with interest on the deferred payments, and that in case you won the suit at Owensboro but the upper court reversed it against you, then and in such case I would stand ready to refund the money with the notes and interest accrued thereon; and I think that I can still get the heirs to consent to that proposition. I did not say that I would guarantee that the case in the lower court would be decided in your favor, although in fact I do think it will be.

You will remember my saying that after you have the case decided in your favor, my price might very likely be higher than \$15,000.00. In other words, if there is any speculating to be done, I am willing to speculate to this extent: That if the trial court decides in your favor, it will not be reversed by the upper court, but I expected you to do a certain amount of speculating in the decision of the lower court.

You will remember also that I took the point of view as it seemed to me that it would be far better for you to wait until the lower court had decided the case. Nor should I enjoy having your \$15,000.00 if the lower court should by any chance decide against you.

This letter does not mean at all that I have any fear of what the lower court will do. The decision of the Court of Appeals in St. Louis is an absolute bar to the action that has been brought against you, and even if by any chance you should lose in the lower court, I am satisfied that the Court of Appeals here would set the lower court right.

To sum up, therefore, I am quite willing to wait until after the lower court decides the case, in which event I shall take the liberty of increasing the price. If, on the other hand, you desire to pay \$15,000.00 either in cash or on time for our interest in the brand, I am almost sure I can prevail upon the heirs to accept the proposition, with the further guaranty that in case the upper court decides against you, I am willing to have the money refunded. You see from this that I have pretty deep confidence in what the upper court will do in this matter.

With my best wishes to you, I am,
Yours very truly,
A. J. Freiberg.

But the Rosenfelds did not want their name or that of their distillery to appear in the transaction.

#### Rosenfeld's Cross-Examination Exhibit

No. 7 (Rec., p. 996).

Feb. 5th, 1910.

Mr. A. J. Freiberg, Cincinnati, O.

Dear Sir :-

Your letter of the first to hand and in reply will say if you and the Hellman heirs consent to the sale of the Old Crow brand to Arthur Rosenfeld and myself for \$15000.00, a note to be given, interest at 5 per cent per annum, and

in case the upper court decide the brand cannot be used, then you are to return us the note and interest. If this proposition is accepted, make out the bill of sale to M. L. Mayer and also the note and Arthur Rosenfeld and myself. Yours truly,

(Signed) Silas Rosenfeld.

The negotiations fell through.

These letters may be appropriately described as an unconscious revelation of psychological conditions. They were not intended, when written, to be a part of this record.

#### CONCLUSION.

XXII. In the Eighth Circuit case the trial judge found explicitly that the early use of the marks "P. Crow" and "J. W. Crow" by the Hellmans was fraudulent. It should be remembered that Crow's real name was James C. Crow (Rec., p. 333).

We read (155 Fed. Rep. 645):

"The defendants have shown by some evidence in the case that they used the words 'P. Crow' and 'J. W. Crow' on packages put up by them. Why were they so used? No one by the name of 'P. Crow' or 'J. W. Crow' was ever in the employ of the defendants, and no satisfactory reason is given for the employment of the name or names. The evidence, on the other hand, is overwhelming, and is practically uncontradicted, that

James Crow began distilling whisky in Kentucky as far back as 1835, and so continued until his death in 1855, that during all of that time he used on the packages containing whisky made by him the words 'Crow' or 'Old Crow', and that from 1867 until the present time the complainant and its predecessors have used the words 'Old Crow' in designating the whisky made by them.''

The Eighth Circuit Court of Appeals disregarded this finding of fraud, and ignored the facts on which it was based.

The Court in so doing did precisely what this Court reversed it for in the recent case of Adamson v. Gilliland, No. 396, decided at this term; and the trial judge in that case was the same (Judge David P. Dyer).

In that opinion this Court reaffirms the rule that the finding of the trial judge, so far as it "depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, must be treated as unassailable" (Davis v. Schwartz, 155 U. S. 631, 636).

The decree of the Eighth Circuit Court of Appeals, so far from following this rule, decided the issue of fraud in the very teeth of all the undisputed facts. We argued in the Sixth Circuit that an opinion from a co-ordinate court which reverses a decree finding actual fraud, in defiance of the facts, was entitled

to no consideration anywhere, outside of the circuit of its rendition.

Even if that Court of Appeals was bound by such a former decision, is it possible that this Court is helpless to inquire into the facts, and redress the wrong, and protect the public from further imposition and fraud at the hands of commercial pirates who are diverting the plaintiff's trade and passing off spurious goods upon the public?

This Court must determine what was decided in the Eighth Circuit. It must see that in order to reverse the Circuit Court, the vital evidences of fraud were ignored by the Court of Appeals; and, in that event (the truth of which can be ascertained by a simple casual comparative reading of the two Eighth Circuit opinions) is this Court helpless to redress a flagrant wrong, which it was asked at the time to review by certiorari? (212 U. S. 572.)

The compounding cellar of the Hellman establishment at St. Louis can only be characterized as a veritable cess-pool of fraud. Magnolia, Arnold, Bowen or Crow whisky was manufactured regardless of the ownership of those valuable brands, to none of which did the Hellmans have any shadow or pretense of title.

This high Court will never, we hope, again have pre-

sented to it a claim so impudent, so shameless, as that of the petitioner, of right to presist in open and notorious trade-mark piracy; not only the right to steal the plaintiff's trade, built up by fifty years of industry and integrity, and a quarter of a million in advertising, but of right to continue to defraud the purchasing public, by substituting on orders (of physicians, hospitals or other consumers) for the genuine Old Crow whisky of the plaintiff, the cheap, inferior and nameless substitute of an unknown and wilfully nameless competing distillery.

The decree of the Sixth Circuit Court of Appeals should be affirmed, but with directions to order an accounting.

Respectfully submitted,
EDMUND F. TRABUE,
DANIEL W. LINDSEY,
JAMES L. HOPKINS,

Counsel for Respondent.

March 24, 1917.



#### APPENDIX.

#### THE FACTS IN THE EIGHTH CIRCUIT CASE.\*

The facts disclosed by the record in the former case in the Eighth Circuit were as follows:

#### Complainant's Testimony.

EDSON BRADLEY has been vice-president of the complainant corporation since 1887. Prior to that time was a member of the firm of W. A. Gaines & Co. from 1880 to 1887, and has been engaged in the direction of the complainant corporation since 1875 (R., p. 244).

Complainant is the owner of the Old Crow Distillery of Woodford County, Kentucky (R., p. 244).

The product of the Old Crow Distillery is a high-grade sour mash, bourbon and rye whisky, every barrel of which has been branded "Old Crow Bourbon," or "Old Crow Rye," and distilled in the name of W. A. Gaines & Co. (R., p. 244).

Witness has been at the head of one of the largest whisky houses in the United States for over thirty years, Paris-Allen & Company, of New York; during that time has purchased hundreds of thousands of barrels of whisky made by distillers all over the

<sup>\*</sup>Note.—That entire record is evidence in this case under stipulation (Rec., p. 164).

United States, and has examined and compared samples of almost all the well-known whiskies and is thoroughly familiar with them.

Witness has examined samples of whisky purchased from the infringers of the "Old Crow" and "Hermitage" trade-marks of W. A. Gaines & Co., which were the basis of several thousand suits brought by W. A. Gaines & Co. against infringers of their trade-mark (R., p. 245).

The product of the Old Crow Distillery of the complainant stands at the head of all the bourbon whiskies distilled in the State of Kentucky, and always has, both as to quality and price (R., p. 245).

Witness is acquainted with the liquor trade of the United States in every part of the country (R., p. 245).

The words "Old Crow" as applied to whisky signify always the very highest grade of whisky and the whisky made by W. A. Gaines & Company of Frankfort, Ky. (R., p. 245).

The "Old Crow" whisky produced by the complainant at its "Old Crow" Distillery is packed for distribution to the trade "in barrels containing about forty-six to forty-seven gallons, bearing the Internal Revenue, warehouse and tax paid, stamps on the so-called Government head of the barrel, and bearing upon the other head, known as the commercial head, the distillery brand containing the words 'Old Crow,' and the name of W. A. Gaines & Co., which brand is burnt into the head of the barrel with a firebrand. It is also sold in cases put up under the Bottling in Bond law on the distillery premises under the supervision of internal revenue officers, and these cases and the bottles therein also bear the internal revenue stamps provided by the Government. To a small extent it has also been bottled by W. A. Gaines & Co. out of bond for themselves and for a few special customers, and all of these bottlings bear distinctive labels and marks showing that it originated in their hands' (R., p. 245).

The "Old Crow" whisky is bottled by the purchasers under the trade-mark "Old Crow" very extensively, the whisky being bought in the original packages, delivered to the customers on their premises, put into bottles and cases under descriptive labels, and sold as the individual bottlings of the trade (R., p. 245).

"In some cases the word 'Crow' on these labels has been omitted entirely, the bottler using the word 'Old' and 'Whisky,' inserting the symbol of a crow between those words, depending upon the familiarity of the consuming public with the name of this whisky, and the use of this symbol to convey the intended meaning, namely, that the bottle contained Old Crow whisky. This special device has almost invariably been employed by those who bottled a spurious arti-

cle, they evidently believing by omitting the word 'Crow' they evaded prosecution. The symbol of a crow has been used, however, on a very large percentage of genuine bottling of Old Crow whisky, so that it has become very fully identified with the brand' (R., p. 246).

"Practically every lithographer in the United States has in his stock of ready-made labels numerous styles of whisky labels bearing the words 'Old Crow.' Nearly all of these are unobjectionable and properly describe the whisky to be put in the bottle where the bottle is genuine Old Crow distilled by W. A. Gaines & Co. Where an improper label is adopted and the fact known to W. A. Gaines & Co., they have put an end to it. These lithographers sell their labels to wholesale dealers all over the country who bottle Old Crow whisky made by W. A. Gaines & Co." (R., p. 246).

The label, "Complainant's Exhibit Hellman Label," embodying the picture of a crow "is one of the very common devices employed by the lithographers on their stock labels for Old Crow whisky" (R., p. 247).

The production of "Old Crow" whisky by the complainant and its predecessors has been continuous since witness' first connection with the business in 1875 and has uniformly been made by the same process, "excepting only some occasional very slight variations in the way of experiment, producing very

limited quantities of whisky. These variations, however, were very slight, and in no way affected the quality or changed the quality of the product' (R., p. 247).

Interrogated as to his interests in whisky trademarks other than those of complainant, tending to give witness expert knowledge of the value of American whisky trade-marks, he testified as follows:

"I am, and have been since its incorporation. president of the Kentucky Distilleries and Warehouse Company, which corporation owns or controls a very large percentage of all the fine whisky trade-marks of the State of Kentucky, numbering in all over one hundred; included among them are the oldest and most prominent brands of the State, exclusive of the Old Crow and Hermitage trade-marks of W. A. Gaines & Co. I am also vice-president of the Distilleries Securities Corporation, the holding company which holds and controls the Kentucky Distilleries & Warehouse Company, the Standard Distilling & Distributing Company and The Hannis Distilling Company, all of which corporations have very valuable and prominent trade-marks" (R., p. 247).

In the course of witness' connection with the various corporations named, he has had to do with the buying and selling of whisky trade-marks as follows:

<sup>&</sup>quot;My company, the Kentucky Distilleries &

Warehouse Company, purchased from the original owners of distilleries and trade-marks in Kentucky all of the trade-marks which it now controls. Of course, as president of that company, I had personal charge of all this business' (R., p. 247).

Based upon his expert knowledge of the values of whisky trade-marks, the witness gives his opinion of the value of the complainant's trade-mark consisting of the words "Old Crow" as "Not less than \$500,000" (R., p. 247).

The City of St. Louis, Missouri, is a very large market for "Old Crow" and has been ever since 1875 (R., p. 248).

It would not have been possible at any time, since 1875, for any person to have sold in the City of St. Louis under the mark "Crow" or "Old Crow" a whisky not produced by the complainant or its predecessors, without diverting from the complainant or its predecessors' trade which belonged to the complainant or such predecessors (R., p. 248).

Complainant has advertised its trade-mark "Old Crow" very extensively throughout the United States since 1875, certainly to the extent of more than a quarter of a million dollars (R., p. 248).

Edward C. Homan (referred to in defendants' testimony) was a salesman for Paris-Allen & Company, New York, from some time in the seventies

until the date of his death. He was never in the employ of the complainant, W. A. Gaines & Co. (R., p. 248).

Witness had no knowledge of the defendants making any claim of title to the trade-mark of "Crow" or "Old Crow" until just prior to the time when the complainant brought this suit (R., p. 248).

As to the allegation of the answer that, "The whisky produced by the complainant and sold by it under the name of 'Crow' or 'Old Crow' represented by it to be whisky of superior excellence, is in point of fact a whisky containing a large and dangerous percentage of fusel oil, a deadly poison, and a large percentage of other dangerous and deleterious impurities, and that the same is unwholsome and impure, and that the same has not been subjected to any process of rectification, blending, or vatting for the purpose of removing such dangerous and deleterious impurities, and that in representing such whiskies to be pure and of superior excellence, the complainant is guilty of fraud upon the public, especially upon purchasers or consumers of whisky," the witness states:

"The statement dictated by you is entirely misleading, and broadly stated, false, except as to the allegation that the Old Crow whisky is not vatted or blended. This statement is strictly true, as the Old Crow whisky is a perfectly straight originally distilled whisky, whereas if it were blended or vatted it would be mixed and adulterated necessarily.

"The facts in regard to the Old Crow whisky are these: In its distillation the liquid part of the material is vaporized by heat, and this vapor condensed in two distinct operations called singling and doubling in the old-fashioned parlance of the distiller. In these processes of distillation, there is necessarily no reclaim of substances having a lower boiling temperature than the mixture of alcohol and water introduced into the stills, except that as the distillation proceeds and the residue in the still becomes reduced in alcoholic strength, some of the bodies boiling at higher temperatures, including the water, pass over and are condensed and reclaimed. By this process of distillation a partial refining or rectification of the original beer and whisky is effected, consequently it is not true that no purification of the whisky occurs in the process. The whisky thus produced at the Old Crow Distillery does contain, as all grain spirits when first distilled must contain, a certain percentage of so-called fusel oil made up of several bodies, some of which are little understood by chemists. The percentage of fusel oil, however, in this whisky is never sufficient, when the whisky is made as at the Old Crow Distillery, to be deleterious to health or in any way objectionable after the whisky has been stored in an oaken barrel a reasonable length of time in order that this fusel oil to a large extent shall be converted

into harmless and desirable ethers which impart to a fine old whisky its characteristic flavor. Even if this whisky were consumed when perfeetly new, it could have no such effect upon the consumer as could be classed as poisonous, although it is a fact that no whisky should be used until it has been stored a reasonable length of time in wood. This question of fusel oil in whisky is analogous to the presence of poisonous substances in articles of daily consumption, by all humanity, such as coffee and tea. In fact, a large percentage of the human family's foods and beverages. Consequently, the toxic effect of the fusel oil in whisky and not its mere presence must be considered if a charge of impurity is to be made against any whisky containing it. The Old Crow whisky of W. A. Gaines & Co., as a matter of fact, is practically never consumed until it has been in an oaken barrel three or four years, and the average is about four years, consequently the Old Crow whisky as sold and consumed is a highly purified and entirely healthful beverage" (R., p. 249).

On cross-examination, witness testifies that he has frequently run a distillery of which he was part owner, some of those distilleries being the Old Crow Distillery, the Hermitage Distillery, the Monticello Distillery of Baltimore, Md., and a distillery in Hartford, Connecticut (R., p. 250).

He describes the operation of the distilleries in his

charge and the work done by him in connection therewith, having the entire supervision of the work of a distillery (R., p. 250).

He describes "yeasting" (R., p. 250); and "ferments of a locality" (R., p. 251).

JOHN A. STEELE (R., p. 288), banker and farmer, residing at Woodford, Ky., 64 years of age, was acquainted with James Crow in his lifetime, when Crow lived in Woodford County on the farm of Oscar Pepper, his occupation being that of distiller (R., p. 288).

James Crow made whisky which was called "Old Crow" whisky. Witness lived about two miles and a half from where Crow lived and never knew of a distiller named J. W. Crow (R., pp. 288, 289).

The whisky Crow produced was called a hand-made sour mash (R., p. 289).

GEORGE T. COTTON (R., p. 291), 67 years of age, residing at Versailles, Woodford County, Ky., was born in 1838, about six miles west of Versailles, near the waters of Glenn's Creek, and resided there until 1870.

He was acquainted with James Crow, who manufactured the whisky at the distillery of Oscar Pepper at Glenn's Creek (R., p. 291). Ever since the witness has known the "Old Crow" whisky it has been made on Glenn's Creek (R., p. 292).

The witness' father always used to get "Old

Crow" whisky by the barrel, and during his father's lifetime there was never a pint of any other kind of whisky in the house (R., p. 292).

James Crow died in the fifties, between 1850 and 1860 (R., p. 293).

The whisky made by Crow was called "Old Crow" by everybody in the neighborhood. It was never called "Pepper" whisky (R., p. 293).

JOHN C. HAWKINS, 60 years of age, residing at Frankfort, in Woodford County, Ky., during the first twenty years of his life, was acquainted with James Crow, who was a distiller on Glenn's Creek owned by Oscar Pepper (R., p. 295).

The whisky was known as "Old Crow" whisky and after the death of James Crow, the same distillery continued in operation. Witness was employed at that distillery in 1862 or 1863 for about three years (R., p. 296).

WILLIAM J. GORMAN, aged 36 years; residence, Frankfort, Ky.; acting secretary of W. A. Gaines & Co., has been in the employ of Gaines & Co. since September, 1900. He is acquainted with the "Old Crow" whisky sold and distilled by W. A. Gaines & Co. That whisky has been distributed by W. A. Gaines & Co. since witness' connection with it throughout the United States, Great Britain, Yukon Territory and China (R., p. 305).

The witness introduces a memorandum of adver-

tising disbursements for the twenty years between 1884 and 1904, and the total advertising disbursements for that period were \$232,809.35 (R., p. 306).

The capitalization of W. A. Gaines & Co. is \$600,-000, and its principal place of business is in Frankfort, Ky.; it owns the Hermitage Distillery in South Frankfort, known to the Government as Distillery No. 4, and the Old Crow Distillery in Woodford County, known to the Government as Distillery No. 106 (R., p. 306).

EDMUND H. TAYLOR, JR., president of E. H. Taylor, Jr., & Sons, Distillers, Inc., of Frankfort, Ky., is 70 years of age and has resided all of his life in the State of Kentucky and has been engaged in the distilling business since 1866 or 1867. The witness first engaged in the distilling business in Woodford County in a little distillery on Glenn Creek. During the lifetime of James Crow the witness was cashier of the Commercial Bank of Kentucky at Versailles, the county seat of Woodford County (R., p. 317).

At that time James Crow was a distiller and operated the distillery with Oscar Pepper on Glenn's Creek, which was subsequently operated by the witness (R., p. 317).

The whisky distilled by James Crow at that distillery was spoken of as "Crow" whisky, and continued to be so known after Crow's death (R., p. 317).

James Crow was the first man, as the witness recollects, to ever distil sour mash whisky in Kentucky, and it was the best whisky found in Woodford County, Fayette County and Franklin County (R., p. 317).

Witness was a member of Gaines, Berry & Company, organized in 1866 or 1867. That firm engaged in the manufacture of whisky at the distillery the witness has referred to formerly, and which was operated by James Crow (R., p. 317).

The significance attached at that time to the words "Old Crow" as applied to whisky was that the whisky was manufactured by James Crow at the distillery on Glenn's Creek and under his established formula (R., p. 318).

The firm of Gaines, Berry & Company operated the Old Crow Distillery, burning a brand on the barrels, which he recollects to read "Old Crow Distillery, Hand-made Sour Mash Whisky, Gaines, Berry & Company, Distillers, Woodford County, Ky.," and the whisky was spoken of as "Old Crow" whisky (R., p. 318).

Gaines, Berry & Company was succeeded by W. A. Gaines & Co. (R., p. 318). Witness was a member of the firm of W. A. Gaines & Co. for several years, during which time the firm continued to operate the

same distillery and produce the same brand of whisky. Since the time that he withdrew from the firm of W. A. Gaines & Co. he has had no interest in the Old Crow Distillery or its product, the "Old Crow" whisky (R., p. 318).

The witness' acquaintance with the wholesale liquor trade of the United States is general and he has a large general acquaintance with the trade. The significance of the words "Old Crow" as applied to whisky in the liquor trade of the United States is that it is the product of W. A. Gaines & Co. and made under the formula of Crow. The witness has never known of any "Old Crow" whisky other than that produced by the persons referred to on Glenn's Creek in Woodford County, Ky. (R., p. 318).

On cross-examination, the witness states that the words "Old Crow" have a joint significance; that the product is both the manufacture of W. A. Gaines & Co. and made by the formula of James Crow (R., p. 319).

In 1866 when the witness' firm of Gaines, Berry & Company began to operate the Oscar Pepper distillery, that firm "employed Wm. Mitchell as distiller, who had been in the employ of Crow for many years, and who was employed by us because of his previous employment by Crow, and who represented to us, which was confirmed to us by all the other employes who had been employed by Crow, as being the for-

mula under which Crow operated, of which we had no doubt, and I have none" (R., p. 320).

The formula which Mitchell had secured from Crow "related to the different materials used in the manufacture of whisky and the proportions of each, with detail as to their application" (R., p. 320).

The whisky manufactured by Crow was known as a hand-made sour mash, which at that time was never spoken of, so far as the witness knows, as bourbon whisky (R., p. 321).

The Blue Grass region of Kentucky comprises parts of Shelby and Franklin counties, all of Woodford and Fayette counties, parts of Harrison, Scott, Montgomery, Mercer, Anderson, Boyle and Garrard counties, and the finest whiskies of Kentucky are produced in that region. The Glenn's Creek region has many advantages for the manufacture of whisky not possessed by other portions of the Blue Grass region, which the witness describes as follows:

"My reasons for the acquisition and construction of distilleries on Glenn's Creek were that I considered their waters the sine qua non for the manufacture of the highest grade of whisky, and after nearly forty years' experience and acquaintance with the product of the different distilleries in the State I regard the product of the three distilleries under discussion as the highest grade and best whisky manufactured in Kentucky' (R., p. 323).

The witness considers the "Oscar Pepper," "Old Taylor" and "Old Crow" whiskies the highest grade of whiskies made in Kentucky (R., p. 324).

WILLIAM HENRY MASTIN, aged 69 years past, formerly a carpenter by trade, has resided in Woodford County all his life and was acquainted with James Crow in his lifetime. He was employed as a distiller at the Pepper distillery in Woodford County on Glenn's Creek. The whisky produced by that distillery prior to Crow's death was known as "Old Crow." After Crow's death he was succeeded as distiller by William Mitchell, and the whisky produced at the distillery after Crow's death was known as "Crow" whisky (R., p. 327).

The witness was personally acquainted with William Mitchell. He states from hearsay that Mitchell is now deceased (R., p. 327).

On cross-examination he testified that he worked at the Pepper distillery and heard Oscar Pepper call the whisky "Old Crow" (R., p. 328).

Witness worked at the distillery when Hawkins was distiller. When witness first knew Crow, Mitchell and two black men were working under him. One of the negroes is now dead and witness is not advised about the other (R., p. 328).

WILLIAM BOYETTE, 71 years of age, farmer in Woodford County, Ky., came to that county when 5 years old and with the exception of four years has

lived there all his life; was acquainted with James Crow in his lifetime when he was in the distillery business making whisky at the Oscar Pepper distillery, the whisky being known as "Old Crow." The witness lived from two and one-half to three miles from the Pepper distillery, near Glenn's Creek. Witness went to school near the distillery and would go into the distillery and see old man Crow there giving orders (R., p. 331). After Crow's death the whisky made at the distillery was also called "Old Crow" (R., p. 331), and the witness took it for granted that it was made under the same process as "Old Crow," although the witness never made any whisky and never worked in the distillery (R., p. 332).

RICHARD W. WHITTINGTON, 61 years of age, storekeeper and gauger in the internal revenue service, resides in Frankfort, Ky. He entered the internal revenue service under Cleveland's first administration, went out under Harrison's, went in again under Cleveland's second administration and has been in the service since (R., p. 333).

Witness was born and raised in Woodford County, within a mile of the Oscar Pepper distillery, and has lived in Woodford County off and on all of his life (R., p. 333).

When the witness resided near the Oscar Pepper distillery as a boy, James Crow was the distiller.

He was an uncle of the witness by marriage. Crow's wife and the witness' mother were sisters (R., p. 333).

When the witness was around the distillery as a boy "old man Crow would take a piece of chalk and make the letters and then he had a gouge that he would gouge it out with C-R-O-W. The gouge looked like a steel hook. He gouged it on the heads of the barrels. He would first make the letters with a piece of chalk and then took the gouge and followed it around." As a boy he visited the distillery every week. After Crow's death he continued to live in the same place until 1868. During that time the whisky produced at the distillery was known as "Crow". During three years of that time the witness was in the Confederate army. He has never known of any "Old Crow" whisky not made on Glenn's Creek, Woodford County (R., pp. 333, 334).

Witness was at the burial of James Crow and after Crow's death, Oscar Pepper had a sale of several hundred barrels of whisky which was sold as "Old Crow" whisky. This was several years after Crow's death. Witness does not think that the whisky produced at the Pepper distillery after Crow's death was known as anything but Pepper whisky (R., pp. 334, 335).

WILLIAM R. DEAN, retired, formerly in the hotel business, is past 80 years of age and resides

at Versailles, Ky.; has resided in Woodford County all of his life with the exception of ten or twelve years. He knew James Crow in his lifetime by sight. He had a hotel for ten years within three miles of Pepper's distillery, known as Dean House. He dealt in corn and sold to the different distilleries and sold corn to Mr. Crow at the Pepper distillery. The witness always considered the whisky produced at the Pepper distillery as "Crow" whisky; it was called "Crow" whisky during the lifetime of Crow (R., pp. 338, 339).

Witness moved into Dean House in 1865; during all of 1865 the troops were passing going into Louisville. He got the "Old Crow" whisky for particular friends in jugs; sent down to Pepper's distillery to get it (R., p. 339).

The present "Old Crow" distillery was built on Glenn's Creek before the witness left Dean House. The whisky produced there was called "Old Crow" (R., p. 342 on XQ. 18 and at p. 341).

JOHN E. MILES of Frankfort, Ky., is a flour dealer and has resided in Frankfort since 1874. Prior to that time he resided at Millville on Glenn's Creek in Woodford County all his life. He was acquainted with Oscar Pepper and James Crow in their respective lifetimes, and knew Crow well; he was the distiller at the Oscar Pepper distillery (R., p. 342). The whisky made at the distillery during

Crow's lifetime was called "Old Crow" and after Crow's death Pepper called it "Old Crow" (R., p. 342). He is still residing at the mill and the present "Old Crow" distillery was built in 1867 or 1868 (R., p. 343).

"Once Crow left Pepper and went down a half mile, perhaps, below where he was to Johnson and Yancey's and distilled for a while there and he died there in the house that was built for him on the Johnson place, and that whisky was not known as Old Crow whisky although it was made by him, it was Johnson and Yancey's" (R., p. 343).

Witness lived about a mile and a half from the Oscar Pepper distillery (R., p. 343).

Witness is acquainted with the O. F. C., Franklin, Carlisle, Kentucky River, Hermitage, Cochran, Cedar Run and Blackmore whiskies of Franklin, Kentucky; the Old Crow, Woodford, E. H. Taylor, Jr., Sons, or Taylor & Sons, Labrot & Graham, in Woodford County; the Old McBrayer and Tyrone in Anderson County, Ky., and others.

"I have traveled all over the world and I have always called for Kentucky whisky—these brands stand the highest. I have traveled in Europe, West and East, and these brands of whisky stand the highest of any brands of

whisky in the world that I know of today" (R., p. 345).

"In traveling I have often found whisky put off to me for Old Crow or Taylor and I found it was not the genuine stuff" (R., p. 346).

Asked whether he had ever heard of any "Old Crow" whisky other than that produced on Glenn's Creek in Woodford County, Kentucky, witness answers, "It's the only Old Crow whisky made" (R., p. 347).

WILLIAM W. DARNELL, aged 75 years, retired, formerly a farmer, storekeeper and miller, with a farm on the Kentucky River about seven or eight miles from Versailles. Lived there ever since two years after the war. Was born and raised up there about three miles from the Oscar Pepper distillery. Went to Missouri during the war, and with the exception of the time when he was in Missouri lived in Woodford County all his life until he came to live in Frankfort. Knew James Crow in his lifetime, when he was distiller at the Oscar Pepper distillery on Glenn's Creek just a little bit above the witness' mill property (R., p. 347).

The whisky made at the Oscar Pepper distillery was called "Old Crow" whisky. After the death of Pepper there was a sale at Oscar Pepper's place of Old Crow whisky, From eleven to twelve barrels of the whisky stored in the cellar was sold. The

whisky was about eleven years old. Oscar Pepper had kept it in his cellar for his own use (R., p. 348).

CHARLES H. HERRMANN of Chicago, secretary of Chapin & Gore, wholesale dealers in wines and liquors and eigars, importers and distillers, is acquainted with the liquor trade in the United States from New York to California and as far south as New Orleans. Chapin & Gore do business in those places (R., p. 354).

The brand "Old Crow" as applied to whisky "signifies a certain grade of whisky and a trademark. We can sell 'Old Crow' whisky without showing samples of it by merely saying it is 'Old Crow,' because 'Old Crow' means a certain grade of whisky." It indicates the whisky of W. A. Gaines & Co., Frankfort, Ky. The witness never heard of any whisky named "Old Crow" unless it was the whisky of W. A. Gaines & Co. of Frankfort, Ky. The effect of selling any other whisky than that of W. A. Gaines & Co. under the brand "Old Crow" would be a great loss to W. A. Gaines & Co. and also to all wholesalers who handled the genuine article, and witness would consider it a great swindle upon the consuming public (R., p. 355).

The "Old Crow" whisky has been advertised in the City of Chicago in the daily papers, on signboards, in saloons, in street cars, by the salesmen of W. A. Gaines & Co. and by houses having connection with W. A. Gaines & Co., like that of Chapin & Gore (R., p. 355).

Witness identifies a photographic reproduction of page 9 of the "Chicago Times" of Saturday, December 15, 1877, containing quotations of "Old Crow" whisky distilled in 1872 (R., pp. 356, 682).

"The brand 'Old Crow' has a value so well known that every dealer concedes it. It commands a high price on account of its reputation and its good quality" (R., p. 362).

"If I asked for 'Old Crow' whisky and got something else I would be hurt; I would feel that I had been swindled even if the article I received was better" (R., p. 362).

WILLIAM MIDA, aged 66, resident of Chicago, is a publisher of a trade journal devoted to the wholesale liquor interest called Mida's Criterion of the wholesale whisky and wine market; and the publisher of the Register of Trade-Marks of the Liquor Trade. He has been acquainted with the wholesale liquor trade of the United States for the past thirty-six years; has acted as representative of Freiberg & Workum and located in St. Louis; subsequently in Chicago. After eight years' connection with that firm, resigned and started a brokerage and commission whisky business, and as an adjunct to the commission business, started a price current giving quotations on all straight whiskies, which he named

"Mida's Criterion." Sixteen years ago witness started Mida's Trade-Mark Register, which comprised all the known brands used by the wholesale liquor interests. He represented Freiberg & Workum in the City of St. Louis thirty-six years and was acquainted with the firm of I. & L. M. Hellman and with the late Abraham Hellman (R., pp. 363-364).

The leading brands of Freiberg & Workum were J. A. Bowen, Snyder Sour Mash, Lynchburg Rye and Highland Rye (R., p. 364). I. & L. M. Hellman were purchasers of Freiberg & Workum's Bowen whisky (R., p. 364).

Witness has been acquainted with the "Old Crow" trade-mark for whisky for thirty-six years; during that time has had transactions all over the United States in the whisky brokerage business; and as a publisher, his paper circulates in every section of the country (R., p. 365).

"Old Crow is recognized as a brand of one of the finest whiskies made in the country; and has been so recognized since I have been connected with the wholesale liquor interest, either in the capacity of a representative, or as a broker."

Q. 14. To whose product are those words understood by the liquor trade of the United States to refer?

A. It refers to the product of W. A. Gaines & Co., of Frankfort, Ky.

Q. 16. What would be the effect of offering to the public a whisky not produced by Gaines & Co., under the trade-mark "Old Crow"?

A. It would be regarded as a substitution or infringement.

"I never heard of 'Old Crow' being either offered, sold or claimed by I. & L. M. Hellman to use it in connection with their whisky as their own brand" (R., p. 365).

In 1869 when the witness first engaged in the whisky business in St. Louis, the "Old Crow" whisky of Gaines & Co. was being bought and sold in the St. Lonis Market and the words had the same significance that they now have in the liquor trade of the United States (R., p. 365).

The Mida's Trade-Mark Register published by the witness is the publication referred to by Judge Colt in the case of Heublein v. Adams, 125 Fed. Rep. 782 (R., p. 366).

On cross-examination the witness explained that the date given in Mida's Register (offered in evidence at R., p. 366) of 1870 as the date of adoption and use of the "Old Crow" brand, was merely approximate. "In order to be on the safe side, I generally insert a date a little later than it has probably been used" (R., p. 367).

Witness has known of the "Old Crow" brand as long as he has been in the whisky business and the high reputation it bears; also the price which the brand commanded and which was a criterion as to its high quality and grade and based upon the intrinsic merit of the goods (R., p. 367).

The witness knows personally that the "Old Crow" whisky "is unquestionably one of the standard, highest grade whiskies made, by reason of my handling it, both as an owner, purchaser, and commission merchant on account of others" (R., p. 370).

The witness points out the distinction between straight whisky and neutral spirits at R., p. 369, et seq.

He describes the hand-mashing process (R., p. 376).

LYMAN T. HAY, manager of the Jefferson Hotel, St. Louis, and of the Arlington and Eastman Hotels of Hot Springs, Ark., has been engaged in the hotel business for twenty-two years and has had charge of the bar since March, 1893, and has general supervision of the buyers for his house. In buying large quantities they submit the prices to the witness before buying (R., p. 379).

Has been acquainted with the "Old Crow" whisky of W. A. Gaines & Co. for ten or twelve years and has bought a good deal of it. The whisky has been sold at all three of his hotels. During that time he has never known of any "Old Crow" whisky produced or claimed to be produced by A. M. Hellman & Company of St. Louis (R., p. 379).

DAVID NICHOLSON, of the house of David Nicholson, testifies that the house of David Nicholson was founded in 1843 in the City of St. Louis and that he has been connected with the house since 1867, during all of which time the house has handled liquors (R., p. 387).

He has been acquainted with the "Old Crow" whisky of W. A. Gaines & Co. for about twenty-five years and his house bottles it (R., p. 388) under a label which is shown at R., p. 694.

He was acquainted with Abraham Hellman for about twenty years (R., p. 388).

Concerning the assertion of any claim of A. M. Hellman & Company to the trade-mark in issue, he says:

"Q. 17. During that time did you ever hear of the firm of A. M. Hellman & Company asserting any claim to right or title of the trade-mark 'Old Crow' for whisky?

A. Except as their own bottling.

Q. 18. Please explain your last answer?

A. They had a piece of bottled goods on the market which they called Old Crow whisky, but it was supposed to be Gaines whisky. Gaines was the only man we knew that made Old Crow whisky.

Q. 19. Did you ever hear of A. M. Hellman & Company making any claim that they owned the

trade-mark for whisky consisting of the words 'Old Crow'?

A. No" (R., pp. 388, 389).

HERMAN A. STEINWENDER, of H. A. Steinwender & Company, 65 years of age, has resided in St. Louis for fifty years and has been engaged in the liquor business in St. Louis for about forty years (R., p. 395).

For thirty-eight years he was connected with the firm of Steinwender & Sellner (R., p. 396).

At the present time H. A. Steinwender & Company bottle W. A. Gaines & Co.'s "Old Crow" whisky under the label appearing at R., p. 692. He has handled W. A. Gaines & Co.'s "Old Crow" whisky for twenty-five years (R., p. 396). During that time the words "Old Crow" have always indicated to his mind the whisky of W. A. Gaines & Co. (Q. 14 and answer, R., p. 396).

The witness has sold his own bottling of W. A. Gaines & Co.'s Old Crow whisky throughout the States of Missouri, Illinois, Iowa, Nebraska, Texas and Colorado (R., p. 397).

He was acquainted with the firm of A. M. Hellman & Co. for about thirty years and knew its predecessor, the firm of I. & L. M. Hellman. During all of that time he never heard of either of those firms

claiming to own the trade-mark for whisky consisting of the words "Old Crow" (R., p. 397).

ALBERT C. SELLNER, 65 years of age, and a resident of St. Louis since 1870, is treasurer and manager of Steinwender & Sellner Mercantile Company. Has been acquainted with W. A. Gaines & Co. in a business way since 1870. During the past fifteen years his corporation and its predecessors, Steinwender & Sellner, have bottled the "Old Crow" whisky of the complainant under the label shown on page 276, and have sold that bottling in New York, Indiana, Illinois, Idaho, Wyoming and Colorado (R., p. 403).

Witness was acquainted with the late Abraham M. Hellman and his firm and did some business with his firm. He knew Hellman for the past thirty years (R., p. 405).

He first heard about three or four years ago that the Hellman house made a claim to the trade-mark "Old Crow." During the time that the witness had been engaged in business in St. Louis the words have indicated to his mind the whisky of W. A. Gaines & Co. (R., p. 405).

JOHN T. McMAHON, 46 years of age, residing in St. Louis and having his place of business at 724 Olive street, has been engaged in the retail liquor business in the City of St. Louis for the past two years and prior to that was engaged in the same

business in Kansas City, Mo. During the past twenty years has been engaged in the liquor business in the State of Missouri and has been acquainted with the "Old Crow" whisky of W. A. Gaines & Co. all of that time. The words "Old Crow" have indicated the whisky of Gaines during all that time. "Gaines' Old Crow is all that I ever knew" (R., p. 412). He has handled the "Old Crow" whisky in his business and has never known of any other "Old Crow" whisky except that of W. A. Gaines & Co. (R., p. 412).

A. Moll Grocery Company of St. Louis, has been familiar with the "Old Crow" whisky of W. A. Gaines & Co. for twenty years. Ever since he has been connected with the concern they have bottled it under the labels shown at R., pp. 690 and 691. During all of that period the name "Old Crow" has meant to his mind the whisky of W. A. Gaines & Co. He was acquainted with A. M. Hellman during his lifetime and the firm of A. M. Hellman & Company and never heard of A. M. Hellman claiming or using the name "Old Crow" previous to the institution of this suit (R., p. 417).

PATRICK J. CARMODY, 70 years of age, resident of St. Louis, has been in the liquor business for forty years. Was at Moberly, Mo., for about thirteen years and has been acquainted with the "Old

Crow" whisky of Gaines & Co. about thirty years. When asked whose whisky the name "Old Crow" had indicated to his mind during that period, the witness says:

"I have never known of any except Gaines & Co., W. A. Gaines & Co., I believe it is. It was understood that they were the legitimate makers of that goods. I never handled the goods myself, but I have known those who have handled and I never knew of any one having the Old Crow except W. A. Gaines & Son, or W. A. Gaines & Co. I don't know which it is" (R., p. 422).

Witness was visited by the traveling men of A. M. Hellman & Company and thinks he bought a bill of goods from them once, but never heard of any claim being made by A. M. Hellman & Company of owning the trade-mark "Old Crow" (R., p. 422).

JOHN A. SPECHT, restaurant proprietor, 114 North Fourth street, was engaged in the liquor business beginning along in the seventies. Went into business for himself in 1891. Has been acquainted with the "Old Crow" whisky of Gaines & Co. for twenty years past. During that time the name "Old Crow" whisky of W. A. Gaines & Co. Never heard of any claim of ownership to the mark "Old Crow" by Hellman & Co. (R., pp. 428-429).

JAMES H. McTAGUE, proprietor of McTague's Restaurant, Century Building, St. Louis, 47 years of age, lived in St. Louis nine years past. Prior to that time he was in the restaurant business in Omaha for about eleven years. The witness has dealt directly or indirectly in "Old Crow" whisky since 1876. During the past twenty years the words "Old Crow" have indicated to his mind W. A. Gaines & Co. He never heard of A. M. Hellman & Co. making any claim to the ownership of the trade-mark "Old Crow" (R., p. 433).

GEORGE J. KNAPP, manager of the bar of the Lippe Restaurant, in the Chemical Building, St. Louis, has been manager of that bar for the past eight years and has been in the liquor business in Cincinnati, O., Put-in-Bay, O., Detroit, Mich., and St. Louis for fifteen to seventeen years, all told. Wherever he has been he has handled the "Old Crow" whisky of W. A. Gaines & Co., and during the past sixteen or seventeen years the words "Old Crow" have always indicated the whisky of W. A. Gaines & Co. to his mind. In his language, "I never heard of any Crow but Gaines' Crow" (R., p. 437).

FRANK R. CLAYTON, aged 33, residing in St. Louis, inspector of the Thiel Detective Service Co.; with the exception of two years, when deputy sheriff at the Four Courts, has been in the employ of the Thiel Service for twelve years past. Is acquainted

with the "Old Crow" whisky of W. A. Gaines & Co. and has been acquainted with it for fifteen years. Has seen the "Old Crow" whisky in every State except three west of the Mississippi River; nearly all of the Central States, four of the Northern States and all of the Southern States. The three States west of the Mississippi River in which he has not seen Gaines" "Old Crow" whisky are Idaho, Utah and Nevada (R., p. 442).

The witness has never seen the whisky of A. M. Hellman & Co. except once, then in St. Louis at Judge & Dolph's drug store, on Olive street between Sixth and Seventh streets, where it was in competition with well known bottlings of W. A. Gaines & Co.'s "Old Crow" whisky, and was advertised in Judge & Dolph's circular, Complainant's Exhibit, Judge & Dolph's Price List, as "Old Crow" whisky, bottled by Hellman (R., p. 443).

The Hellman "Old Crow" whisky was displayed with the Bottled in Bond Old Crow whisky of W. A. Gaines & Co.'s, Wm. H. Lee & Co.'s Old Crow and David Nicholson's Old Crow (R., p. 444).

"They were all lined up together on the top of the show case" (R., p 444).

Witness has visited nearly every wholesale liquor house in all the Southern States, particularly in Louisiana and Texas, and has never seen the "Old Crow" whisky of Hellman & Co. displayed for sale at any other place than the Judge & Dolph drug store, under the circumstances described (R., p. 445).

AUSTIN CARTER, manager of John W. Howard Liquor Co. of St. Louis, has resided in St. Louis since 1887 and has been connected with John W. Howard for the past fifteen years, and during that time the words "Old Crow" have indicated to his mind the whisky of Gaines & Co. (R., p. 460). The business of the John W. Howard Co. was wholesale until three or four months prior to the time the witness testified (R., p. 461).

EDSON BRADLEY, called in rebuttal, identifies a certified copy of the record in W. A. Gaines & Co. v. E. Whyte Grocery, Fruit and Wine Co., 107 Mo. Appeals 507, which is in evidence (R., p. 625). This certified copy appears in this record at p. 698.

William H. Lee, whose testimony appears in that exhibit record at page 811, is the same William H. Lee referred to by defendants' witness, T. W. Manning (R., p. 626).

William H. Lee purchased very large quantities of "Old Crow" whisky for a period of twenty-five or thirty years, and he was one of the largest customers of Paris, Allen & Co. for that brand of whisky (R., p. 627).

Asked whether during that time the witness had any knowledge or information of any such traffic in spurious whisky under the name of Old Crow by William H. Lee as is described in the testimony of Manning, witness answered "Never. I believe that Mr. Lee was thoroughly honest" (R., p. 627).

Witness visited the place of business and the bottling department of Mr. Lee during his lifetime (R., p. 627). The witness never heard of or saw the buring brand and stencil brand of "J. Crow" whisky referred to by defendants witness, Manning (R., p. 628).

After the death of Lee, his business was incorporated as Wm. H. Lee & Company and continued, a man by the name of Morrin being the principal person interested, the same John S. Morrin whose testimony is contained in the record of W. A. Gaines & Co. v. E. Whyte Grocery, Fruit and Wine Co. (R., p. 628).

The witness describes and explains the so-called tank whisky referred to by defendants' witness (R., p. 629).

Paris, Allen & Co. did not at any time sell to Lee & Co. whisky as "Old Crow" whisky which was not the genuine "Old Crow" whisky of W. A. Gaines & Co. (R., p. 630).

There is nothing embodied in the language of the glass sign of I. & L. M. Hellman indicating to the trade any assertion on the part of I. & L. M. Hell-

man of any title to the mark "Old Crow" (R., p. 630).

Witness identified the price lists of H. W. Voss & Co., William C. Biles & Co. and J. W. Biles & Co., which are offered in evidence at pp. 631, 632.

Asked whether it is possible for W. A. Gaines & Co. to ascertain whether or not a bottler of whisky under the name of Old Crow has in his possession for the purpose of that bottling the genuine Old Crow whisky of W. A. Gaines & Co., the witness answers:

"It is absolutely impossible unless W. A. Gaines & Co. has access to the bottling establishment of the bottler, for the reason that practically every wholesale liquor dealer in the United States has in his possession at different times genuine Old Crow whisky distilled by W. A. Gaines & Co., the greater portion of which was not bought direct from W. A. Gaines & Co., but was purchased from other dealers, or on the open market through brokers. This condition of things makes it possible for any bottle of whisky bearing the words Old Crow to be the genuine Old Crow whisky of W. A. Gaines & Co., although W. A. Gaines & Co., or any person known to that company, had not sold any Old Crow whisky to the bottler. There is only one way in which W. A. Gaines & Co. can obtain knowledge of spurious bottlings under its trademark, that is to say, by physical examination

of the whisky contained in the bottles, and as only a very small percentage of these bottlings can ever come to the notice of W. A. Gaines & Co., it makes it a very difficult matter for them to detect these spurious bottlings" (R., p. 634).

No claim has at any time been made of ownership of the trade-mark "Old Crow" or in the secret process whereby the "Old Crow" whisky is produced by W. A. Gaines & Co., by the heirs of James Crow or by the heirs of Oscar Pepper (R., p. 634).

As to the alleged conversation between the late Abraham M. Hellman and E. C. Homan, salesman for Paris, Allen & Co., concerning which defendants' witnesses have testified, witness says:

"Mr. Homan never made any written communication to Paris, Allen & Co. on that subject, but on his return to New York City he told me personally that he had charged Hellman with having put up spurious imitations of W. A. Gaines & Co.'s Old Crow whisky and that Hellman had agreed that he would never do it again" (R., p. 635).

Mr. Homan was not an agent of W. A. Gaines & Co., but was a salesman for Paris, Allen & Co. of New York (R., p. 635).

#### DEFENDANT'S TESTIMONY.

JOHN O. URNER, age 65, bookkeeper for the Gregg Varnish Co., was in the employ of I. & L. M. Hellman in 1865. Testifies to Louis M. Hellman continuing the business under the same name after the death of Isaac Hellman in 1867, and that Abraham M. Hellman was taken into the firm four to six years later. Then fixes the date as 1871 (R., p. 467). The firm was dissolved in 1881 by the withdrawal of L. M. Hellman, the record entry showing that \$9,878.98 was paid to L. M. Hellman for his three-eighths interest, and \$5,000 of that amount for good will (R., p. 470).

Certain books were identified by the witness and offered in evidence as follows (R., pp. 471, 472):

Defendants' Exhibit No. 1, Ledger. (See Extract, R., p. 953).

Defendants' Exhibit No. 2, day book from January 3, 1881, to January 1, 1886. (See Extracts, R., p. 953).

Defendants' Exhibit No. 3, Ledger from December 31, 1867, to December 31, 1870. (See Extract, R., p. 954).

Urner testifies (R., p. 472):

"Q. Do you remember whether in the year 1866 or the year 1867 the firm sold any whisky which was designated Crow whisky?

A. Yes.

Q. Where did they get the whisky which they sold as Crow whisky?

A. It was blended in the store and was not bought from any one under the name of Crow. It was branded in the store.

Q. Did you have a brand indicating this name of Crow whisky?

A. Yes; they had a brand, J. W. Crow Bourbon.

Q. How was that brand attached to the packages of whisky sold under the name of Crow?

A. It was a fire brand, burned on. It was heated by the rectifier and the brand burned on the head of the barrel.

Q. Of what was the whisky so branded made?

A. Well, I was not the rectifier, I don't know exactly' (R., p. 473).

"Q. Do you remember whether the firm during the period that you were with them, purchased any whisky as Crow whisky?

A. No.

Q. Well, now, do you mean you don't remember, or that they did not purchase any?

A. No; they didn't purchase any" (R., p. 473).

He identifies a plaster cast of a burning brand reading "J. W. Crow Bourbon" (R., p. 473), and a certain glass sign (see photograph, Defendants' Exhibit No. 6) being shown him, says:

"Q. I show you a sign, Mr. Urner, and ask you if you remember that sign?

A. I remember it.

Q. How far back do you remember this sign, or a sign like it, or a similar one, as being displayed in the office or salesroom of the firm?

A. I can't remember exactly when I first saw one, but it was back in the sixties, some time in the later sixties" (R.; p. 474).

Witness identifies a sales book (Defendants' Exhibit No. 7, R., p. 475), a day book (Exhibit No. 8, R., p. 477), a day book (Exhibit No. 9, R., p. 477), and refers to entries reading "Crow" whisky in these books, saying: "It is entered as Crow whisky; it must have been branded J. W. Crow Bourbon. That was the brand which was used on whatever went out as Crow whisky at that time" (R., pp. 480-481).

All of the sales, at early dates, shown by these books to have been made under the mark "P. Crow" or a like name by defendants' predecessors, are as follows:

		To Whom Sold. Gal.	Price.
Mar.	18, 1863	Robt. Forbringer, Atchison 381/2	\$0.85
Dec.	28, 1866	O. Waldkirch, Baton Rouge 401/2	3.00
April	20, 1867	W. G. Wear & Co., Memphis 821/2	2.75
6.0	25, 1867	S. Mendelsohn, Baton Rouge 321/2	2.70
July	13, 1867	S. Mendelsohn, Baton Rouge 411/2	3.00
Aug.	8, 1867	D. Bruner, Montgomery City 43	3.25
Sept.	18, 1867	Bernard & Albrecht, Ottawa 41	3.00
Nov.	9, 1867	D. Bruner, Montgomery City 411/2	3.25
14	15, 1867	Lohman & Beckstead, Havana 401/2	3.00
6.6	23, 1867	M. D. Thatcher, Pueblo164	2.85
Jan.	18, 1868	Albert Ertel, El Paso 401/2	3.00
Mar.	7, 1868	Paul Pantler, Evansville 221/2	2.75
86	21, 1868	John Aaron, Peru 40	3.00
8.6	31, 1868	A. Heffly, Nebraska City	3.00
April	13, 1868	V. L. Todd & Co., Ft. Wallace1201/2	3.00
64	21, 1868	P. C. Patterson, Lexington 42	3.00
May	5, 1868	Jos. Albrecht, Ottawa 411/2	3,00

64		1868	Mrs. F. Keller, Independence 84	3.00
44		1868	Chas. Seitz, City 821/6	1.95
June	1,	1868	A. Heffley, Nebraska City	3.00
May	13,	1869	Malcolm-Orchard & Co., Rolla 42	1.75
June	24,	1869	A. H. Haller, Pilot Knob	1.75
July	13,	1869	H. C. Leighton, Omaha162	2.00
Aug.	13,	1869	Mrs. F. Keller, Independence 40	2.00
6.6	24,	1869	Hall & Porter, Junction City 42	2.00
**		1869	A. Heffley, Nebraska City 841/2	2.00
41	30,	1869	Morgan-Stoddard & Co., City 42	1.65
44	30,	1869	L. Kiefer & Co., Port Gibson 821/2	1.50
Oct.	4,	1869	A. W. Benedict, Council Bluffs 791/2	1.75
6.6	12,	1869	Theo. Selhorst, Chester	1.70
44	12,	1869	W. E. Bard & Co., Sedalia 431/2	1.50
66	14,	1869	Thos. Dower, City 9	1.50
4.6	15,	1869	Bushey & Duncker, Pt. Pleasant 10	1.75
1.6	15,	1869	Hall & Porter, Junction City 39	2.00
44	21,	1869	Newton M. Calloway, Marshfield 43	1.75
44	22,	1869	J. G. Anmoth & Co., Lebanon110	1.65
4.6	23,	1869	Bushey & Dunker, Osceola, Ark 10	1.75
64	28,	1869	Philip Bower, W. Baton Rouge 411/4	1.75
Nov.	1,	1869	L. Kiefer & Co., Port Gibson 41	1.50
4.6	1,	1869	Dr. J. E. Wilson, Sarcoxie, Mo 40	1.75
64	3,	1869	Alfred Weil, Ft. Scott	1.75
8.6	3,	1869	Van Frosien & Jones 41	1.75
64	3,	1869	Kyele & Keller, Weston 401/6	1.75
8.6	11,	1869	Wm. Rhodes & Co., Brandon 411/2	1.50
4.6	12.	1869	T. C. Peters, Ellis Grove 411/4	1.75
66	12,	1869	Sweecy, Yost & Co., Omaha 41	2.00
66	12,	1869	J. G. Anmoth, Springfield210	1.65
**	12,	1869	Wm. Clark, Hillsboro	1.75
4.6	17.	1869	Bushey & Duncker, Pt. Pleasant 23	1.75
**	17.	1869	H. Richter, Pilot Knob 41	1.75
44	22,	1869	Llewellyn & Co., Mexico 84	1.75
6.6	25,	1869	L. Kiefer & Co., Port Gibson 42	1.50
4.6	26,	1869	Dr. Wm. Jennings, Marshfield 44	1.75
Dec.	2.	1869	N. Lorie, Vidalia	1.75
44	8,	1869	Hall, Beiler & Co., Sedalia2231/2	1.10
4.6	17,	1869	Dr. Wm. Jennings, Marshfield 421/2	1.75
6.6		1869	Newton M. Calloway, Marshfield 45	1.75
44	28.	1869	T. K. Paul, Marshfield 411/4	1.75
44		1869	Dr. F. W. Kelton, Mt. Vernon 451/4	1.75
				4.10

Recalled, Urner identifies the book marked "Journal H. M. & Co." Defendants' Exhibit No. 10 (R., p. 510).

On cross-examination his attention is directed to an entry reading "1 bbl. Bourbon P. Crow" at p. 48 of Defendants' Exhibit No. 7, concerning which he testifies:

"Q. During the time that you were employed by the firm of I. & L. M. Hellman, was any person of the name of P. Crow connected with the firm of I. & L. M. Hellman, as an employe, or otherwise?

A. No.

Q. Did you ever know a person by the name of P. Crow, engaged in the liquor business?

A. I don't remember of ever hearing the name before' (R., p. 512).

"Q. Who was J. W. Crow?

A. I don't know.

Q. There wasn't any one of that name connected with the firm of I. & L. M. Hellman while you were employed there!

A. No one" (R., p. 513).

"Q. You did not know at that time of any Old Crow whisky other than that made by I. & L. M. Hellman, did you?

A. I have heard all my life the word Crow in connection with whisky; in fact, I have heard the words 'Old Crow' without being able to place them. I don't remember of ever seeing a barrel with that brand on it' (R., pp. 514-515).

He also testifies as to the spurious "Magnolia" and other imitation whisky sold by I. & L. M. Hellman, as follows:

"Q. You remember the brand, J. W. Crow,

of which you say defendants' exhibit is a cast; I will ask you how many other brands, meaning thereby metallic brands used for branding the heads of whisky barrels, you recollect as being in use by I. & L. M. Hellman, in 1865 and 1866, and what those brands were?

A, I can't just now recall any brand except Arnold & Fuller's.

Q. Magnolia whisky appears frequently upon these books of accounting during that period, does it not?

A. I presume so. Yes.

Q. Was there a metal brand there bearing the name Magnolia?

A. There was not.

Q. Wasn't that Magnolia whisky made on the premises, just like J. W. Crow or Old Crow?

A. It was as good an article of whisky as Crow. It was 30 below proof and common whisky.

Q. That Magnolia whisky was blended or compounded, there at the place of business of I. & L. M. Hellman, was it not?

A. It was rectified there. It was leached through charcoal and drawn from a large tub into a barrel and the brand Magnolia put on the head of the barrel, which had previously been painted yellow. It was put on with a stencil brand.

Q. You remember that stencil being on the premises of I. & L. M. Hellman, don't you?

A. Yes.

Q. Now, what material was used by I. & L. M. Hellman in making this Magnolia whisky?

A. High wine.

Q. I. & L. M. Hellman never purchased any Magnolia whisky from S. N. Pike & Co., of Cincinnati, did they?

A. No.

Q. Did I. & L. M. Hellman ever purchase any Magnolia whisky from Mills, Johnson & Co.?

A. No" (R., pp. 513-514).

"Q. Did you at that time know of any Magnolia whisky other than that produced by I. & L. M. Hellman?

A. I never saw any Magnolia whisky that was produced by any other party than I. & L. M. Hellman.

Q. Didn't you, as a matter of fact, know that the Magnolia brand was at that time one of the leading brands of American whisky sold extensively throughout the United States? And that it was owned by parties other than I. & L. M. Hellman?

A. I would like to explain that; when you speak of a matter of fact I don't know anything about any other Magnolia whisky than that made by I. & L. M. Hellman, as a matter of fact.

Q. Was there any person of the name of Arnold connected with the firm of I. & L. M. Hellman in the years 1865 and 1866?

A. No.

Q. Do you know who that brand Arnold belonged to?

A. No. Except that it belonged to I. & L. M. Hellman.

Q. Was there any person named Bowen con-

nected with the firm of I. & L. M. Hellman in 1865, 1866?

A. There was not.

Q. Did you know at that time who the Bowen brand belonged to?

A. I can't remember.

Q. Was there any person named Fuller connected with the firm of I. & L. M. Hellman in 1865 and 1866?

A. There was not.

Q. Did you know who the Fuller brand belonged to?

A. Belonged to I. & L. M. Hellman' (R., pp. 514-515).

MARTIN W. HERON, of Memphis, testifies he was in the employ of I. & L. M. Hellman and their successors from the fall of 1865 to 1882 (R., p. 488). Assisted the rectifier and they blended whiskies and neutral spirits and sold them as Crow whisky (R., p. 489).

On cross-examination he testified as follows:

"Q. Who was J. W. Crow?

A. I really don't know.

Q. Was any person by the name of J. W. Crow a member of the firm of I. & L. M. Hellman at the time you were employed there?

A. No, sir.

Q. Was any person named J. W. Crow employed by the firm at the time you first went there?

A. No, sir; not that I know of" (R., p. 492).
"Q. Now I will ask you to state whether or
not you can recollect whether any of the regularly distilled whisky which you used in making
that so-called Old Crow compound for I. & L. M.
Hellman came from the distillery of Gaines,
Berry & Co., Kentucky?

A. I don't remember.

Q. So far as you can recollect now, it may or may not have come from Gaines, Berry & Co., may it not?

A. I don't remember what distillery it came from; they didn't use any one certain brand'' R., Vol. II, p. 393).

At R., p. 495, he admits making the affidavit reproduced at R., p. 495, which reads as follows:

"State of Tennessee, County of Shelby.

Martin W. Heron, being duly sworn, on his oath states that he is 53 years of age; at present a resident of Memphis, Tennessee; that in the year 1865 he was in the employ of the firm of I. & L. M. Hellman, of St. Louis, Missouri, in the capacity of assistant compounder, and that he remained in the employ of I. & L. M. Hellman until 1885; that in the year 1886 and prior thereto, the said firm of I. & L. M. Hellman used a brand called 'Crow' brand on a blend or compound manufactured by them, and that they continued to use such brand during the whole of the

time that he was in their employ; that during all of that time display glass advertising signs of the 'Crow' brand were distributed by the firm to their customers, and one sign of that kind hung continuously on the wall of the office; that at that time it the only 'Crow' brand of whisky that was known to the trade in St. Louis.'

HERMAN H. LIEMKE, age 61, designer of signs, is asked to identify the glass sign, Defendants' Exhibit No. 5 (R., p. 500), which he says he made in 1878 or 1879, and that he made one like it in 1867 for I. & L. M. Hellman (R., p. 501).

On cross-examination he says he fixes the date of making Defendants' Exhibit No. 5 as follows:

"Q. How do you fix the time when this sign, Defendants' Exhibit No. 5, was made by you as being in 1878 or 1879?

A. How do I fix the time? Because I was married shortly after, in '68 or '69, and I have the marriage certificate to show; I mean 1878 or 1879, and that was the last sign made in that locality bearing the number 315 Olive street.

Q. Now which of the four years you have referred to were you married in—1868, 1869, 1878 or 1879?

A. In 1878 or 1879.

Q. Have you been married more than once?

A. No, sir' (R., p. 504).

In further cross-examination the witness is unable

to fix the date of his marriage (by which he fixed the date when he made Defendants' Exhibit No. 5), except as follows:

"A. Well, I was married in February, I know that, the exact date I can't tell. It is the 27th or not, but in '78 or '79, I am sure one of those two years. The marriage was published in the Missouri Republic of '78 or '79.

Q. Are you sure it was not in 1877?

A. It could not have been.

Q. Are you positive of that?

A. To the best of my knowledge, I am.

Q. Can you testify positively that it was not as early as 1876?

A. I think I can" (R., p. 509).

## FREDERICK A. HUGO and ADNUL HOBBS.

On December 29, 1904, before this cause was at issue, and the complainant not consenting thereto, the defendants took the alleged depositions of the persons above named, which are now in the files of this case.

Former Equity Rules 67, 68 and 69 all provided that testimony can be taken *only* after the cause is at issue. Therefore this *ex parte* matter is not testimony and cannot be considered.

It purports to set out conversations between E. C. Homan of New York, a whisky salesman for Paris, Allen & Co., of New York, who was never in the em-

ploy of complainant, with Abraham M. Hellman, deceased; Homan also being long since dead. It is neither competent, relevant, nor material for any purpose.

TIMOTHY W. MANNING, a compounder for W. H. Lee & Co., of St. Louis, testifies that in 1865 a liquor house in St. Louis named Samuel McCartney & Co. was using a stencil reading.

## PURE OLD CROW BOURBON

#### 1858

"Respondents' Exhibit Manning A" (R., p. 528), and that the brand has been used ever since by the McCartney house and its successors, terminating in Wm. H. Lee & Co.

Also that a burning brand reading "J. Crow Bourbon, Paris, Ky." (Respondents' Exhibit Manning B, R., p. 529), was used in like manner; both brands being used "on a rather fair grade of blend" (R., p. 529), without reference to the distillery where the goods were produced (R., Vol. II, p. 442).

Witness identifies the label used by Wm. H. Lee & Co. in bottling complainant's Old Crow whisky and reading as follows:

"Old Crow Pure hand-made sour mash Kentucky Bourbon, distilled by W. A. Gaines & Co., Frankfort, Kentucky, selected and bottled by William H. Lee & Co., St. Louis. We guarantee

the purity and high quality of these goods, which we especially recommend for family use" (R., p. 536).

EMILE SCHAEFER, of Yazoo City, Mississippi, had dealings with I. & L. M. Hellman in 1866, and bought "Crow" whisky in barrels from them from that time up to 1870 (R., p. 542).

He testifies on direct examination as follows:

"Q. What kind of goods was it that were contained in these barrels marked 'Crow' or 'Old Crow'?

A. The finest whisky that I handled, and I had some customers that wanted fine whisky; it was flush times shortly after the war; the people had saved some cotton out of the wreck, and they had plenty of money, and they wanted the best goods. You could not sell those goods down there now.

Q. I will ask you whether it was single stamped or double stamped goods, if you remember?

A. I am not sure that the stamp act was in force at that time; I don't remember about the stamp; I think it was before the Stamp Act was passed.

Q. Do you remember whether it was blended or not?

A. No, they were not blended; they were pure goods; they were first-class goods' (R., p. 543).

"Q. Was there anyone else in the city who sold or dealt in this Old Crow?

A. Yes, sir; there was an old barroom man whose family is there now—he is dead himself—named Haberkamp, and another man named John Lear, whose son is now the president of the Delta Bank and Trust Company; those men who handled it are all dead. There was another man by the name of R. C. Shepard that handled it, but he is dead.

Q. These three houses that you mention handled Old Crow whisky?

A. I think so; I could not swear positively to that; I think they all handled fine whisky and that was the finest whisky we handled. Two of those kept a barroom or saloon; the third was quite a wealthy man, who done business like I did" (R., p. 543).

On cross-examination he testified:

"Q. Was this whisky that you bought and handled in this manner a bourbon or rye whisky?

A. I think it was a bourbon whisky.

Q. Kentucky bourbon whisky?

A. I don't know whether it was Kentucky or not; I don't know where it was made.

Q. You don't know who it was distilled by?

A. No; the finest whisky I handled was that whisky and I bought it from I. & L. M. Hellman, and it was graded 'Old Crow'; I don't know who made it.

Q. You bought it believing it to be straight high-grade bourbon whisky?

A. That is it; yes, sir.

Q. That is a regularly distilled whisky and not a compound or blend?

A. No, sir; nothing of that kind.

Q. And you paid a very high price for it?

A. Yes, sir; my recollection is that it always cost me \$3.00 and upwards' (R., p. 544).

"Q. Since 1875 you have not had occasion to handle or deal in any whisky?

A. No, sir.

Q. And during all that period that you handled this whisky was it of the same high character that you describe, uniformly the same?

A. Yes, sir; I handled other whiskies in addition to that.

Q. But I mean this particular whisky?

A. Yes, sir.

Q. This was at all times a high grade straight Kentucky bourbon?

A. I don't know about the Kentucky part; I don't know where the whisky was made; it may have been made in Kentucky; I don't know.

Q. At all events, you never knew it was made in Hellman's cellar, did you?

A. No, you can't prove the making of it by me" (R., p. 545).

## On re-direct examination he testifies:

"Q. When counsel used the word 'straight' you did not attach any technical meaning to that, did you?

A. I merely mean by that that it was not mixed in any way; I don't know what that technicality means; I supposed it was whisky that had never been tampered with, was in its original state, like it came from the distillery' (R., p. 545).

HERMAN A. HAEUSSLER, lawyer, of St. Louis, knew the firm of I. & L. M. Hellman, and was their attorney from 1862. Recollects a "Crow" brand on the barrels lying on the sidewalk on Pine street at their place of business (R., p. 548). "Those times the folks that went in to take a drink would call for 'Crow' whisky the same as they called for Bourbon or Robinson County, different drinks of that kind" (R., p. 548).

MORITZ HELLMAN (defendant), aged 55, came to St. Louis from Europe in 1871. Worked for I. & L. M. Hellman from January 1, 1872 (R., p. 550). The "J. W. Crow Bourbon" brand was in use at that time (R., p. 551), and only on whisky blended by them (R., p. 551).

On cross-examination, he testifies:

"Q. Have you ever seen 'Old Crow' listed in any of the price lists of the liquor trade?

A. I suppose I did, but I never paid any attention to it, as I had no reason to do it.

Q. Are you acquainted with the whisky price list of the J. W. Biles Co.?

A. I have seen it, but I have not paid much attention to it because my trade was mostly blends.

- Q. Can you name any of the other price lists of the whisky trade?
  - A. I have seen a number of them.
  - Q. Can you name some of them?
- A. Well, I have seen—we are getting them every day, Clarkson, Voss' (R., p. 553).

#### On redirect examination he testified:

- Q. Do you know whether or not the words 'Crow' or 'Old Crow' were in general use in St. Louis when you began business with the firm of I. & L. M. Hellman, on whisky?
  - A. How is that?
- Q. Whether other houses used the words 'Crow' or 'Old Crow'?
- A. Yes, sir; other houses used it. I remember there was a house here by the name of Quinlan Bros. & Spotswood; they had a sign also with a Crow brand on it.
- Q. What other houses do you remember that used the words 'Crow' or 'Old Crow'?
  - A. Samuel McCartney & Co.
  - Q. Any other house?
  - A. Do you mean here in St. Louis?
- Q. Yes; you mentioned the house a moment ago?
  - A. Quinlan Bros. & Spotswood.
- Q. Do you know on what kind of goods the brand 'Crow' or 'Old Crow,' or mark 'Crow' or 'Old Crow' was employed?
  - A. Blends.

Q. Do you recall a kind of brand or mark which was used by Samuel McCartney & Co.?

A. Yes, sir.

Q. Describe it?

A. A. J. Crow" (R., pp. 554-555).

#### On recross-examination he testified:

"Q. Then neither you nor your company in this suit pretend to claim that the mark 'Old Crow' or 'Crow' as a mark for whisky ever belonged to your firm, or its predecessors, I. & L. M. Hellman, do you?

A. We never knew any other way that brand was ours, which we have used.

Q. Yet you now say it was in common use by other firms of the City of St. Louis when you began to use it, do you not?

A. Yes, sir; always used Crow whisky, but this brand that was used here was ours, but others have used it also; we never interfered with anybody else.

Q. You never undertook to stop anybody else from using it, did you?

A. No, we never did that I remember.

Q. You let them all use it?

A. If you notice in our brand it is J. W. Crow; I don't know that anybody else used those initials.

Q. I am talking about the words 'Crow' or 'Old Crow.' Did you ever undertake to stop anybody from using this brand on whisky?

A. I don't remember whether A. M. Hellman or I. & L. M. Hellman did, as I was traveling and I was not in the office.

Q. You never heard of it?

A. I don't remember hearing of it.

Q. And you now testify that the marks were commonly used in the trade in St. Louis by a number of houses in the trade when you came here in 1871?

A. Yes, sir.

Q. You have been the president of the Hellman Distilling Company since it was organized, have you not?

A. Yes, sir.

Q. The Hellman Distilling Company never tried to stop anybody from using 'Crow' or 'Old Crow' as marks on whisky, have they?

A. No, sir.

Q. When you came here in 1871 did you ever know of a Kentucky whisky known as 'Crow' or 'Old Crow,' a straight whisky?

A. We never dealt in it, and in those days, as I say, we sold mostly blends, but while I was traveling in Missouri I might have heard of Gaines' Crow here and there, but I never heard of it in the South' (R., p. 556).

"Q. Can you fix the date as near as possible when you first heard of W. A. Gaines & Co.'s Old Crow whisky?

A. No, sir.

Q. Can you fix it within ten years?

A. I was not interested enough to remember anything of that kind.

Q. How long have you been a partner in the firm of A. M. Hellman & Co.?

A. I don't recollect how long.

Q. You cannot tell how many years?

A. I suppose probably twelve or fourteen years; I couldn't tell exactly.

Q. And during that time you never looked in a price list of the whisky trade, and of the standard recognized trade price lists, to see whether Old Crow whisky was listed or not?

A. I had no occasion to look because I haven't sold any.

Q. Have you seen any Old Crow whisky of W. A. Gaines & Co., either in barrels or bottles?

A. I have never seen any in barrels, but I have seen some in bottles, bottled by W. H. Lee & Co.

Q. How long ago did you first see any of that?

A. I couldn't tell.

Q. As long ago as ten years past?

A. I suppose so" (R., p. 558).

WILLIAM J. BRENNAN, teamster, was in the employ of A. M. Hellman & Co. from 1881 to 1889, and as compounder made the mixture and branded the barrels with the "Crow" mark.

"Q. As compounder or assistant compounder, did you have any duties to perform with reference to Hellman's Old Crow?

A. Yes, sir.

Q. What were those duties?

A. With Old Crow?

Q. Yes.

A. Well, generally brand the barrels 'Old

Crow', and generally fix up the formula of Old Crow.

- Q. When you say you fixed up the formula, what do you mean by that?
  - A. Fixed up the refined spirits.
  - Q. Well, was it a blend?
  - A. Yes, sir.
  - Q. Blended there on the premises?
  - A. Yes, sir" (R., pp. 559-560).

He refused to tell what the mixture was, saying the formula is a secret.

He testifies:

"Q. During that period did you use any of the Old Crow whisky of W. A. Gaines & Co. in making this mixture under the name of Crow for the Hellman concern?

A. Well, I don't remember" (R., p. 564).

JAMES F. BRENNAN, compounder for Hellman & Co. since June, 1898, testifies that the Hellman Distilling Company marks packages with the words "Crow" or "Crow Bourbon." He does not testify what whisky or other liquor is placed in these packages (R., p. 564).

NATHANIEL S. REEDER, aged 60, of Cincinnati, testifies that in 1867 the firm of W. W. Johnson & Co. of that city branded rectified whisky with the

word "Crow" (R., p. 570). The house used the words "Crow" and "J. W. Crow" (R., p. 571).

He testifies:

"Q. Can you state, Mr. Reeder, whether the whisky that was sold by your house as 'Crow' or 'Old Crow' came from W. A. Gaines & Co. or any of its predecessors?

A. I think it never did (R., p. 571).

Q. Have you ever heard of Woodford County?

A. Yes.

Q. Have you ever heard of 'Glenn's Creek'?

A. Yes.

Q. Before today?

A. Yes" (R., p. 572).

The "Magnolia" brand belonged to Mills, Johnson & Co. in 1867.

He testified further on cross-examination as follows:

"Q. How long have you been acquainted with W. A. Gaines & Co.?

A. I don't know W. A. Gaines & Co.

Q. Are you familiar with the price currents used in the whisky trade?

A. In a general way, yes.

Q. Do you use them or refer to them in your business?

A. Yes, sir.

Q. Please name the principal price currents for the whisky trade which you have so used and referred to in your business which are now being published?

A. Biles & Co. and Voss & Co.

Q. How long have you been acquainted with the 'Old Crow' whisky of W. A. Gaines & Co.?

A. I am not acquainted with it. Personally, I know nothing about it' (R., p. 573).

WILLIAM N. HOBART, aged 70, liquor dealer of Cincinnati, testifies:

"Q. Have you ever heard of the name of 'Crow'?

A. Yes.

Q. Or 'Old Crow'?

A. Yes.

Q. Or 'J. W. Crow'?

A. I don't remember 'J. W. Crow.' The terms 'Crow' or 'Old Crow' were very common names to the trade.

Q. How far back, Mr. Hobart, do you remember the use of any designations containing the word 'Crow'?

A. Well, it is a very difficult thing to go back forty or fifty years, and say exactly; but I can say in a general way that it is one of my earliest recollections in the business.

Q. The use of that word 'Crow'?

A. The use of that word.

Q. Now, will you kindly tell by whom the word 'Crow' was used, and upon what kind of goods?

A. Well, the word 'Crow' and 'Old Crow' was

used by a great many houses on whiskies that they turned out.

Q. What was the class of goods?

A. It was partly on the double stamp or the original goods, and partly on goods that bore a single stamp.

Q. I will ask you whether or not when it was used on double stamp goods, whether that use was restricted to any one house?

A. So far as I know, yes; I don't know of but one house using it on double stamp goods.

Q. In those days?

A. In those days I don't know of but one house using it on double stamp goods. I never knew of but one house using it on double stamp goods' R., p. 575).

Witness' house was sued for infringing the "Old Crow" brand in the '80s (R., p. 576).

On cross-examination he testifies:

"Q. How long have you been acquainted with 'Old Crow' whisky of W. A. Gaines & Co.?

A. Well, that is a pretty hard answer to make. I should say some time in the early '70s, or possibly as far back as 1868; but I could not—that is too far to remember with any certainty.

XQ. You have known W. A. Gaines & Co. for some time, have you not?

A. Oh, yes, I knew the concern before it was W. A. Gaines & Co. I cannot at this minute recall the style, though.

XQ. Gaines, Berry & Co.?

A. Gaines, Berry & Co.; yes, that is it.

XQ. And do you recall Gaines, Berry & Co. as having been a producer of 'Old Crow' whisky?

A. Yes.

XQ. Are you familiar with the leading price lists of the whisky trade?

A. Now! Oh, yes.

XQ. Please name the principal ones?

A. Those in Cincinnati, you mean? They are in Cincinnati anyhow. I don't know of any large price lists; there are circulars—but the only regular price lists, I think, come from Cincinnati, H. W. Voss & Co., W. C. Biles & Co. and the J. W. Biles Co. and M. Durner & Co.

XQ. Do you use these price lists?

A. I refer to them.

XQ. When the words 'Old Crow' appear listed in one of those price lists, whose whisky do they mean?

A. That refers to the whisky made by W. A. Gaines & Co.'' (R., pp. 577-578).

On redirect he testifies that he recognized Gaines, Berry & Co. as the producers of "Old Crow" (R., p. 579).

On recross-examination he testifies:

"RXQ. What reason have you for believing you had a right to use 'Old Crow' or 'Crow'?

A. Because it was very generally used by the trade all through the country. I knew of so many houses using it, because I wrote to Paris, Allen & Co. at that time that they had known

of its use for a great many years and had never entered any objection to it; I think ours was the first objection that I knew of.

RXQ. The houses that were using this brand were generally known as being counterfeiters and fakers of all letigimate brands of Kentucky whisky, were they not?

A. No; they were not. The ethics of the trade are quite different now. That is very carefully watched now. Mida, of Chicago, publishes a book of brands that we use and refer to that now before taking up a brand. We never touch a brand—at that time it was not considered anything out of the way to use any brand we pleased; it was not considered anything disgraceful, or anything that was wrong.

RXQ. What we now call 'piracy' in the trade was quite generally indulged in?

A. What you call 'piracy' now was very common then' (R., p. 580).

On further redirect he testifies:

"RDQ. In the early days, up to 1870, was the use of these brands regarded as 'piracy'?

A. Not at all.

RDQ. Why not?

A. Well, I don't think people had got up to that standard of business honor at that time; there was a different feeling about it than in the trade now. Now a house like James Walsh & Co., or our own, could not be induced to use a brand that belonged to another house, whether a registered brand or not' (R. p. 580).

"RDQ. What was the condition of affairs as to the commonness of a brand with reference to business honor?

A. There was no sentiment then prevailing that the use of any brand was a matter of business honor, or in any way a violation of it.

RDQ. Why do you use the word 'piracy' in connection with that?

A. I say, it would now be regarded as 'piracy'—not at that time' (R., p. 581).

JOHN T. MAYSE, aged 31, gives testimony as to what he claims to have seen of the machinery at complainant's Old Crow distillery. His testimony, if true, has no bearing on the issues (R., p. 581).

ABRAHAM RHEINSTROM (R., P. 588) is 61 years of age and in the liquor business in Cincinnati since 1862, when he was with Frieberg & Workum, and he alleges they applied the "Crow" brand to a blended whisky. He identifies a daybook of Freiberg & Workum showing sales beginning May, 1866, and ending October, 1869, and points out sundry sales of so-called "Crow" whisky (R., p. 590). The book is in evidence as "Exhibit A to Rheinstrom Deposition" R., p. 592).

On cross-examination: Was acquainted with the "Old Crow" whisky of W. A. Gaines & Co. by reputation for a long time; recollects the firm of Gaines, Berry & Co., predecessors of W. A. Gaines & Co. Has handled the Old Crow of W. A. Gaines & Co.

and "knows it to be listed as 'Crow' whisky" in the price currents of the whisky trade (R., p. 593). These price currents go back into the '80s, and where the words "Old Crow" appear in them they indicate whisky of W. A. Gaines & Co.

Freiberg & Workum owned the Bowen brand and were represented in St. Louis by William Mida. S. N. Pike & Co. owned the "Magnolia" brand. Witness did not know that I. & L. M. Hellman made a rectified whisky and sold it as "Bowen" (R., p. 594).

EMIL L. CHARROPPIN, 62 years of age, resides in Covington, La., was in the employ of I. & L. M. Hellman from 1866 until some time in 1870 (R., pp. 597-598).

He was traveling salesman; first traveled through Illinois and parts of Missouri, and afterwards as far south as New Orleans, through Tennessee, Arkansas, Mississippi and Louisiana. The brands which he sold were Nectar, Planters' Favorite, Crow, Arnold's, Rohrer, Bowen and Pepper. The whisky which he sold as "Crow" was "a blend that was made between spirits, from spirits and straight goods" (R., p. 598).

After leaving their employ was in business for himself and purchased the "Crow" whisky from them for many years (R., p. 600). He is positive he sold "Old Crow" to many people, but can not recollect the names (R., p. 604).

On cross-examination, when asked if he knows whether I. & L. M. Hellman used any of the whisky from Oscar Pepper's distillery in making the compound sold by them as "Old Crow" whisky, he answers, "I don't know" (R., p. 605).

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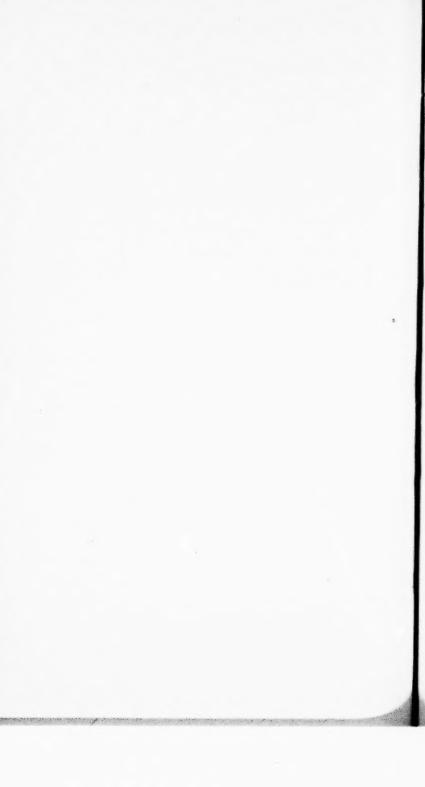
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#### IN THE

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

ROCK SPRING DISTILLING COM-PANY and SILAS ROSENFELD,

Petitioners,

VS.

poration),

W. A. GAINES & COMPANY (a Cor-

Respondent.

No. 311.

## REPLY BRIEF FOR PETITIONERS.

# THE DOCTRINE OF RES JUDICATA PROPERLY INVOKED IN THIS CASE.

GAINES in the "conclusion" of its brief ("XXII", p. 81) asks:

"Even if that Court of Appeals (Sixth Circuit) was bound by such a former decision

(Eighth Circuit Court of Appeals), is it possible that this Court is helpless to inquire into the facts, and redress the wrong, and protect the public from further imposition and fraud at the hands of commercial pirates who are diverting the plaintiff's trade and passing off spurious goods upon the public?

"This Court must determine what was decided in the Eighth Circuit Court. It must see that in order to reverse the Circuit Court (Judge Dyer), the vital evidences of fraud were ignored by the (Eighth Circuit) Court of Appeals; and, in that event (the truth of which can be ascertained by a simple casual comparative reading of the two Eighth Circuit opinions (that of the trial court and that of the Eighth Circuit Court of Appeals which reversed the trial court), is this Court helpless to redress a flagrant wrong which it was asked at the time to review by certiorari? (212 U. S. 572.)"

Gaines' position is stated earlier in its brief as follows (pp. 30-31):

"Petitioners sought, and presumably obtained, the writ of certiorari from this Court upon the ground that it was necessary in order to remove conflict between the doctrines obtaining for the two circuits, but insists that the remedy must be, not the annulment of the doctrine which is unsound, but of the doctrine last announced, sound or unsound. Of course, this contention is untenable because there would be presented no case of conflict but simply a case of prior ad-

judication. Such case might exist as well between judgments in the same circuit, or even in the same court, as between judgments of different circuits. Indeed, it would exist in every case where res judicata might be pleaded. When, therefore, this Court grants its writ of certiorari upon the assumption of the duty to remove conflict between decisions in the two circuits, it is granting the extraordinary remedy of certiorari for a public purpose, viz, to settle the doctrine between circuits correctly, i. e., by announcing the true doctrine for both circuits. This involves, of course, this Court's determination of the merits of the controversy in each circuit."

Unfortunately for Gaines' present contention, the rule is quite otherwise. Early in the history of the proceedings growing out of the Circuit Court of Appeals' act, the position now contended for by Gaines was urged before this Court in the leading case of Forsyth v. Hammond (166 U. S. 507). The rules there laid down in the opinion of Mr. Justice Brewer have ever since been regarded as the tests of certiorari to Circuit Courts of Appeal. "It is a power" (said the Court, 166 U. S., pp. 514-515)

"which will be sparingly exercised and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the court of a state, or some matter affecting the interests of the nation in its internal or external relations, demands such exercise.

"Among the considerations thus suggested are those which indicate why in this case the Court properly exercised its power and issued the writ of certiorari. There was a conflict between the decision of the Circuit Court of Appeals for the Seventh Circuit and the Supreme Court of the State of Indiana. The latter Court had declared that the proceedings by which the contiguous territory was annexed to the City of Hammond were legal, and therefore that the territory was to be considered by all the officers of the State of Indiana as within the territorial limits of the city. The United States Circuit Court of Appeals by its decision in this case had declared that such annexation proceedings were invalid and that the property of the petitioner was not within the city limits."

Addressing itself to the merits of the case, the Coart said (166 U. S., pp. 517-518):

"The decision of the Supreme Court of Indiana was in favor of the validity (of the annexation proceedings), that of the Court of Appeals against this validity. Can she (the plaintiff) after its (Indiana Supreme Court) decision be heard in any other tribunal to collaterally deny the validity thereof? Does not the principle of res judicata apply in all its force? Having litigated the question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently and

having no appellate jurisdiction? The question is not whether the judgment of the Supreme Court (of Indiana) would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum. The principles controlling the doctrine of res judicata have been so often announced and are so universally recognized that the citation of authorities is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions (citing Cromwell v. County, 94 U. S. 351; Lumber Co. v. Buchtel, 101 U. S. 638; Nesbit v. Riverside Independent District, 144 U. S. 610; Johnson Co. v. Wharton, 152 U. S. 252; Last Chance Mining Co. v. Tyler Mining Co., 157 U. S. 683,"

The Court, in the Forsyth case, had the benefit of oral argument and briefs by former President Harrison and former Attorney-General Miller, both able and distinguished lawyers, and familiar with the purpose and history of the Court of Appeals statute—one of them as President had signed the act and made the first appointments under the law; the other had been the chief law officer of the Government during the same period.

Yet this Court ruled against them in their effort to uphold the court below, the effect of which would have been to approve the view now advanced by Gaines, and that decision has been regarded as the law ever since.

Gaines' questions must therefore be answered in the negative. This Court is powerless, even in a *certiorari* case based on conflict of decision, to open up and set aside the final decree first rendered. Res judicata is just as applicable in this case as it would have been if the Court of Appeals act had never been passed and this case were here on direct appeal.

Priority of the Hellmans in the adoption and use, and good faith in the adoption and use of their brand Crow and Old Crow having been found as a fact in favor of the Hellmans and against Gaines by the Eighth Circuit Court of Appeals, that finding, there final, will not be disturbed here.

### GAINES' 1909 REGISTRATION, IN THE FACE OF THAT PRIOR JUDGMENT, IS INVALID.

Gaines' brief utterly fails to meet the issue of invalidity of registration. On the contrary, Gaines' own interpretation of the Eighth Circuit Court of Appeals' decision is that the Hellmans had the right to use the words Old Crow on blended whiskey in the Eighth Circuit and in the lower Mississippi country (Gaines' Brief, p. 42). But the "Lower Mississippi country" and "the Eighth Circuit" are in the "United States", and "blended whiskey" constitutes merchandise of

the same descriptive properties as "straight rye and Bourbon", and the Hellman right to this use was well known to Gaines and its officers when Gaines' 1909 application was filed under Section 1 of the Trade Mark Act.

Section 2 of that Act reads:

"That the application prescribed in the foregoing section, in order to create any right whatever in favor of the party filing it, must be accompanied by a written declaration verified by the applicant, or by a member of the firm or an officer of the corporation or association applying. to the effect that the applicant believes himself or the firm, corporation or association in whose behalf he makes the application, to be the owner of the trade-mark sought to be registered, and that no other person, firm or corporation in the United States, to the best of the applicant's knowledge and belief, has the right to use such trade-mark in the identical form or such near resemblance thereto as might be calculated to deceive."

By section 5 registration is denied to a mark where there is an outstanding right to use the same mark on goods of the same descriptive properties.

Research fails to disclose a single instance where registration has been granted to an applicant where there was an outstanding earlier use on goods of the same descriptive properties in the United States. The 1909 registration is invalid. It never would have been issued had the true facts, well known to Gaines, been disclosed by Gaines in its affidavit.

# GAINES, THOUGH CHARGING THE HELLMANS WITH PIRACY, THEFT, IMMORALITY AND SUBSTITUTION, HAS FAILED TO SHOW ONE SINGLE INSTANCE OF SUBSTITUTION OR EVEN MISTAKE.

Gaines' brief in its concluding plea (Gaines' Brief, p. 82) denounces what it terms petitioners' claim

"of right to CONTINUE TO DEFRAUD THE PURCHASING PUBLIC, BY SUBSTITUTING ON ORDERS (OF PHYSICIANS, HOSPITALS OR OTHER CONSUMERS) for genuine Old Crow whiskey of the plaintiff, the cheap, inferior and nameless substitute of an unknown and willfully competing distillery."

At first reading it might be thought that this language was intended to refer to specific portions of the record showing that such substitution on orders of physicians had already occurred in hospitals. There is no such evidence whatever.

Gaines at page 40 of its brief, in discussing the Eighth Circuit Case, uses the following language with reference to the Hellman Old Crow:

"Not a scintilla of evidence was offered by peti-

tioners (meaning the Hellmans) to show either any damage to them nor that any one ever purchased of respondent under the impression that it was petitioners' (the Hellmans') whiskey. Such claim was, of course, knowingly false. Otherwise, an attempt would have been made to prove it."

The foregoing is from Gaines' pen, not ours.

The language, mutatis mutandis, is equally applicable to Gaines' whiskey in its relation to the Hellmans.

Gaines produced many witnesses in the Eighth Circuit case to the effect that the **necessary result** of the continuance of the use of the Hellman Old Crow mark "would be a great loss (e. g., witness Hermann, Rec., pp. 355, 362), but the Eighth Circuit Court of Appeals found that notwithstanding this testimony, under all the evidence in the case, "the complainant has failed to show that the defendants (the Hellmans) palmed off their whiskey on anybody as that of the complainant's manufacture" (Rec., p. 981).

In the Sixth Circuit case, witnesses for Gaines testifying in 1912 (the suit was filed in September, 1909) gave it as their opinion that "Gaines' business was bound to suffer seriously" if the Hellman use of Old Crow on the Rock Spring product were permitted (Rec., p. 190).

Yet not one instance was then or has ever been pro-

## duced by Gaines where any mistake or substitution, innocent or otherwise, has occurred.

In the face of this state of the record, Gaines in its brief (p. 81) calls upon this Court to

"redress the wrong and protect the public from further imposition and fraud at the hands of commercial pirates who are diverting the plaintiff's trade and passing off spurious goods upon the public" (Gaines' Brief, p. 81).

If, in point of fact "any diversion of trade" had occurred or "any passing off of spurious goods" had ever taken place, Gaines' abundant facilities for discovering evidence would most certainly have revealed it.

The fact that no intsance was produced and that nothing more tangible than the speculation of witnesses as to what might, would, could or should happen, may well be taken as proof positive that no such instance ever did occur, or, amongst persons of even moderate intelligence, ever could occur.

## THE HANOVER MILL CO. CASE (240 U. S. 403) INVOLVED ONLY COMMON-LAW UNREGISTERED TRADE-MARKS.

In that case there had been no prior adjudication of priority against one claimant and in favor of another. There was no registration by any claimant, much less a registration by a claimant already adversely adjudicated as to priority. There was diversity of citizenship and on that fact and that fact alone Federal jurisdiction rested.

In the present case there is no diversity of citizenship, but there is Federal registration, and on that fact and that fact alone Federal jurisdiction rests.

In view of Gaines' affidavit of February 20, 1909, the suppressio veri thereby practiced as to the prior adjudication can not well be regarded as aught but deliberate. The 1909 registration "created no right whatever" under the Trademark Statute (Sec. 2, Act February 20, 1905; 33 Stat. 724), unless the statutory affidavit accompanied it negativing the existence of an outstanding use by another in the United States of the same mark on the same class of goods. The right to Federal jurisdiction, which arises solely from registration, was a right which, if it exists at all, owes its creation to the registration. In view of the character of this affidavit, Federal jurisdiction must fail and Gaines' bill must be dismissed.

#### GAINES' AUTHORITIES.

We have already discussed the Hanover Mill case (240 U. S. 403).

Gaines again cites (Gaines' Brief, p. 57), as in previous briefs, *Heublein v. Adams*, 125 Fed. 782, as to the witness Mida. All of this Mida testimony was before the Court in the Eighth Circuit case and has passed into the final decree of the Eighth Circuit Court of Appeals. But in view of the deference apparently paid by the Sixth Circuit Court of Appeals to Mida's testimony, we quote from Judge Colt's opinion in the Heublein case (125 Fed. 782, 785), as follows:

"The complainants adopted 'Club Cocktail' as the distinguishing mark for their goods in September or October, 1892. In 1898-five years later—the Otis S. Neale Company of Boston caused to be inserted in Mida's Registry a label on which appears the words, 'Outing Club Cocktails', with the accompanying statement, 'Used Since 1894. The published notice to the world that the 'Outing Club Cocktails' began in 1894 raises a strong presumption against any intention to appropriate it at an earlier date. It may be that a few bottled cocktails having this brand were put up at an earlier date, but I do not think the evidence establishes any commercial use of this name SUFFICIENT TO OVERCOME THE DATE DELIBERATELY FIXED IN MIDA'S REGISTER."

Mida's Trade-mark Register containing the Gaines Old Crow registration (offered in evidence by Gaines) reads: "Used since Dec. 1870" (Rec., p. 689). Judge Colt is right. There is a very strong presumption that the date deliberately fixed in the Mida registration filed with Mida in 1889 long before any thought of the present contest arose is correct, and the presumption will prevail against testimony given more than fifteen years later. This record so made in Mida's Trade-mark Bureau is much more persuasive than the testimony of Mida given in the Eighth Circuit case in behalf of so liberal a patron of advertising as Gaines professes to be. Particularly when Mida's own recollection can not run back of W. A. Gaines & Co.-he never heard of Gaines, Berry & Co. -and it is admitted by all that W. A. Gaines & Co., the partnership, was not organized until 1870. The year 1870 was the date fixed by Gaines in its first two registrations in the U.S. Patent Office. It is the date fixed in the Mida registration. Is it strange that the Eighth Circuit Court of Appeals found that "No unprejudiced mind can read the evidence in this case without the impression that the conception of a trademark in the words 'Old Crow' did not enter the mind of Gaines, Berry & Co. prior to 1870?"

Gaines' other authorities are of little assistance to the Gaines contention in the present case. The distinction between straight and rectified whiskey may avail for Kentucky taxing purposes (Brown-Foreman Co. v. Com., 125 Ky. 48), and in issues that arise among the Taylors in family distilling controversies (Taylor v. Taylor, 124 Ky. 181), as noted in the cases cited by Gaines. But any such attempted distinction in trade-mark cases had been distinctly repudiated in the Federal courts (White v. Miller, 50 Fed. 277; American Tobacco Co. v. Polacsek, 170 Fed. 117, 120; Carroll v. Ertheiler, 1 Fed. 688, 690). And the decisions of the Court of Appeals of the District of Columbia in applying the Act of 1915 will be searched in vain for any ruling remotely resembling that now urged by Gaines based upon those two Kentucky decisions.

On the contrary, articles so distinct as coffee and cocoa (Baker v. Harrison, 32 App. D. C. 272) have been held to be in the same class and of the same descriptive properties (see authorities in our principal brief, pp. 122-4). Straight and blended whiskey certainly have the same descriptive properties and are of the same class (White v. Miller, 50 Fed. 277).

Manifestly, the Davids case (233 U. S. 461) and the Coca-Cola case (215 Fed. 527) do not apply, for they depend entirely on the ten-year clause; whereas Gaines has been adjudicated by the Eighth Circuit Court of Appeals not to have the right to the exclusive use, and Gaines' 1909 registration did not purport to be based upon the ten-year clause of the act.

But, says Gaines:

"The Eighth Circuit Court of Appeals disregarded this finding of fraud (by the trial court, Judge D. P. Dyer) and ignored the facts on which it was based.

"The Court (the Eighth Circuit Court of Appeals) in so doing, did precisely what this Court reversed it for in the recent case of Adamson v. Gilliland; and the trial judge in that case was the same (Judge David P. Dyer)" (Gaines' Brief, p. 80).

But in the Gilliland v. Adamson case (242 U. S. 350), certiorari was applied for and granted. In Kahn v. Gaines, the Eighth Circuit Court of Appeals case, Gaines applied for certiorari and the application was denied.

The allusion to the duty of an Appellate Court to defer to the finding of fraud by a Chancellor in Adamson v. Gilliland entirely loses its force in the present case when it develops that the Adamson case was tried under the new equity rules and the witnesses who testified both in that case and in the Wisconsin case which Judge Dyer followed, appeared in open court before the trial judge, who thus had the advantage over the Appellate Court, who were obliged to read from the cold record, whereas the Eighth Circuit case of Gaines v. Hellman was tried under the old equity rules, all

the testimony was by deposition taken before notaries public. There was no finding by a Master—none was appointed in the case—no witnesses appeared face to face before the trial judge. All the evidence went up to the Court of Appeals and that Court was in exactly the same position to pass upon the credibility of the witnesses and to make a correct valuation of the testimony as was the trial court.

But the outstanding fact is that the finding and decree of the Eighth Circuit Court of Appeals is final—it has never been reversed or modified. The Sixth Circuit Court of Appeals might properly refer to the record in the Eighth Circuit to interpret and uphold the final decree there rendered, not to rewrite or overthrow that decree. That decree was binding in the Sixth Circuit, as well as in the Eighth, between the same parties or their privies.

Gaines presses its argument based upon the Magnolia brand adjudicated in Kidd v. Johnson (100 U. S. 617) here even more vigorously than it did in the court below.

The Magnolia argument was a matter fully developed and vigorously urged by Gaines in the Eighth Circuit case, and it there properly failed of all force or effect. No issue was ever made in the pleadings based upon the Magnolia brand. Gaines had no title to it. Neither Gaines nor Hellman was a party to the Kidd v. Johnson controversy, nor was either at

any time in privity with those parties. The testimony before President Taft discloses that Pike's Magnolia was a rectified or compounded whiskey from the earliest days on down. It was not a distiller's brand. Whether or not the Hellmans were using the brand, and if so, whether or not their use was lawful is not an issue in this case.

When an issue involving the Magnolia brand is properly made up, the Hellmans will be prepared to meet it.

#### "PSYCHOLOGICAL CONDITIONS."

The Freiberg correspondence is brought in by Gaines on the plea that it is an unconscious revelation of PSYCHOLOGICAL CONDITIONS". We apprehend that this case will be determined upon the law and the facts, and not upon psychology or psychological conditions.

Those "conditions" are totally irrelevant to this case. The "negotiations fell through", as Gaines points out (Gaines' Brief, p. 89). The Hellman Distilling Company was never a party to them. They were an effort by Mr. Freiberg representing the heirs of A. M. Hellman, who had died in December, 1904 (barely a month after Gaines filed the Eighth Circuit suit), to realize on an equitable or moral duty which he asserted in behalf of said heirs by reason of

their having continued to bear three-fourths of the expense of the defense of the Eighth Circuit case, after the Hellman Distilling Company was organized in January, 1905. This equitable or moral obligation, though not binding as a matter of law, was later recognized by the Hellman Distilling Company, and the heirs were satisfied. The Hellman Distilling Company having lawfully acquired the business and good will of the former firm of A. M. Hellman & Co. in January, 1905, at all times thereafter continued to operate same and continued their Old Crow business, except during the period when it was enjoined. Mr. Freiburg did not represent the Hellman Distilling Company in these negotiations-manifestly he was dealing at arms' length with Rock Spring. The "psychology" of his correspondence is not chargeable to the Hellman Distilling Company or Rock Spring as its agent.

#### THE "INVASION OF KENTUCKY".

The head and front of the Hellmans' offending seem to be that they have "emigrated" to Kentucky. A reading of Gaines' brief (pp. 52, 72, 73) might tend to create the impression that after the rendition of the Eighth Circuit Court of Appeals opinion (1908) the Hellmans then first leased a distillery in Kentucky for bottling in bond purposes. Such is not the fact.

Whiskey produced in 1908 could not have been bottled in bond before 1912 (four years is the minimum age for bottling in bond purposes—29 Stat. 626, Sec. 2; U. S. Int. Rev. Reg. 23, Art. XIII, p. 9), whereas Rock Spring was bottling in bond for the Hellmans in 1909 (Rec., p. 185).

The facts are that the firm of A. M. Hellman & Co., in accordance with a custom well recognized in the distilling business and approved by the Internal Revenue Department, leased the Rock Spring Distillery for a run of whiskey as early as 1904 (the negotiations were by A. M. Hellman, who especially selected a high-grade quality [Rec., p. 185]). This was before the filing of the Eighth Circuit suit. In 1905 the Hellman Distilling Company (which had taken over the Hellman business in January of that year) repeated the lease, and again in 1906, 1907, 1909 and 1910 (Rec., p. 195). Whiskey made under the lease referred to in Arthur Rosenfeld's letter of April 23, 1909 (Gaines' Brief, p. 73), could not have been bottled in bond until 1913. Whiskey distilled by A. M. Hellman & Co. in 1904 was bottled in bond for the Hellman Distilling Company by Rock Spring in 1909.

Thus it will be seen that the "emigration to Kentucky" took place, not subsequent to the Eighth Circuit Court of Appeals decree, but long prior thereto, and the bottling in bond at Rock Spring Distillery in 1909 was but the lawful exercise by the Hellmans of

the right conferred upon them by Congress (29 Stat. 626) and the Internal Revenue regulations, to apply through their agent their own label to their own goods.

In point of fact the goods so labeled were all shipped to the Hellmans in St. Louis for distribution from St. Louis,

## THE MORAL ISSUE AS APPLIED TO GAINES' ACTIONS.

Gaines has assumed a very high moral ground and in so doing has been led to rather vehement denunciations of the Hellmans and their business. It is only fair to say that the Hellmans have acted clearly within their legal and moral rights throughout.

The Court can not fail to have noted the conduct of Gaines in refraining, under the advice of counsel, from answering either of Rock Spring's letters (May 24 and June 7, 1909; Rec., pp. 95-6), stating the receipt of a rumor that Gaines was contemplating some action against them, frankly disclosing what Rock Spring was doing for the Hellmans, and inquiring as to what objection Gaines might have to the use of the label in the manner mentioned.

Gaines had already filed in the Patent Office the affidavit suppressing the facts as to the Hellman's

use and the Eighth Circuit Court of Appeals' decision.

Gaines, though in receipt of these direct inquiries, suppressed all reference to the pending application in the Patent Office.

Here was a direct request prompted by a rumor undoubtedly based upon some "leak" in the Gaines censorship over what it was then doing in the *ex parte* proceeding. Rock Spring's action is prompt, and its appeal direct to Gaines itself. Gaines receives the letters, refers them to counsel, upon advice of counsel ignores the letters, proceeds with the pending application, secures registration in the *ex parte* proceedings, and begins suit based upon such registration.

We refrain from characterizing the morality of this conduct. It characterizes itself. A realization of its true nature may be taken as some excuse for the fury with which Gaines has drawn upon the vocabulary of vituperation almost at each mention it makes of the Hellman's conduct.

### GAINES' PRESENT CONTENTION THAT THE EIGHTH CIRCUIT JUDGMENT WAS IN ITS FAVOR AND ADVERSE TO THE HELLMANS MANIFESTS A STRIKING INCONSISTENCY.

Gaines in its Brief (p. 52) contends that,

"The Hellmans were adjudicated in the Circuit Court not to be the owners of the brand and trade-mark, and to have no right to any injunction against respondent (Gaines), and that such judgment became final and unreversible by reason of the abandonment by petitioners (the Hellmans) of their cross-bill."

And again, at page 72 (Gaines' Brief):

"We confidently assert that it is absolutely demonstrated by the Eighth Circuit litigation that **appellant's** (evidently intended to refer to Gaines') title to its brands and trade-marks are indubitably established and Hellman's pretensions held a fraud."

In the light of this asserted confidence by Gaines in the Eighth Circuit final adjudication, it is difficult to understand why this suit was not instituted in St. Louis within the Eighth Circuit, directly against the Hellmans, who were well known to Gaines, prior to the filing of the present bill, to be the real party in interest. Yet, notwithstanding this asserted

confidence, Gaines elected not to rely upon the courts of the Eighth Circuit, but to hazard its fortune in another circuit.

Again, on the one hand, Gaines now asserts that its "title to its brands and trade-marks are indubitably established by the Eighth Circuit litigation", and on the other hand asks that the final judgment of the Eighth Circuit Court of Appeals be opened up and set aside as erroneous.

Though the cross-bill containing the Hellman prayer for affirmative relief in the Eighth Circuit case was treated by the parties in stipulation (Rec., p. 286) as identical with the amended bill as far as the testimony taken by either party was concerned, and though the cross-bill was regarded by the trial court in the Eighth Circuit (Judge Dyer) as "presenting practically the same question as the bill" (Rec., p. 669), nevertheless the Sixth Circuit Court of Appeals deduces most disastrous results to the Hellmans because of the fact that in the Eighth Circuit Court of Appeals they did not insist upon affirmative relief. The Eighth Circuit Court of Appeals attached no significance to their action in that regard (Rec., p. 976) nor did Gaines in its petition to this Court for certiorari, but quoted Judge Dver's opinion, including his statements, "The bill and cross-bill present practically the same question," "The claim that is made in their (Hellmans') answer as well as their

cross-bill that they adopted the trade-mark of 'Old Crow' long before 1867 can not be allowed.'' (Petition, W. A. Gaines and Co. v. Kahn, No. 455, October, 1908, Term U. S. Supreme Court, pp. 8, 13; brief in support of said petition, pp. 11, 14.)

On the contrary, Gaines, in its said first petition to this Court for certiorari, further said:

"A decree was entered in accordance with the foregoing opinion (Judge Dyer) and an appeal was taken by the respondent to the United States Circuit Court of Appeals for the Eighth Circuit. On the hearing in that court at the March Term, 1908, before Judge Phillips and Judge Sanborn, counsel for respondents abandoned the claim for affirmative relief on the cross-bill. The judgment of the Circuit Court was reversed on the sole ground that the respondents had used the words 'Crow' and 'Old Crow' before the petitioner had adopted the words 'Old Crow' as a trademark. " "

"The Circuit Court of Appeals found that the liquor prepared and sold by the respondents, with the labels and brands herein described, was a blended whiskey, but attached no importance to that fact, merely saying: 'Whether this (blending) made it better or worse than that manufactured by the complainant does not affect this ease.' '' (Petition, W. A. Gaines and Co. v. Kahn, No. 455, October, 1908, Term, U. S. Supreme Court, p. 15.)

The Sixth Circuit Court of Appeals in its "interpretation" of the Eighth Circuit Court of Appeals decision seemed impressed with Gaines' contention that the Hellman business in its early days had not been large, and that the Hellman witnesses testifying as to transactions forty years old should not be taken "at their face value", but their evidence should be discounted or disregarded.

It is altogether erroneous to exclude the testimony of Mr. Hauessler, a well-known lawyer in St. Louis, as to constant sales and regular trade from 1862 (Rec., pp. 547-550), and the testimony of witnesses Heron (Rec., pp. 488-491), Urner (Rec., pp. 466-482), Brennan (Rec., pp. 559-561), Hellman (Rec., pp. 550-9), Hugo (Rec., pp. 518-522), Schaeffer (Rec., pp. 541-7), Charropin (Rec., pp. 597-607).

If, as Gaines attempts to establish in the case of the Hellmans, evidence of sales is to be confined solely to book entries, then Gaines' whole case fails, for Gaines has not shown a single book entry as to its own sales.

Gaines, in an appendix to its brief (pages 83-148) abstracts the Eighth Circuit evidence. All of this, of course, passed into judgment in the former case. The Eighth Circuit Court of Appeals in its finding quotes some of the same witnesses. The testimony of the witness Schaefer as given by Gaines (Gaines' Brief, p. 49) scarcely conveys the idea which he em-

phatically expressed, namely, that he always got the goods he asked for, it was fine whiskey, and the Hellmans always treated him correctly; that he himself was not a judge of whiskey, but his trade liked the Hellman goods (Rec., pp. 543, 545); and the testimony of Liemke as given by Gaines might be thought to leave the impression that Liemke was able to testify as to the Hellman glass sign only from 1878 on (Gaines' Brief, pp. 129-130), barring one made in 1867, whereas Liemke testified as to a hundred or more being made for the Hellmans from 1866 on, and consignments of as many as ten at a time being sent to the Hellmans as early as 1866 (Rec., p. 501).

The Sixth Circuit Court of Appeals takes the testimony of Gaines' witnesses testifying as to events more than fifty years back at more than its face value and supplies by inference and argument what is wanting in substance, and makes a finding of priority of adoption by Gaines squarely in the teeth of Gaines' contemporaneous claim of "1870", in fatal repugnance to Gaines' Eighth Circuit averment of adoption in 1867, and in flagrant conflict with the finding of the Eighth Circuit Court of Appeals, whose opinion and finding the Sixth Circuit Court of Appeals was professing to interpret.

The Sixth Circuit Court of Appeals has decided as issues in the Eighth Circuit case matters never put in issue in that case and has found as facts in favor of Gaines matters which Gaines, by its pleadings in the Eighth Circuit case, admitted were not facts.

## GAINES WOULD REINSTATE THE ORIGINAL EIGHTH CIRCUIT FINDING DECREE WHICL WAS REVERSED BY THE EIGHTH CIRCUIT COURT OF APPEALS.

Gaines' position frankly stated throughout is that the original decision of Judge Dyer at nisi prius in the Eighth Circuit was right, that a "simple casual comparative reading of Judge Dyer's decision with the Eighth Circuit Court of Appeals decision (Gaines' Brief, p. 81) will demonstrate the truth" of Judge Dyer's decision, and that this Court should reinstate Judge Dyer's decision, notwithstanding the fact that Judge Dyer's decision was reversed outright, and the decree which he had rendered set aside in toto for error, and such judgment of reversal is in full force and effect, unreversed and unmodified.

While we may well appreciate the ardor of Gaines' desire to have the Eighth Circuit Court of Appeal. finding and decree set aside to the end that there may be reinstated a decision so satisfactory as Gaine, found Judge Dyer's finding and decree to be, nevertheless Gaines' said desire can not, legally, be gratified. As was well said by Mr. Justice Baldwin in Voorhees v. U. S. Bank, 10 Pet. 449, 474:

"A judgment or execution irreversible by a superior court can not be declared a nullity by any authority of law, if it has been rendered by a court of competent jurisdiction of the parties, the subject matter, with authority to use the process it has issued; it must remain the test, the only test, of the respective rights of the parties to it. " "

"The only difference in this respect between this and another court is, that no court can revise our proceedings; but that difference disappears after the time prescribed for a writ of error or appeal to revise those of an inferior court of the United States or any state; they stand on the same footing in law."

The Sixth Circuit Court of Appeals has in effect reversed the Eighth Circuit Court of Appeals. The Sixth Circuit Court of Appeals in its first subdivision of its opinion states the first issue which it will consider as follows:

"The first objection which plaintiff's alleged trade-mark must meet is that the words are descriptive, and so incapable of becoming a true trade-mark."

The Sixth Circuit Court of Appeals is here meeting and passing upon an objection vigorously urged before the **Eighth Circuit Court of Appeals**, not the Sixth, unless it may be that the Sixth Circuit Court of Appeals itself found this to be an objection.

The Eighth Circuit Court of Appeals had said:

"Passing by the criticism made by defendants' counsel of the words 'Old Crow' as a trade-mark, on the ground that in its origin it referred merely to the name of 'Crow' as the compounder of that grade of whiskey, and that its later use was merely designative of the quality of the article, and, therefore, it might not constitute a technical trade-mark if the complainant employed the words 'Old Crow' and 'Crow' in its trade as designating the quality of the whiskey sold by it, the defendants are not guilty of an invasion of the asserted exclusive monopoly of the complainant" (Rec., p. 980).

The Sixth Circuit Court of Appeals not only opens up the Eighth Circuit record and retries the case there decided (a course not warranted, even though the entire record in that case be present in this [Franklin Bank v. German Bank, 142 U. S. 93, 100-1]), but in making a new finding of facts for that case assumes a state of affairs in the whiskey trade which did not exist, which "assumption" (as the Court frankly confesses [Rec., p. 1053]) "somewhat colors its opinion".

It furthermore "assumes" that Judge Sanborn did not concur with Judge Philips in his findings of fact (Rec., p. 1055), an assumption which is without basis in the record, and assumes that the two Judges comprising the Court did **not unite** in putting their decision upon the finding of priority in favor of the Hellmans (Rec., p. 1020), and seems strongly impressed (Rec., pp. 1020, 1055) with the fact that only two Judges sat—a fact which in no way detracts from the binding effect of the Court's judgment, particularly in view of Gaines' stipulation that a third Judge might be called in in case of division of opinion (Rec., pp. 973-4).

The Sixth Circuit Court of Appeals has built up by inference a chain of facts as to Gaines' Kentucky predecessors (predecessors in time only), and the use of the words Old Crow in Kentucky, which not only was not found by the Eighth Circuit Court of Appeals—it was not even claimed by Gaines in the Eighth Circuit, where its amended bill (prepared and filed after Judge Adams had handed down his opinion sustaining exceptions to the original bill [Rec., pp. 662-4]) contained these averments:

"That Gaines, Berry & Co., in the year A. D. 1867, adopted and commercially applied the words 'Old Crow' as a trade-mark for whiskey distilled by them, and that said words 'Old Crow' were then open for adoption as a trade-mark for whiskey." \* \* \*

"That from the death of the said James Crow in 1855 until the year A. D. 1867, no whiskey was produced upon the said Glenn's Creek or elsewhere, to which the said words 'Crow' or 'Old Crow' were applied as a trade-mark. That the said words 'Crow' or 'Old Crow' had been left open for adoption by the death of the said James Crow (1855), and the cessation of the distillation of the whiskey designated by the said words, so that the same were lawfully appropriated and used by your orator's said predecessors in the year A. D. 1867.'' (Gaines' Amended Bill, Eighth Circuit [Rec. pp. 209, 210].)

The Eighth Circuit Court of Appeals was perfectly justified in taking Gaines at its word (it was legally bound to restrict Gaines to the issue it had thus solemnly made), and in finding that words thus open for adoption during a given period were open for adoption by more than one firm, and in holding, as it in effect did, that if they were open for adoption by Gaines as a trade-mark upon whiskey they were open to adoption by the Hellmans upon whiskey. Thus priority and good faith were found in favor of the Hellmans. That finding may not be called in question and reversed in a collateral proceeding by the Sixth Circuit Court of Appeals.

"In the absence of fraud no question can be collaterally entertained as to anything lying within the jurisdiction of the original case. Infinite confusion and mischief would ensue if the rule were otherwise" (Mr. Justice Swayne in Cornett v. Williams, 20 Wall, 226, 250).

In Kempe's Lessee v. Kennedy, 5 Cranch. 173, 184, this Court laid down a rule which should have guided the Sixth Circuit Court of Appeals, even though it believed that the finding of the Eighth Circuit Court of Appeals was clearly erroneous. Said Mr. Chief Justice Marshall in that case:

"In this case two points are made by the plaintiff in error.

"1. That the judgment rendered by the Court of Common Pleas, which is supposed to bar the plaintiff's title, is clearly erroneous.

"2. That it is an absolute nullity, and is to be entirely disregarded in this suit.

"However clear the opinion of the Court may be, on the first point, in favor of the plaintiff, it will avail her nothing unless she succeeds upon the Second."

"The errors of a court do not impair their validity; binding, until reversed, any objection to their full effect, must go to the authority under which they have been conducted."

Voorhies v. W. S. Bank, 10 Pet. 449 474

The authority of the Eighth Circuit Court of Appeals to take the proceedings that it did take is unquestioned.

Its adjudication of priority and good faith in favor of the Hellmans is at once a bar to Gaines' present suit and an insuperable barrier to the creation of any right in favor of Gaines by the 1909 registration as against the Hellmans, whose right to use the mark in the United States had been established by that judgment. The judgment of the Sixth Circuit Court of Appeals should be reversed with directions to affirm the decree and finding of the District Court.

> W. T. ELLIS, LUTHER ELY SMITH,

Solicitors and of Counsel for Petitioners.

## APPENDIX.

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### APPENDIX.

## I. THE OPINION OF THE EIGHTH CIRCUIT COURT OF APPEALS.

(Kahn v. W. A. Gaines & Co., 161 Fed. 495, 88 C. C. A. 437; Rec., p. 975.)

The appellee (complainant below) obtained decree in the Circuit Court establishing its asserted claim to the words "Old Crow" as a trade-mark, enjoining appellants (defendants below) from the use thereof in their business, and finding the defendants guilty of unfair competition in business and ordering an accounting. The original bill was filed in November, 1904.

The bill alleges that the complainant is the sole and exclusive owner of a trade-mark for whiskey consisting of the words "Old Crow", which words were open to adoption as a trade-mark for whiskey in the year 1867, when the complainant's predecessor in business, Gaines, Berry & Co., adopted and commercially applied the said trade-mark for whiskey distilled by them, and that it acquired by assignment said trade-mark, which has been continuously applied by it and its predecessors in business upon packages containing whiskey from the year 1867 to the time of filing the amended bill.

The bill further alleges that in 1835 one Jamess Crow became domiciled upon Glenn's Creek, Wood-

ford County, Kentucky, when and where he began the manufacture of whiskey of superior quality, which became designated about that time as "Crow" or "Old Crow", and that he was continuously engaged in the distillation of whiskey as "Crow" or "Old Crow" to his death, in 1855. That at that time a considerable quantity of said whiskey remained upon the market and was commercially known and dealt in until the year 1867; that no whiskey was produced during said period anywhere to which the words "Crow" or "Old Crow" were applied as a trademark; that in that year a predecessor of complainant, to wit, Gaines, Berry & Co., began the production on said Glenn's Creek of their whiskey, using the same process and material theretofore used by said Crow; that from 1835 to this time, the words "Old Crow" have been applied continuously to whiskey produced by the process of Crow and to no other whiskey whatever; that the distillation and production of said whiskey has always been on said Glenn's 'Creek and not elsewhere.

The bill further alleges that Abraham M. Hellman and Moritz Hellman, the defendants, had been guilty of fraudulent acts and unfair competition in selling a spurious compounded liquor as and for the complainant's whiskey, to its damage in the sum of \$5,000.00, and prayed for an accounting.

The answer denied specifically the allegations of the bill, alleged the ownership of the word "Crow", "Old Crow", "J. W. Crow", and the celebrated "Crow Bourbon", together with a figure of a crow in connection with their own business upon packages of whiskey in their and their predecessor's business, and so continued the use thereof from the year 1863 and

prior thereto; alleging that the whiskey sold by complainant under the words "Old Crow" was an unrefined, harmful and deleterious article, and that the whiskey sold by them was a blend largely free from impurities. The replication was general.

The defendants filed a cross-bill claiming the trademark in question and asking for an injunction. This need not be considered, as at the hearing the defendant's counsel declined to insist upon any affirmative relief.

The evidence tended to show that a man named James Crow, usually called "Jim Crow" and sometimes as "Crow," or "Old Crow," began the manufacture of whiskey in Woodford County, Kentucky, about the year 1850. The evidence does not show that he ever owned or operated any distillery in his own right, but worked for persons owning distilleries. He died about 1855. Prior to his death he worked at various distilleries in that neighborhood, to wit, at the Edwards Distillery, at Anderson Johnson's Distillery, at Jack Johnson's Distillery, at Johnson & Yancev's, at the Oscar Pepper Distillery, and at Captain Henry's Distillery. Whiskey made by him was called "Crow" or "Old Crow" as stated by one of the witnesses, just as whiskey made by Taylor was called "Old Taylor."

The process employed by Crow was what is known as "Hand-made" whiskey, but there was no secrecy about his process, nor did it differ materially from that employed by other distilleries of the same period. He used in the manufacture the grain grown in the neighborhood, which was not different from that grown in the Western States. When he worked at Johnson & Yancey's Distillery it was not known as

"Crow's" Whiskey, but as "Johnson & Yancey's." The old Oscar Pepper's Distillery, at which Crow at one time worked, was run by various distillers from 1855 to 1865. This whiskey was called "Old Oscar Pepper," and was sometimes called "Old Crow." The men who worked with him understood the process employed by Crow and used it in other distilleries.

The co-partnership firm of Gaines, Berry & Co. began business as distillers in Woodford County, Kentucky, in 1867, and operated the old Pepper distillery as claimed successors. This concern was later succeeded by W. A. Gaines & Co., a co-partnership, which, on the 9th day of July, 1882, filed in the Patent Office at Washington City application for registering the following as trade-mark:

"Old Crow Distillery, Woodford County, Kentucky. Copper distilled whiskey, W. A. Gaines, Distiller."

Accompanying this application was the statement that "this trade-mark we have used in our business since January, 1870." In 1887 W. A. Gaines & Company incorporated under the same name. In June, 1904, shortly before the institution of this suit and after the controversy had arisen between the complainant and the defendants respecting the use of the name of "Crow" or "Old Crow" in business, the complainant corporation filed in the Patent Office application to register as a trade-mark the words "Old Crow." The sworn statement of the officer of the company accompanying the application asserted that:

"This trade-mark has been continuously used by the said W. A. Gaines & Company and its predecessors since the year A. D. 1835."

To say the least of it, these different statements

show some juggling with facts and disclose inconsistent positions.

The record does not show any written devolution of title or right of trade-mark passing from Gaines, Berry & Co. to W. A. Gaines & Company and from the latter to the complainant corporation. Be this as it may, no unprejudiced mind can read the evidence in this case without the impression that the conception of a trade-mark in the words "Crow" or "Old Crow" did not enter the mind of Gaines, Berry & Co. prior to 1870, and they may not under the issue presented by the pleadings lay any claim thereto anterior to 1867. It is to be conceded that after 1870, Gaines, Berry & Company and W. A. Gaines and their successors, W. A. Gaines & Company, built up a large, successful business in the manufacture of whiskey, which has extended throughout the country, and that their whiskey, under the designation of "Old Crow", attained wide celebrity. The question remains, however, to be answered, has the complainant maintained by proof the assertion that the defendants, or their predecessors in business, wrongfully invaded its exclusive right to the use of the words "Crow" or "Old Crow" in business?

The evidence, without contradiction, establishes the following facts: that as early as 1862, the firm of I. and L. M. Hellman, composed of Isaac Hellman and Louis M. Hellman, were engaged in the wholesale liquor business on Pine street in the City of St. Louis, Missouri; that as early as 1862 or 1863 on the whiskey barrels employed in their trade, they had a bird with wings spread, in imitation of a crow, burnt into the head of the barrel and the word "Crow" or the words "Old Crow" were burnt beneath this figure. This

fact is affirmed by the testimony of Mr. Herman A. Haeussler, an attorney at law of St. Louis, whose reputation for intelligence and integrity is such as to entitle it to full credence. The firm of lawyers with which he was connected, whose office was next door to the business house of the Hellmans, acted as counsel for I. and L. M. Hellman in the conduct of their business. Mr. Haeussler testified that as early as 1862-3 they had a brand of "Crow Whiskey;" that he saw the barrels on the sidewalk ready to ship with the figure of a crow either on the barrels or on the signs (and he thinks the barrels), with the word "Crow." The evidence further shows that as early as 1865 they had signs in frame prepared, displayed in the window of their storehouse, like Exhibit No. 6 (see opposite this page), large numbers of which were used in connection with their whiskey trade:

Some of the books of said firm kept at that time were in evidence and showed sales of whiskey some-· times designated as "Crow" and "J. W." or "J. C. Crow". That they used also the designative term: "Old Crow" appears in the testimony of several witnesses. Mr. Charropin of Covington, Louisiana, testified that he entered the employ of I. and L. M. Hellman about November, 1866, and continued therein until 1870; that he traveled first through Illinois and parts of Missouri, and afterward in the South as far as New Orleans and in Tennessee, Arkansas and Mississippi. He gave the names of parties to whom he had sold Hellman's whiskey, and deposed that he sold to customers "Old Crow" whiskey which the Hellmans handled, and that he remembered it was the brand used at the house at the time.

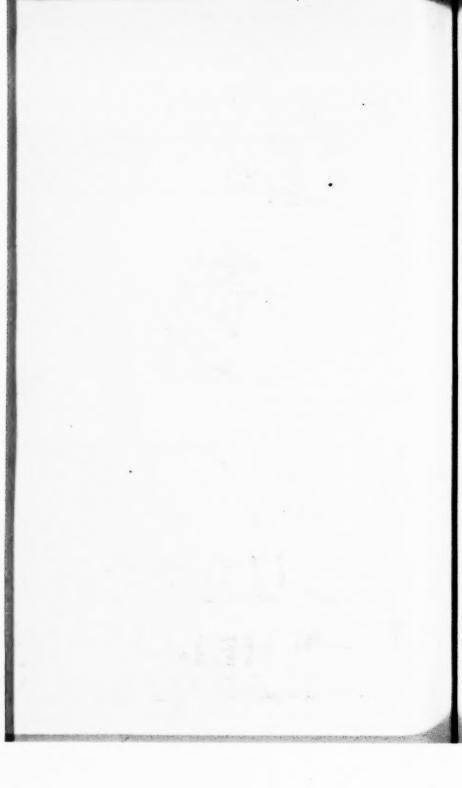
EXHIBIT 6

# CELEBRATE Defendant's Paid No. 6.





BOURBON.
1.&L.M. HELLMAN
STILOUTS.



Schaeffer, of Yazoo City, Mississippi, testified that he had dealings with I. and L. M. Hellman in 1866, and probably the latter part of 1865, and that he purchased liquor from them under the name of "Crow" or "Old Crow".

"Q. Will you describe what marks, if any, these barrels bore?

"A. They had on one end of the barrel a bird with wings spread out burnt in the head of the barrel and the words 'Old Crow' were burnt under them; they were all burnt, not marked; burnt in the wood."

Mr. Heron, of Memphis, Tennessee, testified that he entered the employ of I. and L. M. Hellman, in September, 1865, and remained with the firm until 1882 or 1883, as assistant rectifier. He identified exhibit as similar to the one used when he went there.

"Q. Now, will you state, Mr. Heron, how frequently the firm sold whiskey as 'Old Crow' whiskey during the time you were in the employ of the firm? A. Well, I couldn't say how often I sold it, but to the best of my knowledge, there was very seldom a month or week that some did not go out. Q. By whom was the 'Old Crow' sold by the firm made? A. It was blended right in the house. You could call it blending or compounding right in the house."

This condition continued up to 1867, during which the bill alleges the claimed trade-mark had not been appropriated by the complainant. In August, 1867, Isaac Hellman died. The business of this house has been continuously conducted in St. Louis, up to the time of this litigation, by the brother and their sons who succeeded thereto, doing business under the name of I. and L. M. Hellman, employing the same brands and designation in business. Their trade was

confined principally to states down the Mississippi River and Southwest. Several of the men who worked for this house between 1862 and 1870, as well as several of the traveling salesmen of the house, are living and gave their depositions in this case. Since 1867, this house has conducted its business as theretofore with no knowledge carried home to its members that the complainant, or its predecessors in business, were asserting any proprietary right to the use of the word "Crow" or "Old Crow" in The evidence fails to show that the Hellmans, prior to this controversy, ever heard of Glenn's Creek, in Woodford County, Kentucky. The whiskey sold by them carried with it, plainly marked on the packages, the fact that it was the whiskey of I. and L. M. Hellman of St. Louis, Missouri, or the name of the firm at the time in business. There is not a particle of evidence in this record to warrant the imputation that at any time or place the defendants ever represented that their whiskey was manufactured on Glenn's Creek, or that it was the manufacture of the complainant. There is no evidence that any purchaser from them was ever deceived into the belief that he was obtaining from them whiskey manufactured by the Glenn's Creek monopoly. There is, therefore, no foundation in fact or law for the charge of unfair competition.

After alleging in the bill of complaint that by reason of the defendants' unfair competition the complainant has been damaged in the sum of \$5,000.00 and its vast business jeopardized and threatened with destruction by the defendants' competition, its comsel to impair the evidence that the Hellmans had sold whiskey as far back as 1863, under the name of

"Crow" and "Old Crow", tacked course in argument by asserting that this use was so rare as to subject it to the maxim de minimis lex non curat. The right of the defendants to use in their trade the designative words "Old Crow" or "Crow" can not be measured by the extent to which they employed it, whether more or less frequent at times. It is sufficient to protect them from the charge of an unlawful invasion of the complainant's claimed monopoly that they used in connection with their business as whiskey dealers the trade-name in question prior to any appropriation thereof by the complainant, and that they have so continued to use it. Neither can their right to use it, ad libitum, be destroyed by the overshadowing comparative amount of the complainant's sales under the designation of "Old Crow" whiskey. nor by the asserted superiority of its product.

Passing by the criticism made by defendants' counsel of the word "Old Crow" as a trade-mark, on the ground that in its origin it referred merely to the name of "Crow" as the compounder of that grade of whiskey, and that its later use was merely designative of the quality of the article, and, therefore, it might not constitute a technical trade-mark if the complainant employed the words "Old Crow" and "Crow" in its trade as designating the quality of the whiskey sold by it, the defendants are not guilty of an invasion of the asserted exclusive monopoly of the complainant.

The bill stigmatizes the defendants' business as fraudulent in imposing upon the public a blended whiskey, impure and deleterious. And what it lacks in proof of this its counsel has undertaken to supply by invective and epithets.

The learned trial judge, from his opinion in the record, seemed impressed as to this charge of the bill by the opinion of the Kansas City Court of Appeals in the case of W. A. Gaines & Company v. the E. Whyte Grocery, Fruit and Wine Co. (107 Mo. App. 570). It is assigned for error that the Court admitted in evidence the entire record, including the voluminous evidence in the bill of exceptions in that case. In view of the conclusions reached by us on the merits, we may pass by this criticism with the observation, that while the evidence in that case could not be employed as proof of the matters in contestation in the case here under review against this appellant, who was not a party to that suit, it could be considered by the Chancellor for his information as to the scope of the decision in that case as a precedent. (Liebig's Extract of Meat Co. v. Libbey et al., 103 Fed. 87-89; N. Y. Filter Mfg. Co. v. Jackson, 112 Fed. 678-683; Liebig's Extract of Meat Co. v. Walker, 115 Fed. 822-825; American Bell Tel. Co. v. Wallace Electric Co., 37 Fed. 672; Rose v. Fretz, 98 Fed. 112; Adams v. Tannage Patent Co., 81 Fed. 179.)

The evidence, especially on the part of the defendants, in the case under review is so materially different in character and effect from that in the case tried in the Jackson County Circuit Court, as also that of Gaines & Co. v. Leslie, 54 N. Y. Supp. 421, cited by complainant's counsel, as to render them of no controlling force on the facts involved in and the principles of law applicable to this case.

The only evidence touching the character of the whiskey sold by the Hellmans is, that it was blended whiskey—a mixture of so-called straight whiskey with refined spirits, from which the blenders claimed the

largest possible percentage of impurities were removed. Whether this made it better or worse than that manufactured by the complainant does not affect this case. No customer of the Hellmans is complaining, and the complainant has failed to show that the defendants palmed off their whiskey on anybody as that of the complainant's manufacture.

The complainant lays much stress upon the situs of its distillery on Glenn's Creek in Woodford County, Kentucky, as if there were some peculiar virtue in the air and water of that place adapted to the distillation of whiskey, which it had in some way wholly appropriated. The evidence does not show that Glenn's Creek in any way entered into the composition of the whiskey. The water used came from the springs some distance from the creek, in nowise different from other springs in the limestone region of the Bluegrass district of Kentucky. We fail to perceive the relation of all this to the claimed trademark.

As there was no secret about the process of distillation employed by James Crow, which the complainant assumes to follow, as "hand-made" whiskey (and there was some evidence that the complainant now employs machinery in some material respect in the process of manufacture), the use of which process is not secured to the complainant by any patent, and as the defendants have not claimed to use either Kentucky corn, water or air in the composition of their blended whiskey, and did not represent that it came from Glenn's Creek, all these matters are quite immaterial on the issue of unfair competition in trade.

After a careful consideration of the mass of relevant and irrelevant evidence in this record our con-

clusion is: (1) that inasmuch as the defendants' predecessors in business prior to the use or the adoption of the designative word "Crow" or the words "Old Crow" as a trade-mark, employed those words as descriptive terms in connection with their business as dealers in whiskey in St. Louis, Missouri; that said predecessors and the defendants so continued to use the same, to a limited extent, up to the time of the institution of this suit, in good faith, they are not guilty of infringing the complainant's claimed trade-mark; and, (2) that the defendants are not guilty of having engaged in unfair competition with the complainant in the prosecution of their business.

It results that the decree of the Circuit Court must be reversed, and the case remanded with direction to the Circuit Court to dismiss the bill of complaint.

## II. FINAL DECREE ENTERED IN THE EIGHTH CIRCUIT JULY 10, 1908.

(W. A. Gaines & Co. v. Hellman, U. S. Circuit [now District] Court for the Eastern District of Missouri [Rec., p. 124].)

Now, on this day, this cause coming on again to be further heard and to be disposed of in conformity with the mandate of the United States Court of Appeals, heretofore received by this Court and filed herein on the 29th day of June, 1908, and it appearing to the Court that the appeal taken by the respondents from the interlocutory judgment and decree rendered and entered of record in this Court against the said respondents on the 24th day of June, 1907, and at the March Term, 1907, of this Court, to the United States Circuit Court of Appeals for the Eighth

Circuit, has been duly heard by the said Circuit Court of Appeals, upon the transcript of the record in said cause, brought into the said Circuit Court of Appeals on said appeal, and upon the argument of counsel on said transcript of record in said cause, and that upon consideration thereof it was ordered, adjudged and decreed by the said Circuit Court of Appeals that the said decree of this Court in this cause be reversed with costs, and that the respondents recover against the said W. A. Gaines and Company, a corporation, the sum of \$920.20 for their costs in this behalf expended and have execution therefor.

And it further appearing to the Court from the mandate of the said Circuit Court of Appeals that said cause was remanded to this Court with directions to dismiss the bill of complainant as of April 27th, 1908, and this Court was commanded that execution and further proceedings be had in this cause in conformity with the opinion and decree of the said Circuit Court of Appeals, also filed herein, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Now, therefore, in conformity with and in obedience to the said mandate, it is considered, adjudged and decreed by the Court that the injunction [be] granted by this Court in and by said interlocutory decree, be, and the same is hereby dissolved and for naught held, and that the said interlocutory decree against the said respondents and in favor of the complainant, be and the same is now set aside, annulled and for naught held.

And it is further ordered, adjudged and decreed by the Court that the complainant's bill and supplemental bill be, and the same are hereby dismissed for want of equity, and the said respondents recover of and against the complainant, W. A. Gaines and Company, a corporation, the said sum of \$920.20 adjudged in their favor by the said Circuit Court of Appeals, and that they also recover from said complainant all the costs of this Court taxable in their favor, or incurred, in their behalf, and in favor of their solicitors and counsel, and that they have execution therefor.

# III. THE OPINION OF DISTRICT COURT (JUDGE EVANS) UPON FINAL HEARING.

(Instant case, W. A. Gaines Co. v. Rock Spring Distilling Co., 202 Fed. 989 [Rec., p. 168]).

From time to time as questions arose during the progress of this case we expressed our views upon them in opinions then filed (Rec., pp. 127, 136 [179 Fed. 544], 143, 145). Those opinions, if it be necessary or desirable, can be referred to in connection with what we may now say without repeating them.

The complainant, a corporation, by its bill, alleges an infringement by the defendants of a certain trademark, which on the 20th day of July, 1909, had been admitted to registration in the office of the Commissioner of Patents under the provisions of the Act of February 20th, 1905. The trade-mark is familiarly known as Old Crow, and is described in the certificate of registration as being used upon "Straight Bourbon and Rye Whiskey".

Upon the allegations of the bill an injunction was prayed for, together with other relief.

On May 2nd, 1910, the Hellman Distilling Company came and tendered and asked leave to file a petition, in which it alleged that it was the trans-

feree and successor of A. M. Hellman & Co., who long previously to the transfer to the petitioner had owned the trade-mark referred to in the bill of complaint: that the defendants, Rock Spring Distilling Co. and Silas Rosenfeld were petitioner's agents in Kentucky, and as such were using the trade-mark; that it had undertaken to defend them in such use, and thereupon prayed that it might be admitted as a defendant in the suit for the purpose of making such defense. The Court expressed then its opinion (179 Fed. 545), that the petitioner could not, in the face of complainant's opposition, be made a defendant, but that any estoppel by the former judgment referred to in the petition and presently to be described, would, under the facts therein stated, be available for the defendants.

Thereafter the defendants interposed a plea to the effect that long before the registration of the trademark by the complainant, the latter, on November 11th, 1904, had filed its bill of complaint in the Circuit Court of the United States for the Eastern District of Missouri, at St. Louis, against A. M. Hellman & Co., a firm composed of Abraham Hellman and Moritz Hellman, in which it alleged itself to be the owner and proprietor of the trade-mark Old Crow when used in connection with whiskey, and, charging that the defendants were infringing it, had sought an injunction against them to prevent such use; that both sides in that suit claimed ownership of the trademark Old Crow: that after the death of Abraham Hellman, his administrator, Max Kahn, was made a defendant, and the issues of fact were made up in that case in due course of pleading, and that it was finally brought to trial in that court, whose

judgment was rendered therein against said defendants, who were enjoined from using said trademark; that the defendants in said cause thereupon prosecuted an appeal from said judgment to the Circuit Court of Appeals for the Eighth Circuit, which Court, after full consideration and argument, reversed, on February 27th, 1908, the decree of the Circuit Court and remanded the case with directions to the latter court to dismiss the action for want of equity, and that the latter Court had, by its decree, entered on July 10th, 1908, done as directed by the Circuit Court of Appeals. The defendants pleaded the final judgment in that cause in bar of the present action. When the plea was set down for argument and heard, the Court, in an opinion and judgment thereon, on May 2nd, 1910, held that the plea was sufficient in law. Instead of dismissing the bill the Court gave leave to the complainant to take issue on the plea, which was done. The Court also, in its opinion filed February 27th, 1912, stated its reasons for giving the defendants leave to answer such part of the complainant's bill as were not covered by the plea. This was done upon authorities cited in the opinion last referred to. The defendants, in the answer thus allowed to be filed, assailed the registration of the trade-mark upon various grounds. At the final hearing the issues thus raised, alike upon the plea and upon the answer, were heard and argued. As already stated, it will serve little or no purpose to restate the grounds of our former rulings, as the several opinions heretofore filed in the case do that with a clearness quite sufficient to indicate the bases of our several rulings, but a brief summary of the essential facts as we find them may not be amiss in disposing of the plea.

Many years ago, probably in 1835, one James Crow, in Woodford County, Kentucky, began the use of the trade-mark Crow or Old Crow in connection with bourbon whiskey of his own make. He continued the use of his trade-mark until his death in 1855, at which time its use was discontinued. In 1867 one Mitchell. a former employe of Crow's, in the same or in a contiguous locality in Kentucky, began the use of the same trade-mark on whiskey. He did this on his own initiative and without having in any way inherited or purchased the right to use the trade-mark from Crow or his heirs or representatives. It is, therefore, only from Mitchell's use of the trade-mark, begun in 1867, that complainant's claim can come. But four years previously to the beginning of its use by Mitchell, namely, in 1863, the use of a similar trade-mark was begun in reference to whiskey in St. Louis, Mo., by persons who have transmitted their rights to the defendants. It was out of this general state of fact that the controversy arose which was adjudicated finally in the Circuit Court of the United States for the Eastern District of Missouri. Whatever may have been the merits of the controversy which that Court determined in that case we are not to inquire, nor are we to inquire into the merits of the whiskey made or sold by either party thereto. The question we are to determine on this phase of the case is whether, in its essential elements, the title adjudicated in that case was the same as the one again attempted to be litigated in this action. When we attentively examine the record, the pleadings and the final decree in the former cause we can not doubt that the essential question in dispute there was the same as that involved here. This being so, and the defendants and the Hellman Distilling Company having in due course succeeded to the rights of A. M. Hellman & Co., we hold that the plea has been established, and that it is a bar to the relief now sought as to the infringement of the alleged trade-mark.

But the defendants in that cause were denied an injunction upon their cross-bill asking that relief, and it is insisted that that shows that neither themselves nor their successors have any rights in the trade-mark inasmuch as the record shows that they dismissed their cross-appeal from that part of the judgment in that case. We have not been able to see how that affects the question here involved, because, whatever effect may be given the denial to defendants of the relief they sought in that action, it is certain that in the most impressive way it was adjudged that the complainant had no equity to the relief it there prayed. At most it might be said that the result of that litigation was to leave both parties to it, each of whom had used the trade-mark for about forty years, free to use the trade-mark as each pleased in connection with whiskey. Indeed, it might probably be that the proper conclusion is that the effect would be to open up the use of the trade-mark in counection with whiskey to the public generally, because no one party had acquired a right to its exclusive use since Crow's death in 1855. Which of the views thus indicated be right is immaterial. They are only suggested as illustrations.

Again it is insisted by the complainant that it uses the trade-mark in connection with "straight" whiskey, while the defendants have heretofore used it in connection with "blends". The bill of complaint, as we shall see, charges a broader use. The general doctrine, we apprehend, is that a trade-mark used in connection with any class of things must apply to all the various species of grades of that class. It would be an endless task to differentiate the various grades or qualities of whiskey or any other article of merchandise and say to which one or more of them a trade-mark was appropriated or applicable. Especially, we apprehend, would this be so in reference to whiskey, which has as great a variety of grades (extending from the very best to the very worst) as probably any article in commerce. Some of the authorities illustrating this view are Layton Pure Food Co. v. Church & Dwight Co., 182 Fed. 35, 38, and authorities therein cited, and Collins Co. v. Oliver Ames & Sons Corporation, 18 Fed. 561, 570.

Another question of vital importance is to be considered. It is whether the registration obtained by the complainant is effective and available to overthrow a judgment finally, and under the direction of the Circuit Court of Appeals, rendered by the Circuit Court previous to the registration of the trade-mark. In an opinion delivered on February 27th, 1912, we endeavored to clearly indicate our views on this phase of the case and our reasons for supposing that it was never in the contemplation of Congress that such a registration, especially if obtained ex parte, should invalidate the solemn judgment of a court having jurisdiction. The controlling facts in this connection are that on February 27th, 1908, the opinion of the Circuit Court of Appeals was rendered in the former suit then styled Kahn, administrator, and others v. W. A. Gaines & Co., 161 Fed. 495. After an application for a stay of the mandate was refused on July 18th, 1908, the Supreme Court, on October 19th, 1908.

denied a petition for a writ of certiorari. On February 13th, 1909, Edson Bradley, describing himself as vice-president of W. A. Gaines & Co., was sworn to a statement intended to be filed as the basis of an application for the registration of the trade-mark Old Crow on straight bourbon and rve whiskey. statement and the accompanying petition were filed in the Patent Office on February 26th, 1909, about one year after the decision by the Circuit Court of Appeals. This latter circumstance may be most significant in connection with the fact that in the papers just referred to, and as amended later, the vice-president stated under oath that W. A. Gaines & Company in the County of Franklin and State of Kentucky "has adopted for its use a trade-mark which consists of the words Old Crow, and that said trade-mark has been used in the business of ourselves and our predecessors since, to wit, January 1, 1835. The class of merchandise to which the trade-mark is appropriated is class 49, distilled alcoholic liquors, and the particular description of goods in said class upon which the said trade-mark is used is straight bourbon and rve whiskey." The vice-president also swore "that no other person, firm, corporation or association. to the best of his knowledge and belief, has the right to use said trade-mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive." As we have seen, it is altogether incorrect to say that the complainant and its predecessors had used that trade-mark since January 1, 1835, because the complainant and its predecessors did not begin its use until 1867, nor then, in any legal sense as the successors of James Crow. Besides, from the testimony and developments in the suit in St. Louis the complainant certainly knew that its opponents in that suit had been adjudged the right to use and that they in fact had used the trade-mark Old Crow ever since 1863 though probably not as energetically or as extensively as complainant. Yet upon these statements the registration was obtained.

The application for the registration was dealt with in the Patent Office in an entirely ex parte way, and though there was a formal publication on May 18th, 1909, in the Official Gazette of the Patent Office of the notice required by Section 6 of the Act of February 20th, 1905, the record in no way indicates that W. A. Gaines & Company caused notice of the application to be actually given to any of those who had been defendants in the previous suit, nor that they otherwise had such notice. There is no indication in the record that those defendants ever knew of the application until long after the registration had been made on July 20th, 1909. While under the Act of 1905 the registration, even when thus made, affords a prima facie presumption of ownership of the trademark in complainant, is not that presumption entirely overcome by the judgment which had been rendered against the complainant in the suit in St. Louis, long before the application was made, and of which litigation and judgment no information was given by the complainant to the Patent Office? To ask the question is to answer it in the negative unless such ex parte registration, obtained under such circumstances, and in the way indicated, is to override the previous judgment directed by the Circuit Court of Appeals in a litigation between the opposing claimants of that trade-mark and in which all were fully

heard. That such a result is impossible is, in our view, too plain for argument. Nor can we conceive that Congress ever contemplated such a result when enacting the legislation of 1905.

Notwithstanding all this, it is insisted that there is a question of unfair trade to be considered, and we find that in stating its causes of action that complainant, in its bill filed the next day succeeding that of the registration, while alleging an infringement of its trade-mark, also says "that well knowing the premises and with full knowledge of this complainant's rights above recited, the respondents above named, without knowledge or consent, and against the will of the complainant, did on the twenty-first day of July, A. D. 1909, and then continuously from day to day until the time of the filing of this bill of complaint, in violation of the complainant's rights in and to said trade-mark consisting of the words 'Old Crow' and in invasion of the complainant's rights under its said registration and in infringement of your orator's said registered trade-mark, and in fraud against this complainant and against the public, did make, or cause to be made, and sell or cause to be sold, in Owensboro, in the County of Daviess, State of Kentucky, a certain spurious straight bourbon whiskey not the product this complainant's 'Old Crow' distillery, or distilled by this complainant, or licensed to distilled by this complainant, and that they, the said respondents, have marked or branded the same with the words 'Celebrated Old Crow whiskey Bottles in Bond' and have caused the same to be bottled in bond, and have applied to the labels thereon the words 'Old Crow' in script type: and have caused the same to be sold and transported in commerce among the several States of America; that a specimen of the packages so made and sold by respondents is exhibited with this bill and is filed herewith as 'Exhibit B' accompanying the bill."

The bill also stated "that the whiskey so dealt in by the respondents and marked and branded with the words 'Old Crow' was so marked and branded for the purpose and with the intent to mislead and deceive the public and consumers of whiskey distilled by the complainant and bottled in bond by the complainant, and the public and consumers of whiskey have, by the said acts of the respondents, been led into purchasing the respondents' whiskey under the false belief that it was the whiskey of the complainant, and that by means of the said fraud and imposition upon the public by means of and through the instrumentality of their said unlawful appropriation and infringement of your orator's said registered trademark, the respondents have sold very large quantities of their whiskey so falsely marked and branded, all of which wrongful acts have resulted in injury to the complainant's business and the good will thereof, and were wantonly, willfully, deliberately and maliciously done by the respondents to complainant's damage in the sum of twenty thousand dollars (\$20,000.00)."

If in addition to an action for the infringement of a registered trade-mark the bill shows a claim for damages for unfair trade in blended whiskies, it is probably multifarious. However, the defendants have not insisted upon that objection, and the Court will not at this stage treat the bill as open to it, but will dispose of the question of unfair trade upon the entire record before it. Treating it thus, we think the record clearly

shows that the defendants, in using the trade-mark Old Crow, whether in connection with a picture of a raven, as was usual, or not, used what they had a clear right to use. This being so, there could be no deception in doing that thing. This, however, is what is claimed to constitute unfair competition with complainant, and the testimony clearly shows that in other respects the defendants' labels, brands and other marks are altogether different from complainant's and of themselves show that complainant did not make the whiskey sold under defendants' brands.

So that at least this phase of the case seems to resolve itself into a complaint that the defendants use the words Old Crow on their labels, brands and other marks and probably in their advertising matter. After much consideration we have concluded that the defendants have acted within their rights, and have attempted to sell their own whiskey as being of their own make, and not as complainant's, each using the words Old Crow, as they had the right to do, and as the predecessors of each had done for over forty-five years. Besides, while at the argument it was much asserted that complainant's whiskey was "straight" and defendants' a "blend", the testimony indubitancy shows that much of complainant's Old Crow whiskies are "blends" and so labeled under the pure food laws. As "blends" they are not within the registered trademark, which on its face refers only to "straight" rye and bourbon whiskey. The testimony also demonstrates that much of the defendants' whiskey is bottled in bond, and is, therefore, necessarily "straight". inasmuch as under the statute nothing but "straight" whiskey is permitted to be so bottled. So that as to 'straight'' whiskey the complainant must be regarded as suing only on its trade-mark, while, as to "blends" as well as "straight", it is suing for unfair competition in trade.

And in this conection it may be stated as matter almost of common knowledge, first, that the purchaser of drinks over the counter of a bar-room seldom knows or is told what he is getting, or if he is told it soon becomes a matter of indifference to him, and, second, that the wholesale or retail dealer who buys from a manufacturer generally knows exactly from whom he purchases and the character of spirits he gets. The danger to the manufacturer is, therefore, not great. The same may be said of a wholesale dealer who sells to a \*etail dealer.

It results that the decree now must be, first, that the plea of the former adjudication is sustained; second, that the registration of the trade-mark under which relief is claimed in this action was insufficient to invalidate the judgment in the prior suit; third, that the charge of unfair trade has not been established, and, fourth, that the action be dismissed with costs to the defendants.

A decree accordingly will be entered.

### IV. THE OPINION OF THE SIXTH CIRCUIT COURT OF APPEALS IN THE INSTANT CASE.

(W. A. Gaines & Co. v. Rock Spring Distilling Co., 226 Fed. 531, 141 C. C. A. 287; Rec., p. 1013.)

Appellant, Gaines & Co., is a Kentucky corporation. Appellee, Rock Spring Distilling Co., is also a Kentucky corporation, and appellee, Rosenfield, is the licensee and operator of its distillery, and is a citizen of Kentucky. The appellant will be referred to as plaintiff, the appellees as defendants. The litigation

involves a controversy over the words "Crow" or "Old Crow" as a trade-mark for whiskey. Plaintiff filed its bill in the court below alleging its trade-mark right in these words, and claiming that defendants were infringing. The answer denied the existence of the right claimed, and set up as a bar a decree rendered against plaintiff in the United States District Court at St. Louis, under mandate of the Circuit Court of Appeals for the Eighth Circuit. The answer claimed privity between the Hellmans-the defendants in that case—and these defendants. A plea of former adjudication was held good (179 Fed. 544); after replication filed, proofs were taken, including, by stipulation, all proofs in the Hellman case; and, on final hearing, the bill was dismissed (202 Fed. 989).

From the pleadings and proofs, these facts appear. either without dispute or beyond fair question: Woodford County, Kentucky, is not far from Bourbon County, and is in the heart of the limestone formation, "bluegrass" country. This general region has always been and is the center of the distilling business for the best known Kentucky whiskies. water from the limestone springs-whether or not it is really better than other waters for making whiskey -in the early days was thought to be of unique purity and essential to the highest grade of the distilled product. Three brands, among those most advertised and so most widely known now for a generation, are made within a few miles of each other, in Woodford County, along Glenn's Creek,-"Taylor", "Pepper" and "Crow". For a long period before 1855, James Crow was a practical distiller in the Glenn's Creek neighborhood. He did not have a

distillery of his own, but was employed by various distillers-for some years before Crow's death in 1855, by Oscar Pepper (except for the last year or two, and even then Crow retained some supervision for Pepper). He was reputed to be the first man in Kentucky to make a sour mash whiskey, and he had a high reputation as a skillful distiller. During his years at the Pepper distillery, he made a large quantity of whiskey; this whiskey came to be called by his name as "Crow" or, as it aged, "Old Crow" whiskey, and it acquired, by that designation, a reputation for good quality. At his death, a considerable quantity was in existence, both where it had been scattered upon the market and where it was aging in the distiller's possession. During the succeeding years, it continued to have a market reputation and represent a high standard, under one or the other of these names. After Crow's death, Oscar Pepper, at the same distillery and with the same formula, continued to make a whiskey which some witnesses say he continued to call "Crow". He died about 1865. In 1866 or 1867, the Pepper distillery was bought by Gaines. Berry & Co. They employed, as distiller, a man who had been a foreman for Crow and who knew his formula and methods, and their product they called "Crow" or "Old Crow". They were succeeded in the business by W. A. Gaines & Co., first a partnership and then the plaintiff corporation. Since such adoption by Gaines, Berry & Co., these words have been continually used by plaintiff and its predecessors as a trade-mark; vast sums of money have been expended on advertising the brand and the trade-mark: and the brand, under that name, has, for many years, been one of the best known in the country. All the

other distilleries where Crow worked, and which so might have had special rights in the name, have now, for sixty years or more, not questioned the exclusive rights of the Pepper distillery, and its successor; and while, doubtless in the seventies, and perhaps in the eighties, there were some instances of trespassing which were not attacked, plaintiff's right was even then generally observed, and now, for 25 or 30 years, has not been seriously challenged—save for the Hellman use.

The witness Mida, who conducts the Bureau of Registration for brands and trade-marks regarded as authoritative by all the liquor trade, and who has published, since 1878, "Mida's Criterion," the recognized price list of "all brands and all ages" of liquor, testifies that "Old Crow" has always and everywhere been considered the Gaines brand, and is universally understood to refer to whiskey made at the Gaines Old Crow distillery. This testimony is undisputed—excepting the Hellman use, if that is an exception.

It further appears that Gaines & Co., in 1882, registered, as a trade-mark, "Old Crow," alleging its use as a trade-mark "since 1870". Again, in 1904, plaintiff duly registered as a trade-mark the words "Old Crow", alleging its continuous use, by plaintiff and its predecessors, since 1835. Again, in 1909, and under the Act of 1905, plaintiff duly registered the same trade-mark, alleging that it had been used since 1835; that the class of merchandise to which it was appropriated was "distilled alcoholic liquors"; and that the particular description of goods comprised in the class upon which the trade-mark was used is "Straight Bourbon and Rye Whiskey". This last

registration is the only one alleged in the bill in this cause; and upon it jurisdiction depends, since there is no diverse citizenship.

Since it is admitted that defendants are using the name "Celebrated Old Crow" upon whiskey not made by plaintiff, the right to an injunction would be clear, except for the defense and counter-claims made in the Hellman case, taking effect here either by virtue of the inherent force of the facts there and here appearing, or through the operation of the rule of adjudication. In that case, the defendants Hellman filed a cross-bill alleging their own prior and superior right to the trade-mark "Old Crow", and asking for appropriate relief. By the proofs, it appeared that prior to 1867, and perhaps as early as 1863, the Hellmans had made some shipments of whiskey which they mvoiced under the name of "Crow", and which were contained in barrels stamped with the picture of a erow, and with the words "P. Crow" or "J. W. trow"; that they had distributed to their customers signs advertising "Celebrated Old Crow Bourbon"; that they were not distillers, but were wholesalers or jobbers; and that the whiskey which they sold under that name had no connection with the Kentucky "Old Crow", but was a "blend" and made by them on their own premises, while the plaintiff's product was a straight whiskey, and its trade-mark was never applied with its approval, to anything else than its product. Upon this general situation, the District Court, at St. Louis, found the facts and the law in plaintiff's favor, awarded to it the usual injunctional relief and dismissed the cross-bill of defendants Hellman (Gaines v. Kahn, 155 Fed. 639). Both parties appealed; but the Hellmans dropped their appeal from the dismissal of their cross-bill, whereby, whatever adjudication was carried by such dismissal became final. The opinion of the Court of Appeals is reported in Kahn v. Gaines, 161 Fed. 495. Its precise effect, we must hereafter consider. It directed that the decree be reversed and that plaintiff's bill be dismissed; and this was done.

#### DENISON, Circuit Judge:

1. The first objection which plaintiff's alleged trademark rights must meet is that the words are descriptive, and so incapable of becoming a true trade-mark. If nothing were involved except the effect of the 1909 registration, this objection might be passed without decision, since the application for registration indicates use for more than ten years before 1905, thus perfecting rights which might have been imperfect when the use began, and would have so continued except for the statute (Davids Co. v. Davids, 233 U. S. 461; Nashville Co. v. Coca Cola Co., 215 Fed. 527, 529); but it is impossible wholly to separate the force of this registration from the underlying broader question, because rights prior to this registration are indirectly involved.

During the lifetime of the distiller Crow, it seems clear enough that to call his product by his name could not amount to the adoption of a valid trademark; the use of the name was descriptive rather than arbitrary, and a manufacturer can not thus exclude all others. Such use might give right to quasi-exclusive rights on the secondary meaning theory; but this theory is not alleged. The same situation, apparently, must continue after Crow's death, and in reference to whiskey which had been manufactured by

him during his life. The necessary meaning of the words, as merely describing the article or stating the name of the maker, would seem to merge and destroy any otherwise possible implication that they were an arbitrary symbol of origin. As the making of whiskey after Crow's death, but by the same formula and methods, was continued by Pepper or by Gaines, and as it continued to be called "Old Crow", this appellation would gradually change its character. It at once ceased truly to personify the maker; it did not immediately become merely arbitrary. As the trade lost the sense of Crow's personality, as he became less real and more traditional, as no one else of the same name challenged the growing right, and as with Crow's personality fading there must also fade the vague descriptive effect of using his formula, the words "Old Crow" would become less descriptive and more arbitrary; and after a period of such unchallenged use, they would become dominantly and substantially a mere symbol of origin. Whether this right of exclusive appropriation as a trade-mark had matured in 1866 or 1867, when Gaines, Berry & Co. began the use, or matured in 1870, the date named in their first trade-mark registration, or matured at some other date, is not now material; the facts seem to show an unbroken development of the type which the courts had recognized but which had not been effectuated by statute until the law of 1905; words which were at first essentially incapable of exclusive appropriation were continually used as descriptive by the only one who could truthfully make such use, until, by change of circumstances and by long acquiescense, they had come to indicate, and indicate only, a particular product of a particular manufacturer. It might be otherwise, if the words had originally been more purely descriptive of quality or method; and it may be that some person named Crow would even yet have a measure of right to call his product "Crow". We do not meet either of these questions; and, in what has been said regarding the capability of the name for exclusive appropriation, we have, for the time being, disregarded whatever force the St. Louis use by Hellman may have.

2. When we consider the claim that the Hellman decree is a bar to any relief in this suit, we first meet the objection that there is no privity of parties. We must think that privity sufficiently appears. The parties defendant in that case, at the time of its commencement, had been the two Hellmans, who were partners. Pending the suit, one partner died and his administrator, Kahn, was substituted. Later, but still pending the suit, the entire business of the Hellman Bros. was transferred to the just organized corporation, the Hellman Distilling Company, and, by supplemental bill, this corporation was made defendant. The corporation was, therefore, a party to the suit at the time of the final decree. During the existence of the partnership of Hellman Bros., it had leased the distillery of the Rock Spring Distilling Company, near Owensboro, Kentucky, and, as lessee, it had manufactured whiskey there in 1904. The Hellman Distilling Company, as such lessee, continued such manufacturing in 1905, 1906 and 1907. In 1909, all this remained in bond in the distillery warehouse. In 1909, and after the final decree in the Missouri case, the Hellman Distilling Company contracted with the Rock Spring Company, and with Rosenfeld, as its lessee, for the further manufacture of whiskey, and

for the bottling in bond of the 1904 stock, and for the use upon such bottles of the brand or label "Hellman's Celebrated Old Crow". The Hellman Company gave to defendants a bond of indemnity to protect them against plaintiff's claims; in using this brand or label, defendants are acting for and in behalf of the Hellman Distilling Company; and the right of that company to use this brand on this article is the very thing in controversy. The former decree must be given the same force and effect as if the Hellman Distilling Company were the nominal, as it is the real, defendant here (Kesler v. Eldred, 206 U. S. 285).

3. Plaintiff next urges, by way of escape from the claimed force of the Hellman decree, and even if that decree is to be considered as an adjudication that the plaintiff had no lawful title to the trademark, yet, that since the only use there involved was upon a blended whiskey while the use here involved is upon a straight whiskey, a judgment that plaintiff had no trade-mark valid against a blended whiskey would not be a judgment that plaintiff had no trade-mark valid for straight whiskey. Disregarding, for the present, such limitations as for the purposes of this suit must be thought to have been imposed on plaintiff's rights by the peculiar form of the 1909 registration, and with reference only to the general question and the general rule, we can not be satisfied with the theory which would thus interpret and then limit the effect of the Hellman decree. The general rule is clear that a common-law trade-mark for one article extends to another article of the same descriptive properties; the difficulties come in applying this limitation, "of the same descriptive prop-

erties". The distinctions between a straight whiskey and a blended whiskey have given rise to much controversy in other legal fields, but it seems to us clear that whatever the extended classifications and subclassifications of the Patent Office practice may contemplate, neither the common-law nor the registration statute can intend such confusion as must result from recognizing the same trade-mark as belonging to different people for different kinds of the same article. Established trade-marks directly indicate origin, but if they have any value, it is because they indirectly indicate kind and quality; and to say that the seller of a blended whiskey might properly put upon it a mark which was known to stand for a straight whiskey, or vice versa, would be to say that he might deceive the public not only as to the origin, but also as to the nature and quality of the article. The decided cases do not permit a trade-mark like this to be thus divided as to its subject matter,\* and we must think that whatever was adjudicated regarding plaintiff's title to its trade-mark applies to its use on both kinds of whiskey.

4. It is next urged that the Eighth Circuit decree may be reconciled with granting the relief now sought, and upon the theory that trade-mark rights may be limited in territory, and that plaintiff might have the right to this trade-mark for whiskies throughout the country generally, while the Hellmans might have an exclusive right to the same words as a trade-mark

<sup>\*</sup>Coffee and cocoa—Court of Appeals, D. of C.—Baker v. Hanson, 138 O. G. 770; toilet brushes and tooth brushes—C. C. A. 2—Florence Co. v. Dowd. 178 Fed. 73; soda and baking powder—C. C. A. 8—Layton Co. v. Church, 182 Fed. 35; axes and shovels—Collins v. Ames Co.—Mr. Justice Blatchford—18 Fed. 561; tobacco and cigarettes—American Co. v. Polacsek (Coxe, C. J.)—170 Fed. 117.

for the same article in St. Louis and the Southwest, thus being given the field which they claimed they had first exploited and reduced to possession. suggestion presents two conflicting theories of trademark origin and right-and we speak now only of marks which are so-called "technical" trade-marks. One theory is that the right arises from adoptionfrom a kind of creation or discovery followed by appropriation. Whether the right is perfect at the instant of adoption or whether there first must be sufficient use upon the goods to create for the mark a meaning among that part of the public which begins to purchase, is a detail which would not usually be important. According to this theory, if the right is once acquired by prior adoption, it is, by its very nature, exclusive of all later, similar rights which might ofherwise be acquired by similar adoption; and from that theory it would to follow that one who first adopts the mark and applies it to his goods in interstate commerce, and who extends his business into new localities, until, in regular course, his business may cover the country, may prevent the use of the mark by another later user. even though that other has adopted the mark in good faith, and, in his particular field, has given it identity with his goods. How much diligence on this theory the first user must employ in extending his business to get the full benefit of his initial right need not now be considered. The other theory is that no right is perfected until the mark has been used to such an extent that it has come to have a meaning to the particular purchasing public as to which a controversy arises, and that the duty of courts of equity to enforce such rights depends essentially upon the duty

of protecting this public against being misled. From this theory, it will follow, or it may follow, that the later adopter, who has brought it about in a given locality that the mark indicates to the public that the goods are of his manufacture, may thereby himself acquire a trade-mark right or its equivalent, affirmatively enforceable in that locality and among that public, even against the first proprietor.

We do not find it necessary to consider or to attempt to decide the question so presented. For the purposes of this case, and without intimating any opinion, we give the first appropriator the benefit of the doubt and assume that his title is prima facie country-wide and exclusive against all others, and that as against all who have no special and superior equity, he is entitled to carry his trade into the new territory and there to enforce his exclusive right. However, the existence of this general or prima facie exclusive right is not inconsistent with an inability to enforce it against some persons and under some circumstances. Instances may arise where the affirmative conduct or the laches of the first appropriator. and with reference to what he was at first entitled to call an infringement, has been such that on the principles of estoppel or the rule of laches a court of equity can not tolerate that he should enforce against the later user the right which might have been originally perfect. This subject is more fully discussed and the reasons which lead us to this conclusion pointed out, with some reference to the decided cases. in our opinion in the Rectanus case, this day decided.

Under these considerations and upon reference to the pleadings and the proofs in the Hellman case, we onclude that the latter case is of the class where the refusal to give an injunction to the first appropriator of the mark may be justified upon the ground of his laches or estoppel; and so this ground of support must be considered in determining what is the true basis of that decree.

5. Is the Eighth Circuit decree a judgment that the trade-mark, in its general, prima facie, affirmative aspect, belonged to the Hellmans by prior appropriation? This is the interpretation claimed by defendants. The language in the body of the Circuit Court of Appeals' opinion is consistent with that interpretation, but the last paragraph indicates that the two judges (only two sitting) did not unite in putting the decision on this ground. When we turn to the record for further light, we find, first, that the defendants' cross-bill claiming the trade-mark ownership was dismissed, and that the dismissal became final. If it had been even seriously contended by defendants that their early use of the words was effective to vest a trade-mark right therein, surely there would not have been acquiescence in the dismissal of the cross-bill. It was apparent, then as now, that affirmative title to the trade-mark would have been of great value to defendants, if they could maintain that position. We find, second, that there was in the record practically nothing indicating that the Hellmans ever pretended to adopt or claim these words as their trade-mark. They stamped some barrels with the words "P. Crow" or "J. W. Crow"; but no person of this surname had ever been connected with the Hellmans. The Crow or Old Crow which, in 1863, had been manufactured in Kentucky for twenty years or more, was at least considerably known on the market. No reason has ever been suggested in this

litigation, and we can think of none, why they should put this name on their barrels, unless they intended to indicate that the whiskey was that made by Crow of Kentucky. Unless the selection of this name meant that, it meant nothing. Witnesses for the defense frankly stated that in those years it was nothing unusual for jobbers or blenders of whiskey to use well-known brands belonging to others, and that if the initial of a proper name was changed, this was . thought sufficient in morals to remove any objection to the appropriation. This may be the genesis of the otherwise unexplained use of "P." and "J. W." The Hellmans also used advertising signs, "Celebrated Old Crow Bourbon". From the record, we must doubt whether these signs antedated 1870. But if they did reach back to 1863, and if they referred to the blend or mixture which the Hellmans produced, it was neither "Celebrated", nor "Old", nor "Crow", nor, unless by chance, "Bourbon".2 It was made by mixing colors and flavors with neutral spirits or high wines, or, sometimes, straight whiskey; but, if the latter, it was whatever they happened to have on hand. Defendants' witness says, "any brand would do". Records which seem to be complete show that during the seven years from 1863 to 1870, the Hellmans sold, of this "Crow" whiskey, an average of less than eight barrels per year.

In considering whether their use was of a trademark character, the peculiar nature of their business

Assuming that at that date. "Bourbon" fairly meant a corn whiskey from somewhere in Kentucky, even if not from Bourbon County.

One of the stencils was "J. Crow-Bourbon-Paris, Ky.".—a plain declaration that "Crow" was a maker's name, and not a Hellman trade-mark; and as there never was any "Crow" in "Paris, Ky.", the intent seems clear enough.

and their markings must not be overlooked. The brands or marks on whiskey are usually those of the original manufacturer. The dealer or jobber may handle many well-known brands and may mark his own name upon the packages or upon the advertisements, but this does not indicate that he claims the brands as his, or that he is acquiring a trade-mark right therein. While the stencils on the barrel and the glass signs carried the name "Hellman & Co.", they did not say "manufactured by", or that Hellman & Co. were manufacturers or distillers, nor were they in any way inconsistent with mere sale by Hellman as jobber of a well-known brand made by some one else.

The thus described nature and character of the Hellman early use might not always be thought sufficient to initiate and support even a defensive right; but they were so regarded in the former decree, and it is immaterial whether we would independently reach that conclusion. It did there appear that the Hellman use thus began and continued for seven years before 1870, or four years before 1867-the earliest date to which, under the pleadings, plaintiff could then resort-and that after 1870 it continued, increasing somewhat, although remaining comparatively small, and continuing challenge from plaintiff until 1904. It may well be that, even if plaintiff did not know of this use and acquiesce, it was legally chargeable with such knowledge and acquiescence for many years, and that in 1904 the use would have matured into a possession of which a court of equity would not deprive defendant. At any rate, we think that is the theory upon which the former decree should be considered to

stand; and, accordingly, it adjudicates such defensive right and nothing more. As interpreted by Judge Lacombe in the Baltimore Club case (Carroll v. McIlvaine-C. C. A. 2-183 Fed. 22, at p. 28), this right does not go beyond what has actually been "reduced to possession" by defendant, and does not extend to any whiskey not mixed or blended, so as to be of the same general type as that which defendants had been making, or to trade or territory which they were not selling when that bill was filed. Such difficulties as there may be in drawing the exact line of its effect are not here involved, because the infringement here sought to be enjoined is in another locality and of another character. This limitationto blended whiskey as distinguished from straight thus imposed on defendants, is not inconsistent with our earlier holding that, a trade-mark can not be so divided. This limitation is not of the trade-mark itself, but of the fraction thereof which has been lost.

6. The validity of plaintiff's registration under the Act of 1905 is attacked upon two grounds: first, that the registration was forbidden by Sec. 5, because the mark was identical with a "known trade-mark owned and in use by another and appropriated to merchandise of the same descriptive properties", viz, the Hellman trade-mark; and, second, that it would be invalid under that provision of Sec. 21 which relates to certificates of registration fraudulently obtained.

We pass by the plaintiff's contention that the validity of registration can not be collaterally attacked, but must be directly reached under the provisions of Sec. 13, which provides for the cancellaton of the certificate if it is made to appear that the registration

was unlawful; and we do so because we conclude that the registration of a word capable of exclusive appropriation has no effect upon the substantive rights of the parties, excepting its evidential force to make a prima facie case of title. We find nothing in the act purporting to cut off or impair any substantive defense which would have been open to the defendant if there had been no registration-except in so far as it perhaps may affect the character of registrant's title to a descriptive word of a secondary meaning (Nashville Co. v. Coca Cola Co., 215 Fed. 527, 529), and this effect is not now involved. If, then, the law does not otherwise indicate the intention to cut off or embarrass ordinary defenses by one who has not been heard in the registration proceedings, that intention can not be inferred merely from the insertion of a provision by which a hostile party can secure the cancellation of a certificate and so destroy even its evidential force and its effect upon questions of jurisdiction as between different courts.

The first objection is that because the trade-mark "Old Crow" belonged to the Hellmans for use upon blended whiskey and because this is an article of the same descriptive qualities as plaintiff's straight whiskey, the registration was forbidden. This objection must fall, when it is found, as we have held, that upon the basis of the former decree the adjudication does not establish the ownership of the trade-mark by the Hellmans, but only a defensive right sufficient to protect them against the remedy then sought, and that if we go behind the adjudication and into the facts, the Hellman right is not enlarged.

It is next said that the registration was "fraudulently obtained" because, before the a plication was made, the Eighth Circuit litigation had been finished, and yet the application falsely stated two things, the untruth of which had then been judicially established (1) that the trade-mark had been continuously in use by registrant and its predecessors since 1835; (2) that no other person had the right to use the mark.

The statement that the trade-mark had been in use since 1835 is not shown to be untrue to such extent and with such certainty as would be necessary to fix a fraudulent character on the application-within the meaning of fraudulent, as used in this connection, The proof does not carry the use of the word back to a definite beginning. At Crow's death, in 1855, the name had been long used. No one undertakes to say how long. It was not important for plaintiff to prove that the use did extend back of, say 1850, and defendant did not undertake to prove that the use did not go as far as 1835. The period between 1835 and 1850 was not important either for the purpose of registration or for the purpose of this suit. It is true that the use was of a character analogous to a descriptive use rather than a strictly trade-mark use for a period which did not expire until an indefinite date, perhaps 1870, perhaps earlier; but this fact, with these surroundings, is plainly insufficient to make "fraudulent" the statement that the trade-mark had been continuously used since an earlier period.

The application says "that no other person \* \* \* has the right to use the trade-mark". It had then been decided that as against plaintiff's claimed exclusive right, the Hellmans could continue to use the words as they had been doing, viz, in their trade and territory and upon their blended product. The registrest thought of a o'd this as parent conflict by limitations.

iting the registration to straight whiskey only, and undoubtedly the application, when read together, is only a statement that no one else has the right to use the words upon straight whiskey. We have expressed our opinion that a trade-mark can not be so limited; but we see no reason why an applicant may not, if he wishes, confine his registration and its effect to such classes or sub-classes of the article "of the same descriptive properties" as he may select,\* or why he thereby necessarily abandons such rights as he may have to the use of the mark upon other sub-classes of the same article. It is true that the jurisdiction in this case depends upon this registration; but the deeree sought is confined strictly within the limitations of the registration, viz. it affects straight whiskey only; and it is no concern of defendants if the registration might have been broader.

The application, obviously, did not state the whole truth regarding the mark, but as far as it stated anything in this respect, it was carefully accurate. It claimed only that exclusive right of use which remained unimpaired by the Hellman decree.

It is also said that the registration was fraudulent because the Hellmans' well-known interests were, by silence, concealed, whereby they were not summoned as adverse claimants, and lost their chance to be heard. The registration statute contemplates that adverse claimants, when known, shall have notice and an opportunity to oppose. There is little reason to doubt that this application was carefully so shaped as to avoid any neces-

<sup>\*</sup>Koehler v. Beeshore, 59 Fed. 572; Richter v. Reynolds, 59 Fed. 577; and Pittsburg Co. v. Diamond Co., 85 Fed. 637, pertain to the word itself, not to its use.

sity for such specific notice; and if the effect of the registration was to take away any right of use which the Hellmans actually owned, it might well be that any intentional failure to disclose facts which might give another the right to be heard, would be fatal to the proceeding; but with due regard for the limited effect of the registration, there is no occasion for so strict a rule in determining "when the certificate is fraudulently obtained". Whatever new rights, of evidence or of forum, plaintiff was getting were confined to its trade-mark used upon straight whiskey; in that use, the Hellmans had no concern. Their failure to receive notice impaired no right of theirs; and it follows that the deliberate limitation and shaping of the registration so as to avoid conflict with their claims was not fraudulent, as against them or as against the public.

We think the plaintiff was entitled to an injunction against the continuance of what defendants were doing, viz, using the names "Crow" or "Old Crow" in connection with straight whiskey not made by plaintiff. Extending the injunction in the broad terms of the prayer of the bill might not only cause confusion with rights secured by the Eighth Circuit decree, but might go beyond our jurisdiction in this case. That jurisdiction is confined to protecting the class of merchandise specified in the certificate of registration, "straight Bourbon or rve whiskey"; and, if, upon the principles herein declared, plaintiff would be entitled to any broader measure of relief, this limitation of the injunction will not prejudice proceedings therefor in a court whose jurisdiction does not depend solely upon the registration. ma difficulty of distinguishing between the results of defendants' wrongful use of these names as compared with the results of a rightful use make the case inappropriate for an accounting (Ludington Co. v. Leonard—C. C. A. 2—127 Fed. 155, 157). The decree below is reversed with costs, and the case is remanded for the entry of a new decree consistent with this opinion.

## THE OPINION OF THE SIXTH CIRCUIT COURT OF APPEALS DENYING MOTION FOR REHEARING.

(W. A. Gaines & Co. v. Rock Spring Distilling Co., 226 Fed. 543, 141 C. C. A. 299 [Rec., p. 1053].)

An application for rehearing points out certain supposed errors in the opinion, and their existence and effect should be considered:

(a) We assumed that the distinctions between straight whiskey and blended whiskey and their attendant market conditions had existed substantially as at present, from the commencement of the period under consideration. Undoubtedly, this assumption somewhat colors the discussion in the opinion. assumption is now said to be wrong, and our attention is directed to the decision of President Taft in the controversy arising under the Pure Food Law. and to its recital of facts in the trade history. This recital shows that prior to the Civil War, the greater part of all whiskey sold in the usual retail methods had been, in different ways, purified and refined after leaving the original distiller, and had also been artificially colored and flavored—all by the methods then or later known as rectifying and blending. Only at about the time of the Civil War was it discovered that whiskey, by aging in charred barrels, could be satisfactorily refined and colored, and, in a sense, flavored, without any secondary treatment. Thus and then, what is now called "straight" whiskey first came into existence.

Upon a review of the opinion, we can not see that its conclusions are seriously affected by this correction of our misapprehension. The sales of "Old Crow" whiskey made before 1865 by the predecessors of Gaines & Company would have been more largely to rectifiers and less to the consumer than we had assumed would be natural, and so much reputation as the name had would be more among rectifiers and less among the users; but this is only a matter of degree; it comes to saying that the standing and reputation which grew up with the name were more local and less widespread than would have resulted under presentday conditions; and correcting this matter of degree according to the fact will bring no different result. Even if up to a given date, say 1867, rectifiers had been the sole purchasers of the distillery product and had been the only class to whom the product was known as "Crow" or "Old Crow", this would not subject the growth and development of the trademark right to any different principles.

(b) The opinion, in a note, refers to the use by the Hellmans of the brand "J. Crow, Paris, Ky." This particular brand was in fact not used by the Hellmans, but by another rectifier in St. Louis. It may be noted, also, that at the same time (in the sixties) a Cincinnati house was marking some of its cutput "Crow".

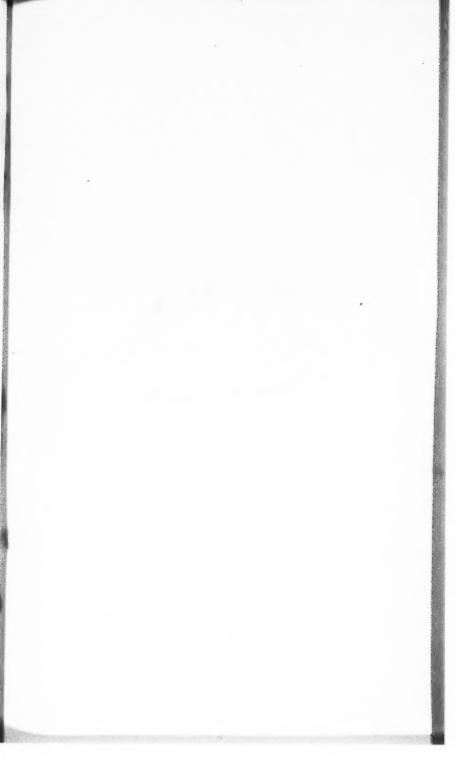
This correction, and its resulting inferences, do not belp the Hellman case. If it is improbable that such a name as "Crow" was adopted by one rectifier merely by chance, it is rather incredible that each of three rectifiers, in communities where Kentucky whiskeys came to market, fortuitously hit on the same unusual trade-mark; and to find that in 1865 three dealers were using a name which had become at least somewhat known in a nearby center of original production many years before, confirms the conviction that the name must have acquired reputation enough to make it worth taking, or else that it had become at that time indicative of a class or type of product.\*

(c) It is said we were in error in assuming that "Old Crow" had anything to do with the age of the whiskey, but that, in fact, this word refers only to the age of the man, Crow. This may be so; but the same mistake would have been natural in the sixties to those who heard the name but did not know of the man; and as to its effect on the trade-mark development discussed in the opinion, it would not be important whether the natural inference that "Old Crow" implied age in the whiskey was the right or the wrong inference.

The petition assures us that there was no "implication of age in applying 'Old Crow' to the Hellmans' blended whiskey", and that it was used as "Old Hickory" might have been. If so, the reference was to an individual; and as no man of this name or so-called appears ever to have been known, except the Gaines Creek James Crow, it would follow that the Hellman use must have been fraudulent.

<sup>\*</sup>The latter seems to be the interpretation expressly adopted by the Eighth Circuit opinion in saying that the Hellmans at this period "employed these words as descriptive terms". (161 Fed., at p. 502.)

- (d) The opinion is criticized because we hesitated to accept, at its face value, the Hellman testimony regarding the extent of their Old Crow sales, the use of their advertising signs, etc., before 1867. There is a considerable volume of this testimony, but it consists almost wholly of unaided recollections of dates forty years old—and it is that class of testimony which, by decisions familiar in patent cases, the Supreme Court has refused to accept. True, there is in a trade-mark case no initial presumption of validity to be overcome, but the principles for determining the evidential value of testimony can not differ according to the subject matter of the case.
- (e) The petition points out that the opinion, after stating that the Hellmans appealed from the St. Louis decree dismissing their cross-bill asking affirmative relief, then erroneously states that they dropped this appeal "whereby, whatever adjudication was carried by such dismissal, became final". The facts are that the decree below directed an injunction against the Hellmans on the original bill and the dismissal of their cross-bill; that they appealed from each portion of the decree; that in the Court of Appeals their counsel announced that they would not ask affirmative relief, and the Court of Appeals did not consider that subject; and that the decree below was reversed and a new decree was entered below simply dismissing the bill. It is not of controlling importance in what technical situation this final dismissal left the rights claimed by the cross-bill. The persuasive thing is that the Hellmans abandoned any claim to relief on the theory that they had any trade-mark; and it is this conduct that helps to interpret the Eighth Circuit litigation and tends to support our conclusion that



## ROCK SPRING DISTILLING COMPANY ET AL. v. W. A. GAINES & COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 58. Argued January 31, February 1, 1918.—Decided March 18, 1918.

Under the common law and the federal registration statute (February 20, 1905, c. 592, 33 Stat. 724) a trademark for one variety of goods includes other varieties of the same species.

An adjudication that, as against B, A is entitled, by prior appropria-

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tion, to use a trademark on "blended" whiskey, protects A, as against

B, in its use on "straight" whiskey. G, claiming a trademark by prior adoption and use and by registration under the Act of February 20, 1905, supra, in connection with the manufacture in Kentucky and extensive sale of "straight" whiskies, sued R to enjoin the use of the mark on "straight" whiskey manufactured in that State. R. claiming to be acting as the agent of H. set up in bar a decree of the Circuit Court in Missouri, directed by the Circuit Court of Appeals, dismissing the bill in a former suit brought by G against the predecessors of H to enjoin them from using the same mark on "blended" whiskey, which they had been producing and selling under it, in a limited way, at St. Louis. Held, reviewing the pleadings in the former case and the findings and conclusions of the Circuit Court of Appeals as displayed in its opinion, (1) that the issues as to the common-law right were the same in both cases; (2) that the former decree established against G, in favor of the predecessors of H, a title by prior appropriation, and not merely a defensive right limited to the type of whiskey ("blended") they were selling and to the volume and territorial extent of their trade in it when the former bill was filed; (3) that this adjudication enured to R by privity and (4) barred the subsequent suit, notwithstanding the latter related to whiskey of another type-"straight" whiskey,-and notwithstanding the subsequent registration of the trademark by the plaintiff for "straight" whiskey under the federal act.

226 Fed. Rep. 531, reversed.

This is a bill in equity brought by the Gaines Company against the Rock Spring Company to restrain the latter from using the trademark of the former. The trademark is registered and is employed by the Gaines Company to designate a brand of straight rye or straight bourbon whiskey manufactured by that company.

The following are the facts of the bill, stated narratively: The Gaines Company is the owner of a whiskey distillery in Woodford County, Kentucky, known and named as the Old Crow Distillery. It is the only one in the State that is or ever has been designated by the name of "Crow" or "Old Crow."

Its product has been at all of the times mentioned in

the bill straight rye and straight bourbon whiskey and to it there has at all times been applied the trademark consisting of the words "Old Crow" by being imprinted or branded on the wooden box containing the whiskey and imprinted upon labels affixed to bottles containing the whiskey. The trademark is now and for many years past has been used by the company and its predecessors in commerce among the States.

On February 26, 1909, it filed in the Patent Office, in pursuance of the Act of February 20, 1905, 33 Stat. 724, in due form and under the conditions required, an application for registration of the trademark and a certificate of registration for the same was duly issued and for many years past has been used by the company as a trademark for its straight rye and straight bourbon

whiskey.

The Gaines Company, availing itself of certain acts of Congress, began and has ever since maintained the bottling of the "Old Crow" in bond and it was then and has ever since remained the only "Old Crow" whiskey bottled in bond and has an extensive sale throughout the United States and in foreign countries; and when so bottled in bond it is known as and called "Old Crow Bottled in Bond," is so marked, and commands a high price.

The Rock Spring Company is a corporation, has a distillery in the county of Daviess, Kentucky, and is the owner of a distillery situated therein known as Distillery No. 18, operated by Silas Rosenfield, one of the defendants.

The Rock Spring Company, in fraud of the Gaines Company's rights and in infringement of its trademark, made or caused to be made and sold or caused to be sold in Kentucky a certain spurious straight bourbon whiskey, not the product of the Gaines Company, and branded the same with the words "Celebrated Old Crow

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Whiskey Bottled in Bond," have caused the same to be bottled in bond, have applied to the labels thereon the words "Old Crow" in script type, and have caused the same to be sold and transported in interstate commerce, and this with the intent to mislead and deceive the public, and are doing so and will continue to do so unless restrained.

An injunction is prayed and an accounting.

Demurrers were filed by the Rock Spring Company and Rosenfield, which were overruled, and they then answered, pleading a prior adjudication based upon the following alleged facts: A suit was brought in the United States Circuit Court for the eastern division of the Eastern District of Missouri by W. A. Gaines & Company against Abraham M. Hellman and Moritz Hellman charging infringement of the trademark and unfair competition. The bill was subsequently amended making Max Kahn, administrator, with will annexed, of the estate of Abraham M. Hellman, deceased, a party to the suit. Upon the issues framed a decree was entered in favor of the complainants, an injunction granted and an accounting ordered.

The decree was reversed by the United States Circuit Court of Appeals for the Eighth Circuit with directions to dismiss the bill on the ground that the evidence clearly showed that the predecessors in business of the appellants therein had adopted the words "Old Crow" as a trademark for whiskey as early as the year 1863, and the evidence failed to show that the predecessors of the Gaines Company had used the words as a trade-

mark prior to the year 1870.

A petition for certiorari to review the decision was denied by the Supreme Court of the United States.

Other proceedings were had in the suit pending its appeal and afterward. The suit, however, was finally dismissed on the merits because of the decision of the Court of Appeals and the action of the Supreme Court of the United States.

Defendants are in privity with the parties recovering under those decisions and decrees and are manufacturing whiskey under contracts of agency from them or their successors and neither have nor claim any right except through such contract.

The Hellman Distilling Company filed a petition to be permitted to intervene, which was denied. 179 Fed.

Rep. 544.

After hearing, a decree was entered sustaining the plea of former adjudication based on the decree of the Circuit Court for the Eastern District of Missouri, and accordingly and for that reason the bill of complaint, so far as it sought relief for any infringement of the trademark "Old Crow" in connection with its use on whiskey, was dismissed. And it was further decreed that the registration of the trademark July 20, 1909, could not and did not invalidate or nullify the estoppel. 202 Fed. Rep. 989.

The decree was reversed by the Circuit Court of Appeals (226 Fed. Rep. 531,) and thereupon this certiorari was applied for and allowed.

Mr. Luther Ely Smith, with whom Mr. W. T. Ellis was on the briefs, for petitioners.

Mr. Edmund F. Trabue and Mr. James L. Hopkins, with whom Mr. Daniel W. Lindsey was on the brief, for respondent.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court.

The decree of the Circuit Court for the Eastern District of Missouri, directed by the decision of the United States Circuit Court of Appeals for the Eighth Circuit,

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is pleaded in bar, and whether it is such depends upon the issues that were made or passed upon in those courts.

The bill of complaint in the case alleged that in 1835 one James Crow (he is the James Crow of this suit) invented and formulated a novel process for the production of whiskey which he did not patent or seek to patent but kept for his own use until his death in 1855.

During all of the time after 1835 the whiskey so produced was known and styled as "Old Crow" whiskey and the designation was adopted and used as a trademark.

After the death of Crow one William F. Mitchell, to whom Crow had communicated his secret process, continued the distillation so designated, and in 1867 a partnership, styled Gaines, Berry & Co., obtained possession of the distillery wherein the whiskey distilled by the indicated process continued to be produced by the same process until the partnership was succeeded by W. A. Gaines & Co., and the latter company succeeded also to all of the partnership assets of the other and continued to produce the whiskey until the incorporation of the complainant, when all these assets were acquired by it.

When the name "Old Crow" was applied by Crow, it was a valid trademark, and since its adoption it has always been applied to the whiskey produced by the indicated secret process, and since that time has indicated to the public whiskey distilled on Glenn's Creek, in Woodford County, Kentucky, and nowhere else.

Complainant caused the same to be registered in the Patent Office under the provisions of the act of Congress so providing. The value of the trademark is \$500,000 and an integral part of the good will of complainant's business, and the whiskey is of greater value than any other of equal age.

Since January, 1903, the defendants, in violation of complainant's rights and good will, have made or caused to

to be made and sold in the City of St. Louis a certain spirituous or alcoholic fluid not made under complainant's process and have labeled it with the words "Old Crow" without license from the complainant and against its consent. Such unlawful use will greatly lessen the value of complainant's business and good will, and complainant is without adequate remedy at law.

There was the usual prayer for an accounting and an injunction.

There was a supplemental bill to the same effect, but charging that A. M. Hellman & Co. had become the successors of the original defendants and had continued the acts alleged in the original bill.

To the bill the defendants answered, with denials, and alleged the use of the words "Crow," "Old Crow" and "J. W. Crow" in connection with their own business upon packages of whiskey and in their and their predecessor's business from 1863 and prior thereto; that the whiskey sold by complainant was an unrefined, harmful and deleterious article and that the whiskey sold by them was a brand largely free from impurities.

The defendants also filed a cross bill which, however, was not insisted upon.

These, then, were the issues, and upon them and the evidence adduced to sustain them the Circuit Court entered a decree establishing complainant's right to the word "Old Crow" as a trademark, enjoined the use thereof by defendants and found them guilty of unfair competition in business and ordered an accounting. The Circuit Court of Appeals reversed the decree.

The latter court made a careful review of the evidence, denominating it a mass of the relevant and irrelevant, and felt that it was not necessary to consider the comparative excellence of the whiskeys, and remarked that the evidence did "not show that Glenn's Creek in any way entered into the composition of the whiskey" and that

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"there was no secret about the process employed by Crow nor did it differ materially from that employed by every other distiller of the same period." To the objection that the "designative words" were rarely used by the Hellmans and that their product was of inferior quality, the court replied that the right to use could not be measured by the extent to which the Hellmans employed it, "whether more or less frequently," nor "by the overshadowing comparative amount of the complainant's [Gaines & Company's] sales under the designation of 'Old Crow' whiskey, nor by the asserted superiority of its product."

The court concluded as follows: "(1) That inasmuch as the defendants' predecessors in business, prior to the use or the adoption of the designative word 'Crow,' or the words 'Old Crow,' as a trademark, employed those words in descriptive terms in connection with their business as dealers in whiskey in St. Louis, Mo., and said predecessors and the defendants so continued to use the same, to a limited extent, up to the time of the institution of this suit, in good faith, they are not guilty of infringing the complainant's claimed trademark; and (2) that the defendants are not guilty of having engaged in unfair competition with the complainant in the prosecution of their business."

It will be observed that the issues in that case were the same as those in the present case as to the right to the use of the word "Crow" with any of its qualifications. But in this case there is another ground of recovery alleged, that is, the application for and the receipt of the certificate of registration for the word as a trademark for straight rye and straight bourbon whiskey. The District Court, however, adjudged that the decree of the Circuit Court in Missouri directed by the Circuit Court of Appeals constituted a bar to this suit. To the judgment of the Circuit Court of Appeals of the

Sixth Circuit, reversing the action of the District Court, this certiorari is directed.

The Circuit Court of Appeals, however, did not yield to all of the views of the Gaines Company. It refused to decide, as urged to do, that the defendants in this suit were not in privity with the defendants in the other, and it rejected the contention that the use of the trademark established in the Hellman Company for a blended whiskey was not an adjudication of the right to use it upon a straight whiskey. In the rulings on both contentions we concur. The first needs no comment; we adopt that of the court on the second. The court said that "whatever the extended classifications and subclassifications of the Patent Office practice may contemplate, neither the common law nor the registration statute can intend such confusion as must result from recognizing the same trademark as belonging to different people for different kinds of the same article. Established trademarks directly indicate origin; but, if they have any value, it is because they indirectly indicate kind and quality, and to say that the seller of a blended whiskey might properly put upon it a mark which was known to stand for a straight whiskey, or vice versa, would be to say that he might deceive the public, not only as to the origin, but also as to the nature and quality, of the article."

The philosophy of this might be questioned. But it seems to have become established, and, however it may be disputed in reason, there is an opposing consideration. As said by Circuit Judge Sanborn in Layton Pure Food Co. v. Church & Dwight Co. (C. C. A.), 182 Fed. Rep. 35, 39, "Uniformity and certainty in rules of property are often more important and desirable than technical correctness."

And this reasoning prevailed with the Circuit Court of Appeals which, after citing cases, said that it was forced to think "that whatever was adjudicated regarding plaintiff's title to its trademark applies to its use of both kinds of whiskey." And, of course, conversely we may say that, whatever was decided against its title to its trademark applies to its use on both kinds of whiskey. In other words, if defendants were adjudged to have title to the words "Crow" or "Old Crow" on blended whiskey, they have a right to use it on straight whiskey without infringing any right of complainant. We come back, therefore, to the question as to what was adjudged in the prior suit.

To this question the Court of Appeals of the Sixth Circuit gave great care and in an opinion of strength decided the negative of it. The court, in concession to the argument, assigned a prior use to the Hellmans, but expressed the view that the existence of such "general or prima facie exclusive right is not inconsistent with an inability to enforce it against some persons and under some circumstances." And it was added: "Instances may arise where the affirmative conduct or the laches of the first appropriator, and with reference to what he was at first entitled to call an infringement, has been such that on the principles of estoppel or the rule of laches a court of equity cannot tolerate that he should enforce against the later user the right which might have been originally perfect. . . . Under these considerations and upon reference to the pleadings and the proofs in the Hellman case. we conclude that the latter case is of the class where the refusal to give an injunction to the first appropriator of the mark may be justified upon the ground of his laches or estoppel; and so this ground of support must be considered in determining what is the true basis of that decree."

The court hence concluded that the decree did not adjudge title to the Hellmans but adjudged them a "defensive right and nothing more," and, explaining the right, the court said that it "does not extend to any whiskey

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not mixed or blended so as to be of the same general type as that which defendants [Hellmans] had been making, or to trade or territory which they were not selling when that bill was filed."

We are not able to assent. The court admitted that the language in the body of the opinion of the Circuit Court of Appeals for the Eighth Circuit is consistent with the interpretation petitioners put upon it, that is, "that the trademark, in its general, prima facie, affirmative aspect, belonged to the Hellmans by prior appropriation," but the court added that the last paragraph of the opinion indicated "that the two judges (only two sitting) did not unite in putting the decision on this ground." We think this was an oversight. The opinion was that of the court, though delivered by one judge, and the conclusion was the conclusion of the court and necessarily had to be, else there would have been no decision or decree. And it was thoroughgoing. It is manifest from the excerpts we have made from the opinion that the judgment of the court was not limited as to time or territory; nor did the pleadings so limit it. The complainant in that case (respondent here) alleged that it was the sole and exclusive owner of the trademark and had used it from 1835 to the present time, being virtually the successor of the first producer of the product.

Defendants (petitioners) contested the claim and asserted a right in themselves based on prior adoption and continuous use, and that right was adjudged to them.

Decree of the Circuit Court of Appeals reversed and that of the District Court affirmed.